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Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices

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Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices

R. Matthew Pearson*

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I. Introduction

A litigant preparing for oral arguments before the Supreme Court has reached the final step in an expensive and time-consuming appellate process. Based on the ability of the attorneys to convince five Justices of the merits of a particular legal argument, one litigant's rights will be adjudicated and often a broad constitutional question will be answered. But what happens when one party becomes concerned that the Court's decision might be based not on the strength of the legal reasoning, but rather on some external interest of one or more of the Justices? To avoid the appearance of bias in those types of cases, a Supreme Court Justice is required to recuse himself from any case in which the Justice's participation would create a reasonable apprehension that he would not act impartially.¹

The difficulty lies in identifying what situations support that type of apprehension. For example, should a Supreme Court Justice be disqualified from a case argued by his former law partner? What about a case on a topic that the Justice has already discussed in Congressional testimony? Should a Justice participate in a case against a member of the executive branch with whom the Justice had recently vacationed? In these three situations—the most controversial recusal cases in the Supreme Court during the last sixty years—Justices Black, Rehnquist, and Scalia, respectively, held that recusal was not required.²

1. See 28 U.S.C. § 455(a) (2000) (describing the situations when judges must recuse themselves from a given case). At the outset it is important to note that the terms recusal and disqualification once carried distinct meaning; in this Note, as is predominantly the case today, the two terms are used interchangeably. See John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 (1970) (noting the difference between recusal and disqualification).

2. See *Cheney v. United States Dist. Court*, 541 U.S. 913, 929 (2004) (Scalia, J., as single Justice) (rejecting recusal motion based on recent travel with Vice President Cheney); *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (Rehnquist, J., as single Justice) (rejecting recusal motion that was based on his professional experience at the Department of Justice); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring) (discussing Justice Black's decision to sit in the case), *denying reh'g* of 325 U.S. 161. Although these three cases present the most famous recusal dilemmas in the last sixty years, disqualification is not a problem reserved to the modern Court. One of the first instances of a Supreme Court Justice sitting in a case where propriety might counsel for recusal was Chief Justice Marshall's role in deciding *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Marshall crafted the Court's opinion in a case that arose directly from his own failure to perform duties as Secretary of State prior to taking his seat on the Supreme Court. See *id.* at 153–54; JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE 1* (1974) (noting the entanglement problems presented by Justice Marshall's ruling in *Marbury*). Scholars have attributed the difference between historical and modern recusal to changes in public standards. See Frank, *supra* note 1, at 43 (explaining differing outcomes as the result of changing law and attitudes).

The uproar that accompanied these decisions is indicative of public dissatisfaction with recusal policy in the Supreme Court.³ The widespread criticism of Justice Scalia's recent denial of a motion to recuse himself⁴ shows that, despite extensive academic and Congressional interest over the past sixty years,⁵ today's process is not successful at producing predictable results. Although development and adoption of a concrete mechanism for recusal is by no means a simple task, the vital role that disqualification plays in preserving the appearance of judicial impartiality requires that a solution to recusal in the Supreme Court be found. Using the facts of Justice Scalia's March 2004 decision as a convenient test case, this Note seeks to propose such a solution.

The recusal challenge to Justice Scalia emerged from a suit filed by the Sierra Club in April 2002.⁶ The Sierra Club alleged that the National Energy Policy Development Group (NEPDG), an organization established by President Bush to develop a cohesive national energy policy and chaired by Vice President Cheney, had violated federal law by having nongovernment employees participating as *de facto* members.⁷ The district court entered a discovery order requiring Vice President Cheney and other senior Executive Branch officials to produce meeting minutes and other materials tending to show the structure and membership of the NEPDG.⁸ The circuit court denied

3. See MACKENZIE, *supra* note 2, at 209 (calling Justice Rehnquist's decision in *Laird* "one of the most serious ethical lapses in the Court's history"); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 607 (1947) (mentioning the criticism levied against Justice Black for his role in *Jewell Ridge*); Editorial, *Justice in a Bind*, N.Y. TIMES, Mar. 20, 2004, at A12 (calling Justice Scalia's recusal decision "unbecoming," "angry," and "dismissive").

4. See *Cheney v. United States Dist. Court*, 541 U.S. 913, 929 (2004) (denying the Sierra Club's motion for recusal).

5. See Frank, *supra* note 1, at 67 (supporting a proposal to modify 28 U.S.C. § 455); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 750 (1973) (encouraging adoption of provisions from the modified ABA Code of Judicial Conduct); Letter from Sen. Patrick Leahy, Ranking Member, Senate Committee on the Judiciary, and Sen. Joseph I. Lieberman, Ranking Member, Senate Committee on Governmental Affairs, to Hon. William H. Rehnquist, Chief Justice of the United States (Jan. 22, 2004), at <http://news.findlaw.com/hdocs/docs/scotus/leahyrehnq12204ltr.html> (last visited August 31, 2005) [hereinafter *Leahy Letter*] (writing to inquire about Justice Scalia's trip and the Court's mechanisms for considering motions to recuse) (on file with the Washington and Lee Law Review).

6. See *Cheney*, 541 U.S. at 913–17 (describing the relationship between the motion to recuse and the Sierra Club's suit against Vice President Cheney and the NEPDG).

7. See *Cheney v. United States Dist. Court*, 542 U.S. 367, 372–75 (2004) (describing the claims of the respondent Sierra Club in its underlying suit); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 23–24 (D.D.C. 2002) (discussing the claims in the consolidated lawsuits against Vice President Cheney and the NEPDG).

8. See *Cheney*, 542 U.S. at 375–76 (explaining the scope of the district court's decision).

the government defendants' subsequent appeal for mandamus relief from the discovery order, and the Supreme Court granted certiorari.⁹

In March 2004, prior to oral arguments before the Court, the Sierra Club submitted a motion to disqualify Justice Scalia claiming that his recent duck-hunting vacation with Vice President Cheney had created a reasonable apprehension of bias.¹⁰ The two men traveled aboard the Vice President's official aircraft to Louisiana where they joined a group of thirteen others for a week of hunting and fishing.¹¹ According to Justice Scalia's description of the facts, his time in the hunting camp only overlapped with the Vice President for two days of the trip, and during that period, they had no private moments together.¹² When details of the event came to light, however, newspapers nationwide were quick to assert that the hunting trip raised the specter of judicial bias and urged Justice Scalia to recuse himself from the matter.¹³ In fact, the Sierra Club cited the press outcry as primary evidence of how Justice Scalia's vacation had created an appearance of partiality.¹⁴

In a rare memorandum opinion, Justice Scalia declined to recuse himself and explained the facts and legal reasoning supporting his decision.¹⁵ After describing the actual circumstances of the hunting trip,¹⁶ Justice Scalia rejected the Sierra Club's contention that Justices must resolve any question of bias in favor of recusal.¹⁷ Unlike a recusal motion to a circuit court of appeals, where an alternate judge could replace one who is disqualified, the lack of substitute Justices for the Supreme Court counseled against recusal.¹⁸

Justice Scalia further found that the Sierra Club had failed to show any reasonable basis for an apprehension of bias.¹⁹ Construing the motion as a

9. See *id.* at 376 (reviewing the circuit court's decision).

10. See Motion to Recuse at 2, *Cheney v. United States Dist. Court*, 542 U.S. 367 (2004) (No. 03-475), available at 2004 WL 397220 (requesting Justice Scalia's recusal on the basis of his impartiality being called into question).

11. See *Cheney v. United States Dist. Court*, 541 U.S. 913, 914-15 (2004) (describing travel arrangements, duration of trip, and number of participants).

12. See *id.* at 915 (detailing Vice President Cheney's travel schedule).

13. See, e.g., Editorial, *Justice in a Bind*, N.Y. TIMES, Mar. 20, 2004, at A12 (criticizing Justice Scalia's decision to sit in the *Cheney* matter).

14. See Motion to Recuse at 5-7, 9, *Cheney* (No. 03-475) (citing various press clippings).

15. See generally *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004) (Scalia, J., as single Justice).

16. See *id.* at 914-15 (providing details of Justice Scalia's duck hunting vacation to Louisiana).

17. See *id.* at 915-16 (rejecting the necessity to favor recusal).

18. See *id.* (explaining the difficulties created by recusal at the Supreme Court level and claiming that recusal is effectively "a vote against the petitioner").

19. See *id.* at 926-27 (stating that recusal is improper because impartiality cannot

charge that his apparent friendship with the Vice President presented a reasonable apprehension of bias, Justice Scalia noted that friendship was not a traditional ground for recusal when the official action of the purported friend is at issue.²⁰ The existence of potential political ramifications from a negative legal outcome, Justice Scalia continued, does not prevent a judge from distinguishing between official action and private action suits.²¹ Justice Scalia also emphatically denied that the weight of popular press opinion could be sufficient to sway his decision in favor of recusal.²² Finally, Justice Scalia declared that "a system that assumes [judges] to be corruptible by the slightest friendship or favor" undermines public confidence in judicial integrity at least as much as the appearance of slight improprieties.²³ Concluding that no person who believed in Justice Scalia's impartiality prior to the duck-hunting trip could reasonably be swayed from his position by that event alone, Justice Scalia denied the Sierra Club's motion for recusal.²⁴

Determining whether recusal is required in a given situation is a matter of applying the standard for deciding questions of apparent bias to the facts, a task that Justice Scalia performed within the limits of the Supreme Court's current policy. This Note's assignment, therefore, is to improve both the standard for recusal and the procedure by which that standard is applied. The first analytical step, discussed in Part II, is to review the ways in which disqualification advances important policy interests and assess how the federal recusal statute has developed to serve those interests. In Part III, this Note focuses on the recusal procedures and standards developed by other common law nations' courts of last resort and seeks to highlight the similarities and differences between the Supreme Court's approach and the approaches taken by peer judicial systems. After analyzing that international guidance, Part IV makes a proposal for an improved recusal standard and procedure for Supreme Court Justices. Finally, Part V will apply the new proposal to the facts of Justice Scalia's recusal decision and assess the propriety of his determination.

reasonably be questioned).

20. See *id.* at 926–27 (noting that many Justices reach the Supreme Court because of a relationship with members of the executive branch and that those executive branch members are often named as parties to lawsuits in their official capacities).

21. See *id.* at 917–20 (rejecting the claim that particular circumstances modified the traditional presumption against recusal in these cases).

22. See *id.* at 928–29 (expressing concern that the public would think a Justice "corruptible" and his influence "cheap" to acquire); see also *TV Comm. Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077, 1080 (D. Colo. 1991) (stating that press reports cannot "serve as a barometer for the reasonable observer standard").

23. *Cheney v. United States Dist. Court*, 541 U.S. 913, 928 (2004).

24. See *id.* at 929 (characterizing the issue and denying the motion for recusal).

II. Domestic Recusal Policy & Procedure in the Supreme Court

Disqualifying judges from cases in which they might not be impartial is not a new phenomenon. Preservation of judicial impartiality has been a hallmark of legal systems since the adoption of the Magna Carta,²⁵ and the United States has made provisions for recusal of judges since 1792.²⁶ Disqualification for bias, however, was not codified until 1911 and then only through a statute that applied strictly to federal district court judges.²⁷ The lack of statutory guidance meant that disqualification in the Supreme Court was left to tradition and to the conscience and ethics of individual Justices.²⁸ The result, as one might expect, is an inconsistent body of recusal decisions that provides little guidance as to what policy or procedure might be applied in future circumstances.²⁹

A. Policy Interests Underlying Judicial Recusal

Consistent application of recusal standards and procedure is important because judicial impartiality is a central expectation of our legal system.³⁰ Disqualification advances that purpose first by preserving actual fairness in the adjudication of disputes.³¹ The Constitution guarantees an independent and impartial hearing in federal courts,³² and the Supreme Court has established

25. See Andrew Field, *Confirming the Parting of Ways: The Law of Bias and the Automatic Disqualification Rule in England and Australia*, 2001 SING. J. LEGAL STUD. 388, 388–89 (commenting on the historic roots of the principle that justice is best administered by an independent and impartial tribunal).

26. See *Liteky v. United States*, 510 U.S. 540, 544 (1994) (commenting on the history of judicial recusal).

27. See *id.* (discussing adoption of the predecessor statute to 28 U.S.C. § 144).

28. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring) (mentioning that determining the propriety of withdrawal has always been considered the responsibility of each Justice), *denying reh'g* of 325 U.S. 161.

29. See, e.g., *Pub. Utils. Comm'n v. Pollack*, 343 U.S. 451, 466–67 (1948) (Frankfurter, J., statement) (recusing himself from a case in which he was a "victim of the practice" of music on public buses, the subject of the case before the Court); *Jewell Ridge Coal Corp.*, 325 U.S. at 897 (declaring that the Justices' "[p]ractice has not been uniform" and has "doubtless [led] to some confusion").

30. See *Offut v. United States*, 348 U.S. 11, 14 (1954) (stating that "justice must satisfy the appearance of justice"); Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 543 (1994) (noting that "[j]udicial impartiality is a significant element of justice").

31. See Note, *supra* note 5, at 746 (discussing the interests protected by judicial disqualification).

32. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986)

that due process requires that disputes be adjudicated by a judge without any pecuniary or other interest in the outcome.³³ Fortunately, the mandatory recusal statutes already in place are quite explicit and effective at eliminating actual bias from the federal court system.³⁴

Disqualification also serves a second, equally vital interest: preservation of the apparent fairness and impartiality of the federal courts.³⁵ As Justice Felix Frankfurter explained, it is central to a free and open judicial system that "the administration of justice should reasonably appear to be disinterested as well as be so in fact."³⁶ Because the judiciary derives authority from the public's belief in the reasoned foundation of its decisions, and because decisions stained with apparent bias undermine that belief, "justice must not only be done but manifestly must be seen to be done."³⁷ Mandatory and discretionary recusal of judges enhances the image of judicial fairness and promotes public confidence in the judicial process.³⁸

Unfortunately, no recusal policy can satisfy everyone; if, as Justice Rehnquist commented, even "fair minded judges might disagree" about recusal under a particular set of facts, it is unlikely that any system will satisfy all interested parties.³⁹ On the other hand, concrete recusal standard and procedure would at least ensure that the determination process itself is not subject to

(explaining the protections of Article III, § 1 of the Constitution); Gregory Wicker, Comment, *Federal Maritime Commission v. South Carolina Ports Authority: Judicial Incursions Into Executive Power*, 69 BROOK. L. REV. 1555, 1582 (2004) (calling the right of litigants to impartial judges one of the "purposes" of Article III).

33. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (declaring that due process is violated by subjecting an individual to a hearing before a judge with a substantial interest in reaching a decision against that individual).

34. See 28 U.S.C. § 455(b) (2000) (requiring mandatory recusal in certain factual situations); Note, *supra* note 5, at 746 (noting that preservation of actual fairness does not require application of stricter standards for judges).

35. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921) (commenting that the action of law must not hint of "prejudice or favor or even arbitrary whim or fitfulness"); Note, *supra* note 5, at 746 (discussing the interest of maintaining public confidence in the "integrity of the judicial process").

36. *Pub. Utils. Comm'n v. Pollack*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., statement).

37. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (1951) (discussing the importance of generating the feeling that justice has been done); Note, *supra* note 5, at 746–47 (commenting on the interplay between public confidence and judicial authority).

38. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 870–72 (1988) (Rehnquist, C.J., dissenting) (discussing the intended purpose of a system for replacing judges challenged due to an appearance of bias).

39. *Laird v. Tatum*, 409 U.S. 824, 836 (1972) (Rehnquist, J., as single Justice).

accusations of impropriety.⁴⁰ As seven sitting Justices have noted, advance expressions of recusal policy and procedure help reduce accusations that later determinations were the product of unique characteristics of those individual cases.⁴¹ Whatever the outcomes of individual decisions, an explicit recusal policy makes members of the public confident that recusal determinations are based on an established and approved formula.

Finally, as Justices Rehnquist and Scalia have both specifically mentioned, recusal of a Justice presents the risk of affirmation by an equally divided Supreme Court.⁴² Equally divided decisions result in affirmation of the underlying circuit court determination, limited to the exact facts of the specific case before the Court.⁴³ Although some commentators have argued that affirmation by an equally divided Court does not present serious concerns,⁴⁴ such a decision has two significant effects: denying the petitioner a decision on the instant action and denying the system a legal determination on one or more issues that were significant enough to warrant a grant of certiorari.⁴⁵ These concerns demonstrate the importance of a recusal policy that minimizes unnecessary disqualification of Justices.

B. Enactment and Development of the Federal Recusal Statute

The development of a recusal standard for the Supreme Court started in 1948 when Congress tried to alleviate the confusion surrounding disqualification by enacting a federal recusal statute applicable to all federal judges.⁴⁶ The new law, codified at 28 U.S.C. § 455, listed three factual

40. See Editorial, *Judicial Ethics Under Review*, N.Y. TIMES, May 27, 2004, at A28 (calling for an improved procedure for determining and enforcing recusal decisions).

41. See WILLIAM H. REHNQUIST ET AL., STATEMENT OF RECUSAL POLICY (Nov. 1, 1993), reprinted at 124 S. Ct., Orders, at 52–55 (explaining the value of determining and announcing recusal policy in advance).

42. See *Cheney v. United States Dist. Court*, 541 U.S. 913, 915–16 (2004) (Scalia, J., as single Justice) (expressing concerns over decisions affirmed by an equally divided Supreme Court); *Laird v. Tatum*, 409 U.S. 824, 837–38 (1972) (Rehnquist, J., as single Justice) (same).

43. See 5 AM. JUR. 2D *Appellate Review* § 892 (2004) (stating that "affirmance by an equally divided United States Supreme Court is a judgment not entitled to precedential weight"); Note, *supra* note 5, at 749 (stating that decisions of an equally divided Court "make no law except with regard to the precise facts" of that dispute).

44. See Note, *supra* note 5, at 749 (calling the appealing party "slightly disadvantaged" by having to persuade five of eight, instead of five of nine, justices).

45. See *id.* at 748–50 (discussing the effects on the petitioners and on the legal system of an equally divided Court).

46. See 28 U.S.C. § 455 (1948) (encoding recusal requirements for federal judges); 28 U.S.C. § 451 (1948) (defining "justice" as "the Associate Justices and the Chief Justice of the

situations when recusal would be mandatory, plus a discretionary provision recommending that a justice disqualify himself "whenever, in [the judge's] opinion, [the judge's] impartiality might reasonably be questioned."⁴⁷ Although § 455 was applied successfully for almost thirty years, Justice Rehnquist's application of the standard in response to a motion to disqualify him in *Laird v. Tatum*⁴⁸ generated significant controversy and, at least in part, led to changes in the federal disqualification statute.⁴⁹

At approximately the same time, the American Bar Association approved a revamped Code of Judicial Conduct (Code), the first update to its code for judges in nearly fifty years.⁵⁰ One of the main motivations for changing the Code was to provide more complete guidance to judges making recusal determinations.⁵¹ This type of guidance meant providing descriptions of

United States Supreme Court").

47. 28 U.S.C. § 455 (1948). The three factual situations which required disqualification were cases in which the judge (1) had a substantial interest, (2) had been of counsel, or (3) had been a material witness. *Id.*

48. See *Laird v. Tatum*, 409 U.S. 824, 825 (1972) (Rehnquist, J., as single Justice) (declaring that 28 U.S.C. § 455 was the governing statute). As Assistant Attorney General prior to his appointment to the Supreme Court, Justice Rehnquist had provided testimony before a congressional committee in which he addressed the legal issue presented in *Laird* and mentioned that case by name. *Id.* at 824–28. The issue was whether Justice Rehnquist's appearance and testimony mandated his recusal from *Laird* pursuant to § 455. *Id.* at 825. Rehnquist first determined that any such determination rested solely with him. *Id.* at 824. Next, he explained that his role at the Department of Justice had not been as counsel or material witness in *Laird* and concluded that the mandatory provisions of § 455 were not applicable. *Id.* at 828. Finally, addressing the possibility of discretionary disqualification, Justice Rehnquist declared that existence of some prior opinion on a legal issue could not reasonably create an appearance of impartiality. *Id.* at 835–37. Because disqualification was neither required nor recommended under § 455, Justice Rehnquist denied the motion. *Id.* at 839.

49. See MACKENZIE, *supra* note 2, at 209 (declaring Justice Rehnquist's decision in *Laird* to be a serious ethical lapse); Editorial, N.Y. TIMES, Oct. 12, 1972, at 46 (criticizing Justice Rehnquist's decision in *Laird*); see also Note, *supra* note 5, at 736 (stating that "Justice Rehnquist provoked a great deal of controversy by refusing to disqualify himself").

50. See CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) (establishing that "[a] judge should disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned"). Interestingly, in his denial of the motion to recuse in *Laird v. Tatum*, Justice Rehnquist dismissed the updated ABA Code as identical to the 1948 version of the federal recusal statute despite clear and substantial differences between the two. See *Laird*, 409 U.S. at 825 (Rehnquist, J., as single Justice) (declining to consider the ABA Code because of its similarity to § 455); Note, *supra* note 5, at 744 (stating that Justice Rehnquist dismissed the ABA Code as indistinguishable).

51. See E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60 (1973) (explaining the shortcomings of previous Canons of Judicial Ethics).

specific situations that would require disqualification and a discretionary standard to apply to new factual circumstances.⁵²

The 1972 Model Code drafting committee, which included Supreme Court Justice Potter Stewart, considered two standards to apply to questions of bias.⁵³ The first was the "substantial threat" standard,⁵⁴ which involved a determination of whether the extent of a judge's relationship with the case presented a "substantial threat to his impartiality."⁵⁵ The purpose of the substantial threat standard was to ensure that a judge who was actually biased would not be able to serve.⁵⁶ The second standard, and the one eventually adopted, was the "reasonable person" standard.⁵⁷ Under that objective standard, the Code declares that a judge should recuse himself whenever his impartiality "might reasonably be questioned."⁵⁸ In other words, if a judge believes that a reasonable person, with full knowledge of the facts and circumstances in question, would have doubts about the judge's impartiality, then disqualification is proper.⁵⁹

In 1974, Congress modified 28 U.S.C. § 455 "to broaden and clarify the grounds for judicial disqualification"⁶⁰ and to bring the federal statute in line with the modified ABA Code of Judicial Conduct.⁶¹ The "massive changes" undertaken by the 1974 amendment included delineation of additional

52. See *id.* at 60–68 (discussing the four specific standards and the general standard).

53. See Note, *supra* note 5, at 742 n.26 (identifying membership of the drafting committee).

54. See Donald T. Weckstein, *Introductory Observations on the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 785, 792 (1972) (describing discussion of the two tests by the American Association of Law Schools committee).

55. Note, *supra* note 5, at 745.

56. See *id.* (detailing the purpose of the substantial threat standard).

57. See *id.* (describing the general test for disqualification and how it should be measured).

58. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

59. See Note, *supra* note 5, at 745 (discussing the ABA standard and the policies behind it). There appear to be two chief reasons why the ABA decided to adopt its standard. The first goal was to ensure that no judge with bias actually participates in the case. *Id.* Second, the ABA wanted to also guarantee that no reasonable person could suspect that the judge was partial. *Id.* Although the substantial threat standard would protect the first goal, the interest in maintaining an appearance of impartiality could only be protected by the more stringent reasonable person standard. *Id.*

60. See Act of Dec. 5, 1974, Pub. L. No. 93-512, cmt., 88 Stat. 1609, 1609 (amending 28 U.S.C. § 455 (1948)) (expressing the purpose for changes to § 455 to be "to broaden and clarify the grounds for judicial disqualification").

61. See H.R. REP. NO. 93-1453, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6353 (explaining that the amended bill will generally conform with the modified standards of the Code of Judicial Conduct).

circumstances when recusal would be mandatory and, most importantly, modification of the standard for discretionary recusal.⁶² The modified statute, codified as 28 U.S.C. § 455(a), required 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."⁶³ What made the 1974 revision so significant was the conversion from a subjective, "in [the judge's] opinion" standard for recusal to an objective, "reasonable person" standard.⁶⁴ The modified standard was a major improvement for protection of public confidence and mirrored the standard proposed by the American Bar Association.⁶⁵

The Supreme Court first considered § 455(a) in *Liljeberg v. Health Services Acquisition Corp.*⁶⁶ The chief issue in *Liljeberg* was whether a

62. See *Liteky v. United States*, 510 U.S. 540, 546 (1994) (summarizing changes to the federal recusal statute).

63. 28 U.S.C. § 455(a) (2000). The version of § 455 adopted in 1974 is still in effect today, save for a few minor amendments. See Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1007, 102 Stat. 4642, 4667 (codified at § 455(f)) (providing for a judge to remain on a case in which significant judicial time has been invested if the judge divests himself of the grounds for disqualification); Act of Nov. 6, 1978, Pub. L. No. 95-598, § 214, 92 Stat. 2549, 2661 (removing references to referees in bankruptcy from § 455).

64. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988) (explaining that § 455(a) was designed to replace the subjective standard with an objective standard); H.R. REP. NO. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355 (describing the proposed legislation as adopting an objective standard).

65. See CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) (supporting a reasonable person standard); see also *supra* notes 50-52 and accompanying text (discussing ABA standard). Although the ABA updated its Model Code in 1990, the standard for discretionary disqualification remained unchanged in its most recent form. See ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2000) (supporting a reasonable person standard).

66. See *Liljeberg*, 486 U.S. at 850 (stating that certiorari was granted to consider construction of § 455(a)). In *Liljeberg*, the Supreme Court considered the application of § 455(a) in a case in which the challenged trial judge was unaware of the existence of a pecuniary interest in the matter prior to delivering his decision. *Id.* at 858. The Court also faced a question of appropriate remedy for a finding of apparent bias under § 455(a) when the challenged judge did not discover a violation until after the judgment had become final. *Id.* The petitioner in *Liljeberg* was the corporate successor to a health management company that had entered into an agreement with the respondent for the purpose of establishing a hospital in Kenner, Louisiana. *Id.* at 853-54. The respondent, who was at the time also involved in negotiations with Loyola University for a piece of property on which to build the proposed hospital, received a required "certificate of need" from state authorities but refused to transfer the certificate to petitioner. *Id.* Petitioner filed a complaint seeking declaratory relief, and the matter was tried before Federal District Court Judge Robert Collins, a member of the Loyola University Board of Trustees. *Id.* at 850, 855. At the time the matter was pending before Judge Collins, he was unaware that the University and respondent *Liljeberg* were involved in negotiations. *Id.* at 855-56. After delivering a ruling favoring the respondent on March 16, 1982, Judge Collins became aware of the relationship between the University and *Liljeberg*

reasonable apprehension of bias could develop if the judge was not conscious of the facts that would create such an appearance.⁶⁷ The Court adopted the Fifth Circuit's holding that the test for apprehension of bias was applied from the perspective of "a reasonable person, knowing all of the circumstances."⁶⁸ Although the Court did not define the reasonable person standard, the decision demonstrated elevated sensitivity in the test's application.⁶⁹ By vacating the trial judge's decision on the basis of apprehended bias despite the minimal likelihood of actual bias, the Supreme Court emphasized its "guiding consideration . . . that the administration of justice should reasonably appear to be disinterested as well as be[ing] so in fact."⁷⁰

The Supreme Court again dealt with 28 U.S.C. § 455(a) in *Liteky v. United States*,⁷¹ a case concerning the source of information giving rise to an apprehension of bias. Justice Scalia, writing for the majority, explained that the 1974 revisions to § 455 created a new catchall provision that emphasized evaluation of all claims of bias on an objective basis.⁷² The simple and universal rule was that "recusal was required 'whenever impartiality might

while preparing for a Board of Trustees' meeting on March 24, 1982. *Id.* The Supreme Court, affirming the Fifth Circuit's decision, held that Judge Collins had a duty to disqualify himself and vacate his ruling as soon as he discovered the relationship between Loyola and Liljeberg. *Id.* at 866–67.

67. *See id.* at 858 (discussing the need to determine § 455(a)'s applicability).

68. *Id.* at 861.

69. *See id.* at 860–61 (considering and applying the reasonable person standard without defining the term).

70. *Id.* at 869–70 (citing *Pub. Utils. Comm'n v. Pollack*, 343 U.S. 451 (1952) (Frankfurter, J., statement)).

71. *Liteky v. United States*, 510 U.S. 540 (1994). The Court in *Liteky* considered whether a reasonable apprehension of bias must be grounded on extrajudicial statements of the judge. *Id.* at 541. The petitioners in *Liteky*, charged with vandalism on the federally owned grounds of Fort Benning Military Reservation, claimed that the trial judge's previous interaction with the petitioners presented a reasonable apprehension of bias. *Id.* at 542. The judge, petitioners claimed, displayed "impatience, disregard for the [petitioners], and animosity" during a 1983 trial for misdemeanors committed during a protest at the same military installation. *Id.* at 542–43. The district court and the Eleventh Circuit denied petitioners' motion on the grounds that "matters arising from judicial proceedings" were not a proper basis for a recusal motion. *Id.* at 543. The Supreme Court agreed, endorsing the application of the extrajudicial source doctrine to § 455(a). *Id.* at 554. The Court emphasized, however, that an extrajudicial source was neither a necessary condition for a finding of bias nor was such a source sufficient to make a *prima facie* showing of bias. *Id.* at 554–55. The Court concluded that judicial rulings were rarely able to support an apprehension of bias unless it was possible to show that the judge relied on extrajudicial sources in making his or her determination, and relied on them to a degree demonstrating favoritism or antagonism that would "make fair judgment impossible." *Id.* at 555.

72. *See id.* at 548 (describing the requirement of an objective evaluation of any basis of bias).

reasonably be questioned.”⁷³ Justice Scalia noted that the question of reasonableness must be addressed with the understanding that an expectation of “child-like innocence” was unreasonable.⁷⁴ A certain amount of external knowledge is inescapable; the issue when applying § 455 is whether an apprehension of a wrongful or inappropriate disposition is reasonable in the context of a particular proceeding.⁷⁵

Chief Justice Rehnquist offered some perspective on § 455(a) recusal in conjunction with an application for certiorari in *Microsoft Corp. v. United States*.⁷⁶ According to Justice Rehnquist, an inquiry into appearance of bias or prejudice is “made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”⁷⁷ He decided that no “well-informed” and “objective” observer would find that an appearance of impropriety existed in the case.⁷⁸ Providing such a “broad sweep” to § 455(a), Justice Rehnquist concluded, was contrary to the reasonable person standard embodied in the statute.⁷⁹

C. The Reasonable Observer

Having an objective standard is only useful if judges understand what “reasonable” means in the context of recusal decisions; to that end, every circuit court of appeals has adopted some form of a “reasonable person” standard.⁸⁰ The standard applied must balance two serious risks: an excessively deferential standard risks eroding public confidence in the face of decisions by apparently

73. *Id.*

74. *See id.* at 552 (discussing the definition of impartiality).

75. *See id.* at 550 (explaining that bias in § 455 does not contemplate all unfavorable dispositions, only an unfavorable disposition that is inappropriate because of its source).

76. *See Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (Rehnquist, J., as single Justice) (describing his consideration of whether his disqualification was required). In *Microsoft*, the petitioners were seeking appellate review of a negative antitrust finding in the circuit court. *Id.* Chief Justice Rehnquist’s son was an attorney with a firm who represented the petitioning party in other antitrust matters. *Id.* at 1302. The question addressed was whether the decision denying certiorari had a sufficient effect on the financial circumstances of the Chief Justice’s son to warrant his recusal under § 455. *Id.* Chief Justice Rehnquist determined that the relationship in *Microsoft* between his son’s antitrust practice and the antitrust issue before the Court was too attenuated to support disqualification. *Id.*

77. *Id.* at 1302 (citing *Liteky v. United States*, 510 U.S. 540 (1994)).

78. *See id.* at 1302–03 (explaining that the potential connection between the issue before the court and his interest in the outcome was too attenuated).

79. *Id.* at 1303.

80. FED. JUDICIAL CTR., RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, pt. 1.IV.A, at 15 (2002).

biased judges, but an excessively stringent standard risks development of a system of judge-shopping that would undermine confidence that judicial outcomes are independent of the decisionmaker.⁸¹ Although the Supreme Court has not adopted a specific description of the reasonable person contemplated by § 455(a), the outlines of the objective standard can be drawn from the positions of the circuit courts.⁸²

Much of the case law discussing the standard is concerned with explaining that the reasonable person is, at the very least, not a judge.⁸³ The Fourth Circuit has made clear that a judge's perspective is inappropriate because judges are more aware of the obligation to judge impartially.⁸⁴ Applying the test from a judge's perspective would likely result in seeing conflicts as more "innocuous" than would an outsider to the judicial system.⁸⁵ The Fifth and Seventh Circuits have noted that outsiders are "less likely to credit judges' impartiality and mental discipline" than would members of the judiciary or the legal profession.⁸⁶ A reasonable person standard that embodies the slightly less deferential perspective of the general public seems to be a logical outgrowth of the change from subjective to objective review under the amended § 455(a).

Although the reasonable person does not have the same faith in judicial impartiality as a judge might have, neither does the standard contemplate a person who "see[s] goblins behind every tree."⁸⁷ The circuit courts agree that a reasonable person is not "hypersensitive or unduly suspicious" because there is always some (albeit miniscule) degree of risk that a judge will ignore the merits of a case.⁸⁸ As Judge Easterbrook of the Seventh Circuit has noted, "[t]rivial risks are endemic, and if they were enough to require disqualification we would

81. See *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (debating the nature of the objective standard and the risk of excessive sensitivity to perceived partiality).

82. The closest that the Supreme Court has come to defining the standard in this context is probably the description in *Liljeberg* of a "reasonable person, knowing all of the circumstances." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 (1988). This is, at best, the minimum requirement for the reasonable person standard; it seems obvious that the drafters of § 455(a) did not contemplate a person with only a speculative understanding of the factual circumstances underlying the claim.

83. See *FED. JUDICIAL CTR.*, *supra* note 80, pt. 1.IV.A, at 16–19 (discussing the positions of the various circuit courts of appeals).

84. See *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (considering the hypothetical reasonable observer).

85. *Id.*

86. See *In re Mason*, 916 F.2d at 386 (considering the reasonable person standard); see also *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995) (same).

87. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).

88. *Id.*; see also *DeTemple*, 162 F.3d at 287 (denying the hypersensitivity of the reasonable person).

have a system of preemptory strikes and judge-shopping" that would thoroughly undermine the judicial system.⁸⁹

Although these broad strokes help discern the reasonableness standard in the federal courts, there is a lot of middle ground between hypersensitivity and giving excessive credit to judges.⁹⁰ The Seventh Circuit defines the reasonable person standard in terms of a "thoughtful" and "well-informed observer."⁹¹ The Fifth Circuit has suggested that the viewpoint of an "average person on the street" is the most effective perspective from which to apply the standard.⁹² The First Circuit found recusal appropriate when the facts create in the mind of an "objective, knowledgeable member of the public" a reasonable basis for doubting the judge's impartiality.⁹³ Fortunately, the diversity of terminology has had little impact on courts' approaches to the standard.⁹⁴

A more understandable recusal policy for the Supreme Court would help provide clear guidance to federal judges at the district and circuit court levels. Under the current system of convoluted standards, memorandum opinions, and unwritten procedure, persuasive legal precedent is emerging from the Supreme Court.⁹⁵ Unfortunately, that precedent arrives without the benefit of en banc consideration by the Supreme Court. A clear standard and settled procedure would ensure that Supreme Court guidance on recusal questions was the product of serious consideration by a majority of the Court.

D. Determinative Procedure for Recusal Motions in the Supreme Court

The "historic practice" of the United States Supreme Court has always been to refer motions for recusal to the Justice whose disqualification is sought.⁹⁶ Thus, although the standard for recusal has received significant

89. *In re Mason*, 916 F.2d at 386.

90. See Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 72-73 (2000) (discussing the various interpretations of the reasonable person standard adopted by state courts).

91. *In re Mason*, 916 F.2d at 386.

92. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

93. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

94. See Abramson, *supra* note 90, at 73 (describing the uniform approach of state courts to the reasonable person standard in spite of widely varying definitions).

95. See *United States v. Bobo*, 323 F. Supp. 2d 1238, 1241 (N.D. Ala. 2004) (citing Justice Scalia's recusal opinion in making a determination for disqualification).

96. See *Cheney v. United States Dist. Court*, 540 U.S. 1217, 1217 (2004) (referring recusal motion); see also *Hanrahan v. Hampton*, 446 U.S. 1301, 1301 (1980) (Rehnquist, J., as single Justice) (explaining that the Court generally leaves such motions to the individual

judicial attention, the actual procedure by which the decision is made is truly a creature of tradition.⁹⁷ In fact, the only statement ever issued by the Court regarding recusal practice touched only on the disqualification standards adopted by seven Justices for situations in which a child was a member of a firm arguing before the Court.⁹⁸ It is indicative of the lack of legal discussion on this topic that the "Recuse" entry in a noted Supreme Court reference volume totals two sentences.⁹⁹ Although there is reason to believe that recusal determinations are at least partially the product of judicial discussion,¹⁰⁰ the lack of concrete policy undermines the appearance of impartiality that recusal is supposed to protect.

III. Recusal Policy in Foreign Courts of Last Resort

The expectation of judicial impartiality is a hallmark of most modern legal systems. In fact, resolution of disputes by an unbiased tribunal has been characterized as a fundamental human right.¹⁰¹ Foreign law and precedent have grown increasingly influential in American courts,¹⁰² a development supported by many modern and historic Supreme Court Justices.¹⁰³ In recent years, courts

Justices); *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 695 (1960) (explaining that recusal determinations are often left to the "conscience and good taste" of the particular judge concerned).

97. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 899 (1945) (Jackson, J., concurring) (commenting on the absence of an established procedure for deciding recusal motions to Supreme Court Justices), *denying reh'g* of 325 U.S. 161.

98. See REHNQUIST ET AL., *supra* note 41 (adopting a recusal policy for situations involving relatives of the Justices).

99. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 712 (Kermit L. Hall et al. eds., 1992) (describing recusal in the Supreme Court). By way of contrast, the entry on unconfirmed Supreme Court nominee John Meredith Read, nominated by President Tyler in 1845, occupies two paragraphs. *Id.* at 709.

100. See *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) [hereinafter *Ginsburg*] (commenting that recusal decisions are reached with "consultation" between the Justices).

101. See *Universal Declaration of Human Rights*, art. 10, in THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS 52 (M. Cherif Bassiouni ed., 1994) (declaring that everyone has a right to a fair and impartial tribunal); *International Covenant on Civil and Political Rights*, art. 14, para. 1, in *supra*, at 13 (same).

102. See generally Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004) (considering the growing impact of international law on U.S. constitutional law).

103. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (affirming the role of international law in judicial construction of domestic legislation);

of last resort in several peer common law nations have directly addressed the issue of recusal standards and procedures.¹⁰⁴ The framework of a generally accepted policy for deciding recusal motions, in terms of both judicial procedure and cognizable standards, has emerged from high court decisions in a number of overseas jurisdictions. A review of the conclusions reached by those bodies provides valuable persuasive guidance in formulating an effective direction for policy in our Supreme Court.

*A. The Supreme Court of Canada*¹⁰⁵

As is the case in the United States, motions for discretionary disqualification of a justice of the Supreme Court of Canada are infrequent.¹⁰⁶ Procedurally, the determination of such a motion in the Supreme Court of Canada is very similar to the procedure in the United States Supreme Court. The moving party submits the request for recusal directly to the justice whose disqualification is sought.¹⁰⁷ That justice, after considering whether the facts as described create a reasonable apprehension of bias, rules on the motion as a single justice.¹⁰⁸

Ginsburg, supra note 100, at 1040–42 (discussing the advisory role international precedent can play in domestic courts).

104. See discussion *infra* Part III.A–D (discussing recusal standards and procedures in foreign courts).

105. The Supreme Court of Canada is the nation's highest court and is the last judicial resource for litigants. The Supreme Court sits atop the four-tiered judicial system of the nation and has final appellate jurisdiction over decisions of the federal courts of appeal and the various provincial courts of appeal. Access to the Supreme Court is generally limited to cases for which the Court grants leave to appeal, but the right of appeal to the Court is guaranteed in certain criminal matters. See SUPREME COURT OF CANADA, *Role of the Court*, at http://www.scc-csc.gc.ca/aboutcourt/role/index_e.asp (last updated Mar. 1, 2005) (providing general information about the Supreme Court of Canada) (on file with the Washington and Lee Law Review); SUPREME COURT OF CANADA, *The Canadian Judicial System*, at http://www.scc-csc.gc.ca/aboutcourt/system/index_e.asp (last updated Mar. 14, 2005) (explaining the Canadian court system) (on file with the Washington and Lee Law Review).

106. See BRIAN A. CRANE & HENRY S. BROWN, SUPREME COURT OF CANADA PRACTICE 2005 § 4 Recusal, at 45 (stating that "[t]he Court has had very few challenges alleging a reasonable apprehension of bias").

107. See *id.* (describing the proper procedure to challenge a justice); see also *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, 852 (Bastarache, J., as single Justice) (deciding motion to recuse himself).

108. See *Arsenault-Cameron*, [1999] 3 S.C.R. at 852–53 (Bastarache, J., as single Justice) (considering creation of a reasonable apprehension of bias).

The test applied to recusal motions by Canadian justices was first described by Justice de Grandpré in his dissent to *Committee for Justice & Liberty v. National Energy Board*.¹⁰⁹ Justice de Grandpré reasoned:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly.'¹¹⁰

This standard implicates a two-part consideration: the reasonableness of the person considering the alleged bias and the reasonableness of the apprehension itself.¹¹¹ Canadian courts have used the de Grandpré test for more than two decades.¹¹²

Under Canadian jurisprudence, a reasonable person is one with an understanding of the role life experiences play in forming the "stream of tendency . . . which gives coherence and direction to thought and action."¹¹³ In essence, the reasonable person understands that every judicial decision is motivated by social experience and that reliance on individual perspectives is a proper and necessary part of the judge's function.¹¹⁴ As such, the reasonable

109. See *Comm. for Justice & Liberty v. Nat'l Energy Bd.*, [1978] 1 S.C.R. 369, 394 (de Grandpré, J., dissenting) (describing the test for apprehension of bias). In *Committee for Justice & Liberty*, the Supreme Court of Canada reviewed an appellate decision declaring disqualification inappropriate in an administrative hearing regarding construction of an oil pipeline. *Id.* at 373–74. The chairman of the National Energy Board, the agency tasked with making the decision, was a former member of a study group closely associated with the particular applicant whose proposal the plaintiff challenged at the hearing stage. *Id.* at 379–81. The issue was whether the apprehension of bias standard should apply to the National Energy Board hearings. *Id.* at 385. The Court concluded that the apprehension test should be applied to the Board's decisions and held that the chairman's participation in the application process was inappropriate. *Id.* at 391–92. Justice de Grandpré, dissenting, instead concluded that the chairman's relationship must be viewed in the context of the decisionmaking body. *Id.* at 395 (de Grandpré, J., dissenting). Justice de Grandpré argued that because the National Energy Board was tasked with making complicated, industry-specific application decisions, industry experience was a desirable feature for a chairman, not a basis on which a reasonable apprehension of bias could be founded. *Id.* at 396–99 (de Grandpré, J., dissenting).

110. *Id.* at 394 (de Grandpré, J., dissenting).

111. See *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, 531 (Cory & Iacobucci, JJ., concurring) (discussing the two objective elements of the test).

112. See *id.* (applying the de Grandpré test).

113. *Id.* at 504 (L'Heureux-Dubé & McLachlin, JJ., concurring) (quoting CARDOZO, *supra* note 35, at 112).

114. See *id.* at 503–04 (L'Heureux-Dubé & McLachlin, JJ., concurring) (discussing the importance of the reasonable person's understanding of the nature of judging); see also

person is not overly sensitive to alleged bias.¹¹⁵ Furthermore, the concept of the reasonable person is localized; it encompasses the idea of a person who is "an informed and right-minded member of the community," both national and local, and possesses knowledge of the history and philosophy of those communities.¹¹⁶ A plurality of the Supreme Court of Canada has described the reasonable person as a member of the Canadian community who approaches questions of bias with a "complex and contextualized understanding of the issues of the case" and who "understands the impossibility of judicial neutrality, but demands judicial impartiality."¹¹⁷

Under Canadian common law, an apprehension of bias is reasonable if: (1) the apprehension is based on a thorough knowledge of the facts and circumstances; and (2) the apprehension results from a careful consideration of those facts in light of the dispute.¹¹⁸ Implicit in the assessment of the reasonableness of an apprehension of bias is the notion that judges are capable of impartiality and are committed to performance of their tasks in an impartial manner.¹¹⁹ Some judges have suggested that an understanding of the social and cultural circumstances underlying both the case before a court and the facts of the apprehension is necessary for a full knowledge of the facts.¹²⁰ Regardless of the exact formulation, the requirement that the apprehension be informed, rather than based on speculation or conjecture, is essential.¹²¹

CANADIAN JUDICIAL COUNCIL, COMMENTARIES ON JUDICIAL CONDUCT 12 (1991) (noting that every individual is the product of past experiences).

115. See *Comm. for Justice & Liberty*, [1978] 1 S.C.R. at 395 (de Grandpré, J., dissenting) (rejecting any relation of the test to a "very sensitive or scrupulous conscience").

116. See *R.D.S.*, [1997] 3 S.C.R. at 507-08 (L'Heureux-Dubé & McLachlin, JJ., concurring) (considering the community identity of the reasonable person).

117. *Id.* at 509.

118. See *Comm. for Justice & Liberty*, [1978] 1 S.C.R. at 394 (de Grandpré, J., dissenting) (describing the elements of the test).

119. See *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, 503 (L'Heureux-Dubé & McLachlin, JJ., concurring) (citing *United States v. Morgan*, 313 U.S. 409 (1941)) (stating that judges are assumed to be conscientious, intelligent, and impartial).

120. See *id.* at 531 (Cory & Iacobucci, JJ., concurring) (stating that the reasonable person is "aware of the social reality" that forms the background to the dispute).

121. See *id.* (declaring the importance of being informed and knowledgeable of the relevant circumstances).

*B. The United Kingdom's House of Lords*¹²²

The principle underlying recusal in Canada and elsewhere was first affirmed in England in 1852 when the House of Lords endorsed the fundamental maxim *nemo iudex in sua causa*: that no man may be a judge in his own cause.¹²³ Although the principle initially developed only to exclude a judge from cases to which he is actually a party,¹²⁴ or in which he has a direct financial or pecuniary interest,¹²⁵ the House of Lords has since recognized its applicability to other situations in which there might be a suspicion that a judge would not rule impartially.¹²⁶ For many years, however, the application of the test to individual situations was hampered by the lack of an understandable and easily applicable principle.¹²⁷

The House of Lords' first effort towards establishing a modern test for appearance of bias cases came in *The Queen v. Gough*.¹²⁸ Lord Goff, speaking

122. Final appellate jurisdiction for certain civil and criminal disputes in the United Kingdom lies in the House of Lords, one of the two branches of the nation's Parliament. Individual cases are heard by an Appellate Committee made up of five randomly selected Lords of Appeal in Ordinary, all professional judges appointed to their position in Parliament. Judgments of the House of Lords are binding on all lower courts. See HOUSE OF LORDS BRIEFING, THE JUDICIAL WORK OF THE HOUSE OF LORDS 1 (2005) (summarizing the makeup and procedures of the House of Lords in its judicial role), available at <http://www.parliament.uk/documents/upload/HofLBpJudicial.pdf>; THE COURT STRUCTURE OF HER MAJESTY'S COURT SERVICE, at <http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm> (last updated Mar. 31, 2005) (diagramming the position of the House of Lords in the United Kingdom's judicial structure) (on file with the Washington and Lee Law Review). It bears mention that a government-supported proposal for creation of a true Supreme Court is currently under consideration in the United Kingdom. Although there is no reason to believe that the standards applied to disqualification questions would change, the status of disqualification procedure under a new Court structure is unclear. See generally DEPT. OF CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM (2003) (discussing the proposal for a new, independent Supreme Court), available at <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>.

123. See *R. v. Bow St. Metro. Stipendiary Magistrate (In re Pinochet Ugarte)* (No. 2), [2000] 1 A.C. 119 (H.L.) (citing *Dimes v. Proprietors of Grand Junction Canal*, [1852] 3 H.L. Cas. 759) (describing the principle); *R. v. Gough*, [1993] A.C. 646, 661 (H.L.) (discussing the principle and its application in *Dimes*).

124. See *In re Pinochet Ugarte* (No. 2), [2000] 1 A.C. at 133 (calling the disqualification of a judge who is party to the suit the "starting point" of the principle).

125. See *id.* at 132–33 (describing the literal application of the rule and its extension to cases in which the judge has an interest in the outcome).

126. See *id.* (discussing the application of the principle to cases in which a judge's "conduct or behavior give rise to a suspicion" that the judge may be biased).

127. See *Gough*, [1993] A.C. at 659 (commenting on the compelling need for a readily understandable principle).

128. See *id.* at 670 (formulating the test for allegations of bias). In *Gough*, the House of Lords considered an appeal from a criminal conviction in a case in which a neighbor of the

for the court, considered the two alternatives suggested by the court of appeals for questions of bias: the "reasonable suspicion" test and the "real likelihood" test.¹²⁹ After reviewing the somewhat mixed judicial precedent on the appropriate test to be applied,¹³⁰ Lord Goff explained that the reasonable suspicion test was an inappropriate principle because the more rigorous real likelihood test equally protected the appearance of judicial impartiality with less risk of unnecessary disqualification.¹³¹ The proper formation of the test, according to Lord Goff, was whether the circumstances created a "real danger of bias" on the part of the judge.¹³²

Although Lord Goff's formulation was dominant for almost ten years in England, it met with widespread criticism from England's peer legal systems, which tended to favor tests incorporating an objective test.¹³³ In light of the weight of international precedent, and particularly the position of the European Court of Human Rights,¹³⁴ the House of Lords in 2002 adopted a new test that incorporated the "real suspicion" test initially rejected by *Gough*.¹³⁵ Although the

defendant's purported accomplice had been seated on the jury. *Id.* at 657–58. The issue was whether the presence of the neighbor created a possibility of bias sufficient to quash the defendant's conviction. *Id.* at 658. The House of Lords, by Lord Goff, assessed the two tests for questions of bias identified by the Court of Appeals. *Id.* at 660. The court first noted that there was no need for distinct tests for allegations of potential bias against a juror versus allegations against a judge. *Id.* at 660. After considering the mixed precedent regarding which test was preferred, Lord Goff explained and adopted the "real danger" test. *Id.* at 670. Pursuant to that conclusion, the House of Lords upheld the conviction on the grounds that the circumstances did not create a real danger that the neighbor was not impartial. *Id.*

129. See *id.* at 660 (describing the two alternative tests used by English courts). According to Lord Goff, the reasonable suspicion test questions whether "a reasonable and fair-minded person, sitting in the court and knowing all the relevant facts, would have had a reasonable suspicion" that impartiality was at risk. *Id.* The real likelihood test considers whether there was a "real likelihood that the judge would . . . have a bias in favor of one of the parties." *Id.* at 662 (citing *R. v. Rand*, [1866] 1 L.R.-Q.B. 230).

130. See *id.* at 661–70 (reviewing the decisions in English courts that address the test to apply to questions of bias).

131. See *id.* at 670 (finding the reasonable man test unnecessary).

132. See *id.* (adopting the real danger of bias test). Lord Goff found no distinction between a real likelihood test and a real danger test and preferred the latter characterization because he perceived that a real danger test better emphasized the consideration of "possibility rather than probability of bias." *Id.*

133. See *Porter v. Magill*, [2002] 2 A.C. 357, 493–94 (H.L.) (discussing the general rejection of the *Gough* test by similarly situated courts); see also *Webb v. The Queen*, (1994) 181 C.L.R. 41, 50–51 (declining to follow *Gough*).

134. See *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221, 244–45 (1997) (holding that a tribunal must be "impartial from an objective viewpoint").

135. See *Porter*, [2002] 2 A.C. at 493–94 (discussing the reluctance of English courts to depart from the *Gough* precedent, but explaining the requirement that English courts take European Court of Human Rights decisions into account); I.R. Scott, Case Comment, *Judicial*

application of either test would likely produce the same result in most situations,¹³⁶ the House of Lords chose to modify the *Gough* test to emphasize the importance of an objective assessment of apparent bias.¹³⁷ The new test, approved by the House of Lords, was "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."¹³⁸ A protracted consideration of the characteristics of the reasonable observer was unnecessary,¹³⁹ the House of Lords concluded, because of their confidence that lower courts applying the standard would incorporate a person who "adopt[s] a balanced approach" to the issue of bias.¹⁴⁰

Although the applicable standard for questions of bias in the United Kingdom has received significant judicial attention, the procedure for applying that standard remains largely a creature of tradition.¹⁴¹ In England, as in the United States and Canada, recusal determinations are made by the very judge whose impartiality is questioned,¹⁴² regardless of whether the judge raises the question of perceived bias *sua sponte* or if he receives an objection from one of the parties.¹⁴³ There is reason to believe, however, that individual decisions might be subject to review of the Court.

The House of Lords demonstrated its willingness to consider, as a judicial body, questions of bias in its own members during the high-profile extradition dispute over former Chilean dictator Augusto Pinochet.¹⁴⁴ The question

Bias, 2003 CIV. JUST. Q. 314, 315 (noting that the House of Lords in *Porter* modified the test for apparent bias to bring the test into line with European Court of Human Rights jurisprudence).

136. See *Porter*, [2002] 2 A.C. at 494 (commenting that application of either test would result in the same outcome in the majority of cases).

137. See *id.* (explaining that the modified language expresses a test "in harmony with the objective test" applied by the European Court of Human Rights).

138. *Id.*

139. See *Lawal v. N. Spirit Ltd.*, [2004] 1 All E.R. 187, 192-93 (H.L.) (describing the reasonable observer test and stating that it is unnecessary to "delve into the characteristics" of the contemplated observer).

140. *Id.* at 193.

141. See Evadne Grant, *Pinochet 2: The Questions of Jurisdiction and Bias*, in *THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS* 44 (Diana Woodhouse ed., 2000) (describing the lack of formal rules and procedures).

142. See *id.* (stating that it is the judge against whom an objection is raised who determines the propriety of recusal).

143. See *id.* (discussing the process by which a judge decides an objection to his sitting in a case).

144. See Timothy H. Jones, Case Comment, *Judicial Bias and Disqualification in the Pinochet Case*, 1999 PUB. L. 391, 391 (U.K.) (describing the incidents surrounding *In re Pinochet Ugarte* (No. 2) as the "first occasion" on which such an appeal was presented to the House of Lords).

presented in *In re Pinochet Ugarte (No. 2)*¹⁴⁵ was whether the House of Lords could set aside one of its own appellate decisions because of a subsequent claim of apparent bias on the part of a member of the original tribunal.¹⁴⁶ Of the five opinions eventually entered in the case, only Lord Browne-Wilkinson directly addressed the jurisdiction of the House of Lords to vacate and re-hear one of its own decisions.¹⁴⁷ Browne-Wilkinson explained that the House of Lords, as the final appellate resource for claimants, must have inherent jurisdiction to correct "injustice" caused by one of its own orders.¹⁴⁸ The jurisdiction to correct previous orders, however, must be limited to situations where the injustice is rooted in some procedural impropriety of the court.¹⁴⁹

The European Convention for the Protection of Human Rights adds another wrinkle to recusal determinations in the House of Lords.¹⁵⁰ Article Six of the Convention states that, in both criminal and civil proceedings, a party is

145. *R. v. Bow St. Metro. Stipendiary Magistrate (In re Pinochet Ugarte) (No. 2)*, [2000] 1 A.C. 119 (H.L.). In *In re Pinochet Ugarte (No. 2)*, the House of Lords was asked to set aside its prior decision holding that Mr. Pinochet was not immune from extradition. *Id.* at 125–28. Pinochet was arrested pursuant to international warrants seeking his extradition to Spain to stand trial on charges of crimes against humanity. *Id.* at 125–26. In a Nov. 25, 1998 decision, the House of Lords determined that Pinochet's immunity from prosecution for acts taken during his tenure as head of state terminated when he ceased to be a head of state. *Id.* at 126. After the decision was entered, however, it came to light that a member of the 3–2 majority in that decision, Lord Hoffman, was a director of a charitable association closely connected with intervener Amnesty International. *Id.* at 127–29. Pinochet entered a motion seeking to have the November 25 decision vacated because of the apparent bias created by Lord Hoffman's participation in the proceedings. *Id.* at 129. The court concluded that the existence of a charitable or social interest was functionally the same as a financial or pecuniary interest, thus producing a situation where the judge was automatically disqualified from participation. *Id.* at 132–35. As a result, the decision of November 25 was set aside because of the participation of a disqualified member of the tribunal. *Id.* at 137.

146. *See id.* at 125–28 (discussing the propriety of reopening a prior decision); Jones, *supra* note 144, at 391 (describing the issue considered by the House of Lords).

147. *See In re Pinochet Ugarte (No. 2)*, [2000] 1 A.C. at 132 (addressing the court's jurisdiction); Grant, *supra* note 141, at 43 (noting that only one of the judges addressed the issue directly).

148. *See In re Pinochet Ugarte (No. 2)*, [2000] 1 A.C. at 132 (explaining the principle that the Lords have the power to correct their own errors); Grant, *supra* note 141, at 43 (considering the inherent jurisdiction of the House). Browne-Wilkinson also noted that there was no statutory limitation or judicial precedent that counseled against jurisdiction. *See In re Pinochet Ugarte (No. 2)*, [2000] 1 A.C. at 132 (discussing the authority backing jurisdiction).

149. *See In re Pinochet Ugarte (No. 2)*, [2000] 1 A.C. at 132 (limiting the situations in which the House will reopen an appeal).

150. *See generally* Paul Catley & Lisa Claydon, *Pinochet, Bias and the European Convention on Human Rights*, in *THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS*, *supra* note 141, at 63–77 (discussing the interplay between the Convention and the House of Lords's decision in *In re Pinochet Ugarte (No. 2)*).

entitled to a hearing before "an independent and impartial" legal tribunal.¹⁵¹ This provision, combined with domestic statutory provisions creating a cause of action against bodies which violate the Convention, has led some commentators to suggest that a concrete procedure for recusal applications must be developed to avoid violation of England's Convention obligations.¹⁵²

*C. The High Court of Australia*¹⁵³

Decisions of the United Kingdom's House of Lords are very influential in Australian courts because of the nation's inheritance of English precedent.¹⁵⁴ On the question of judicial bias, however, the High Court of Australia diverged from English precedent more than twenty years ago by emphasizing the importance of public perception in recusal determinations.¹⁵⁵ Emphasizing the importance of public confidence in the judiciary, the High Court reaffirmed its commitment to a "reasonable apprehension of bias" test in *Webb v. The Queen*.¹⁵⁶ The *Webb* Court, expressly rejecting the House of Lords's recent

151. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 6, para. 1, in *BASIC DOCUMENTS ON HUMAN RIGHTS* 401 (Ian Brownlie & Guy S. Goodwin-Gill eds., 4th ed. 2002).

152. See Grant, *supra* note 141, at 59–60 (discussing the need for formal recusal procedure to ensure compliance with European Convention on Human Rights provisions).

153. Australia, like the United States, has a judicial system with both federal and state courts. The High Court of Australia is the highest court in the country's federal legal system and has jurisdiction over final appeals from both the federal and state judiciaries. The High Court is comprised of seven judges who are not required to sit en banc, but often do so in important appeals. Like those of the United States Supreme Court, decisions of the High Court of Australia are final and may not be overruled by the legislature or any other body. See JOHN CARVAN, *UNDERSTANDING THE AUSTRALIAN LEGAL SYSTEM* 47, 54–55 (3d ed. 1999) (describing the Australian judicial system).

154. See *id.* at 19 (discussing the sources of Australian law).

155. See *Livesay v. New S. Wales Bar Ass'n*, (1983) 151 C.L.R. 288, 293–94 (deciding the question of whether a judge should sit in a particular case on the basis of what impression the "public might entertain" about the partiality of the judge).

156. See *Webb v. The Queen*, (1994) 181 C.L.R. 41, 50 (stating that "the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality"); ENID CAMPBELL & H.P. LEE, *THE AUSTRALIAN JUDICIARY* 134 (2001) (discussing the High Court's reasons for adhering to the reasonable apprehension test). In *Webb*, the High Court was presented with the question of whether the spontaneous delivery of a bouquet of flowers to the mother of the victim in a criminal murder trial created a sufficient bias to overturn the defendant's conviction. *Webb*, (1994) 181 C.L.R. at 67. The High Court concluded that the trial court judge's application of the "real danger" test, derived from the House of Lord's decision in *Gough* was in error. *Id.* at 46. The proper test for questions of bias in Australia was held to be whether the incidents would give a reasonable observer the impression that the juror was not biased. *Id.* One justice noted that the underlying principle was the same regardless of

decision in *Gough*,¹⁵⁷ explained that the "real danger" test improperly emphasized the court's view of the facts and attributed to the general public too much knowledge of the law and faith in the judicial process.¹⁵⁸

The High Court initially described the test for bias in terms of whether "one of the parties or a fair-minded observer" would entertain a reasonable apprehension of bias.¹⁵⁹ Although a judge may still consider the perception of the parties in determining questions of bias,¹⁶⁰ the greater emphasis is on the perception of the hypothetical reasonable person.¹⁶¹ This "fictitious bystander" is imputed with certain moderating characteristics.¹⁶² For example, the person is not a lawyer, but is not wholly uninformed about the law.¹⁶³ Furthermore, the bystander is "neither complacent nor unduly sensitive" and has a basic knowledge of judicial considerations, restraints, and professional pressures.¹⁶⁴ Finally, the observer cannot be taken to be imbued with the characteristics of the social majority.¹⁶⁵

As for the procedure for determining questions of disqualification, the High Court of Australia, like most of its peers, has no concrete rules.¹⁶⁶ A party seeking disqualification can raise the matter by letter prior to the Court's hearing of arguments, by motion, or by objection in open court.¹⁶⁷ Regardless

application to jurors, as in *Webb*, or application to judges. *Id.* at 87. The High Court concluded that the flower incident did not give rise to a sufficient apprehension of bias as required by the Australian rule and dismissed the defendant's appeal. *Id.* at 56, 88.

157. See *supra* text accompanying notes 128–32 (discussing the *Gough* decision and test for bias).

158. See *Webb*, (1994) 181 C.L.R. at 50–51 (contemplating the differences between *Gough*'s real danger test and the reasonable appearance test).

159. See *Livesay*, (1983) 151 C.L.R. at 294 (explaining the situations in which an appellate court might find a reasonable apprehension of bias).

160. See CAMPBELL & LEE, *supra* note 156, at 136 (describing how the reactions of a reasonable observer are determined by Australian courts).

161. See *Webb*, (1994) 181 C.L.R. at 52 (noting that "the court's view of the public's view . . . is determinative").

162. See *Johnson v. Johnson*, (2000) 201 C.L.R. 488, 508–09 (characterizing the reasonable observer as a "fictitious bystander").

163. See *id.* (describing the fictitious bystander's familiarity with the law and judges).

164. See *id.* (listing the attributes of the fictitious bystander).

165. See *id.* at 508 (stating that the bystander is not instilled with majority traits).

166. See THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 214–16 (Tony Blackshield et al. eds., 2001) (summarizing disqualification of justices in the High Court).

167. See *id.* at 215 (explaining the presentation of a party's disqualification challenge); *High Court Practice as to Eligibility of Judges to Sit in a Case*, 49 AUSTL. L.J. 110, 113 (1975) (discussing the presentation of preliminary objections). In any event, it is quite clear that a formal motion for disqualification is unnecessary. See *Kartinyeri v. Commonwealth* [No. 2], (1998) 72 A.L.J.R. 1334, 1334 (Callinan, J., as single Justice) (stating that no formal motion is

of the method of presentation, the general rule in Australia is that the challenged judge rules on whether disqualification is appropriate.¹⁶⁸ Although the Chief Judge of the High Court has the right to decide whether to accept a decision in favor of disqualification,¹⁶⁹ the Chief Judge's power does not appear to extend to requiring such decisions.

An aggrieved party facing an unfavorable recusal ruling from a High Court judge would therefore seem to be left without any conventional remedy.¹⁷⁰ The judicial drama surrounding the politically-charged *Kartinyeri v. Commonwealth (No. 2)*,¹⁷¹ however, seems to indicate otherwise.¹⁷² In that case, petitioners sought en banc review of a judge's decision to not recuse himself, and the High Court agreed to schedule a time for such a hearing.¹⁷³ Although Judge Callinan's unilateral withdrawal denied the High Court an opportunity to hear arguments on the unprecedented appeal,¹⁷⁴ the arguments presented by counsel provide persuasive and well-reasoned grounds for believing that such an appeal could be successful.¹⁷⁵ Nor does the concept

necessary).

168. See CAMPBELL & LEE, *supra* note 156, at 146 (discussing the procedure for determining when a judge is disqualified from sitting in a particular case).

169. See *High Court Practice as to Eligibility of Judges to Sit in a Case*, 49 AUSTL. L.J. 110, 113 (1975) (describing the power of the Chief Justice to accept disqualification and citing examples).

170. See THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, *supra* note 166, at 215 (discussing how no appeal is available from a decision not to disqualify).

171. See *Kartinyeri v. Commonwealth (No.2)*, (1998) 72 A.L.J.R. 1334, 1334-38 (Callinan, J., as single Justice) (considering the propriety of recusal). In the underlying case, petitioners challenged the constitutionality of legislation which excluded a particular piece of land from the provisions of the Heritage Protection Act. *Id.* at 1334. In *Kartinyeri*, Justice Callinan, sitting as a single justice, ruled on plaintiffs' assertion that he should disqualify himself because of his role in preparing a legal opinion on the constitutionality of the challenged statute. *Id.* Justice Callinan had assisted in the preparation of the opinion, provided to one of the parties to the instant action, while counsel to a legislative committee. *Id.* at 1334-35. After applying the apprehension of bias test established in *Webb*, Callinan determined that his advisory role did not give rise to a reasonable apprehension of partiality. *Id.* at 1335-38. Because of that finding, Callinan declined to disqualify himself from hearing the matter before the Court. *Id.* at 1338.

172. See CAMPBELL & LEE, *supra* note 156, at 147 (noting that the High Court had listed the special appeal for arguments before the full court).

173. See Sidney Tilmouth & George Williams, *The High Court and the Disqualification of One of its Own*, 73 AUSTL. L.J. 72, 72 (1999) (discussing the High Court's provision for arguments before the Full Court minus Justice Callinan on the disqualification motion).

174. See THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, *supra* note 166, at 215 (noting that Justice Callinan eventually disqualified himself before the appeal was argued); Tilmouth & Williams, *supra* note 173, at 72 (explaining that the appeal was the first of its kind).

175. See Tilmouth & Williams, *supra* note 173, at 75-78 (arguing for jurisdiction on statutory, constitutional, and natural justice grounds).

appear totally novel, as a former Chief Judge of the High Court has also expressed approval for a system where disqualification motions are decided by the other members of the Court instead of by the target judge.¹⁷⁶

*D. The Constitutional Court of South Africa*¹⁷⁷

The Constitutional Court of South Africa's decision in *President of the Republic of South Africa v. South African Rugby Football Union (SARFU)*¹⁷⁸ involved a thorough review of common law recusal precedent, including many of the decisions discussed above.¹⁷⁹ In its survey, the SARFU Court's first task was to distill a widely accepted standard to be applied to questions of apprehended bias in South Africa.¹⁸⁰ After commenting on the split between

176. See CAMPBELL & LEE, *supra* note 156, at 148–50 (discussing Sir Anthony Mason's argument favoring recusal determination by the judges other than the one who is the subject of the challenge).

177. Unlike the judicial systems in the United States, Canada, and Australia, the South African judiciary includes dual courts of last resort. The Constitutional Court is the court of last resort for constitutional issues; the Supreme Court of Appeal serves the same purpose for nonconstitutional disputes. See S. AFR. CONST. ch. 8, §§ 167, 168 (establishing the court system). Appeals to the Constitutional Court from lower courts are generally heard by all eleven judges of the Court sitting en banc. Decisions of the Constitutional Court are binding on the entire judicial system and all other branches of the government. See CONSTITUTIONAL COURT OF S. AFR., ABOUT THE COURT: ROLE OF THE CONSTITUTIONAL COURT, at <http://www.concourt.gov.za/site/thecourt/role.html> (last visited Sept. 2, 2005) (summarizing the role of the Constitutional Court in the South African government) (on file with the Washington and Lee Law Review).

178. *Pres. of the Rep. of S. Afr. v. S. Afr. Rugby Football Union*, 1999 (7) BCLR 725 (CC), 1999 SACLR LEXIS 18. In *SARFU*, the Constitutional Court considered and decided an application for the recusal of four of the eleven justices of the court. 1999 SACLR LEXIS 18, at *10. The applicant, a political rival of appellant South African President Nelson Mandela, argued in detail that the judges' backgrounds, political affiliations, and extensive prior association with President Mandela created an apprehension of bias. *Id.* at *13–19, *27–51. Complicating matters was the fact that the entire Constitutional Court had been appointed by President Mandela as the nation's only leader since the adoption of the post-apartheid constitution. *Id.* at *19. The Court reviewed international precedent on the standard for questions of bias and the procedure for determining recusal applications. *Id.* at *55–78. The Court agreed that the application for recusal was a "constitutional matter" that should be heard before the whole court. *Id.* at *54. The Court decided that the facts as described did not support recusal of the challenged judges under the applicable standard. *Id.* at *121.

179. See Johann Krieger, Speech, *The Constitutional Court of South Africa*, 36 CORNELL INT'L L.J. 361, 365 (2003) (commenting on the comprehensive analysis undertaken in reaching the decision in *SARFU*).

180. See *SARFU*, 1999 (7) BCLR 725 (CC), 1999 SACLR LEXIS 18, at *60–72 (considering the test for bias and the nature of the bias sufficient to support a finding of reasonably apprehended bias).

the "real likelihood" and "reasonable suspicion" tests for questions of bias,¹⁸¹ the Court agreed that adoption of the reasonable suspicion test best served the interest of protecting of public confidence in the judiciary.¹⁸² The Constitutional Court, however, preferred to word the standard in terms of an "apprehension of bias" rather than a suspicion because of the risk of misunderstanding associated with the latter term.¹⁸³

The next task for the Constitutional Court was to establish the scope of the test and the facts to consider in arriving at a conclusion that a particular apprehension was reasonable. The *SARFU* Court cited with approval the comments of Canadian Justices L'Heureux-Dubé and McLachlin that analysis of bias starts with the presumption that judges are capable and desirous of judging controversies impartially.¹⁸⁴ Citing at length from Australian, English, Canadian, and American court decisions and academic commentary,¹⁸⁵ many of which are described and discussed above, the *SARFU* Court concluded:

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge . . . will not bring an impartial mind to bear on the adjudication of the case, [meaning] . . . a mind open to persuasion by the evidence and the submissions of the counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or [favor] and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant beliefs or predispositions.¹⁸⁶

The Constitutional Court's comments have proven to be quite influential overseas¹⁸⁷ as a concise and detailed summary of contemporary recusal policy.

The *SARFU* decision is also a unique instance of a high court deciding recusal motions en banc prior to argument on the underlying dispute.¹⁸⁸ The

181. See *id.* at *59–60 (commenting on the development of alternative tests for bias in England and the Commonwealth countries).

182. See *id.* at *60 (declaring the appropriate test to be applied in South African courts).

183. See *id.* at *62–63 (stating a preference for apprehension terminology and noting that the two terms have been recognized by numerous other courts as interchangeable).

184. See *id.* at *64–65 (citing *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 (L'Heureux-Dubé & McLachlin, JJ., concurring)) (expressing the presumption of judicial propriety that underlies any bias analysis).

185. See *id.* at *66–77 (surveying various international commentary on application of recusal standards).

186. *Id.* at *78–79.

187. See Kriegler, *supra* note 179, at 365 (noting that the Constitutional Court's decision in *SARFU* has been cited in the House of Lords and other foreign courts).

188. See *Pres. of the Rep. of S. Afr. v. S. Afr. Rugby Football Union*, 1999 (7) BCLR 725 (CC), 1999 SACLX 18, at *15 (calling the application for recusal unprecedented).

SARFU Court noted that judges in South Africa may properly determine recusal challenges individually,¹⁸⁹ but that a special responsibility attaches to motions to the Constitutional Court because of its role as the ultimate court of appeal.¹⁹⁰ Because a judge who sits in a case from which he should be disqualified creates a reasonable apprehension of bias and, in doing so, acts in violation of the Constitution of South Africa, the justices of the Constitutional Court concluded that the entire Court had a duty to ensure that recusal motions were properly decided.¹⁹¹ According to *SARFU*, a recusal determination by the full Court is appropriate when a reasonable apprehension of bias is alleged.¹⁹²

E. Summary of Foreign Common Law Precedent

Preserving public confidence is a fundamental goal of judicial systems,¹⁹³ so it should come as no surprise that recusal policy, which advances that goal by protecting the appearance of impartiality, has developed similarly in many countries. Although this Note's review of foreign guidance is by no means exhaustive,¹⁹⁴ it is clear that certain common principles are found in the way most modern common law systems address disqualification of judges. Reviewing recusal policy overseas shows that in many ways the United States Supreme Court is in the mainstream of common law standards, but differences exist in terms of the procedure used by the courts to reach recusal decisions.

The overwhelming preference of courts for an objective test to apply to questions of bias is evident from the domestic and foreign common law precedent. Although the terminology used to describe the test varies in each nation,¹⁹⁵ the principle is the same in the United States as it is overseas: courts

189. See *id.* at *55 (explaining that "[j]udges have jurisdiction to determine applications for their own recusal").

190. See *id.* at *55–56 (discussing the special circumstances implicated in recusal motions to the Constitutional Court as the court of last resort for appellants).

191. See *id.* at *55 (addressing the constitutional implications for a judge who sits improperly and other judges who sit in a panel with the disqualified judge).

192. See *id.* at *58–59 (reaching the conclusion that apprehension of bias cases must be heard by the whole court).

193. See *supra* note 101 and accompanying text (documenting universal belief in the importance of judicial impartiality).

194. See generally JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet & Jules Deschênes eds., 1985) (surveying judicial independence in twenty-nine nations).

195. See *supra* notes 110–17, 133–40, 159–65, 181–86 and accompanying text (surveying the language used to describe recusal standards in Canada, the United Kingdom, Australia, and South Africa).

must assess the propriety of recusal from a neutral and independent perspective.¹⁹⁶ Domestic and foreign courts also agree on many characteristics attributed to the hypothetical observer, including the degree of familiarity with the legal system¹⁹⁷ and the absence of predetermined beliefs about judicial impartiality.¹⁹⁸ What is clear is that, despite technical differences in the descriptions, the standard applied by the United States Supreme Court is quite similar to the standard applied by foreign common law courts.

In terms of recusal procedure, however, the differences between domestic and international policy are more striking. Courts of last resort in Australia, South Africa, and the United Kingdom all recognize the right of a petitioner to seek review of a negative recusal decision by a single high court judge.¹⁹⁹ The timing of that review, however, is different in each case. In the United Kingdom, the House of Lords reviewed a failure to recuse after the challenged judge had participated and ruled in the underlying case.²⁰⁰ In Australia, the High Court allowed the challenged judge to rule on the recusal motion and provided for subsequent review before the full Court.²⁰¹ In the Constitutional Court of South Africa, the en banc review occurred even before the individual judges had ruled on the recusal motions.²⁰²

In contrast, the United States Supreme Court and the Supreme Court of Canada maintain that recusal determinations are properly left to the final discretion of the challenged judge.²⁰³ In both of these Supreme Courts, no procedure exists for review of a challenged judge's recusal decision.²⁰⁴ In all five legal systems, however, the courts agree that the first decision on questions of recusal properly lies with the judge whose impartiality is being questioned.²⁰⁵

196. See *id.* (describing the objective tests applied in foreign courts of last resort).

197. See *supra* notes 83–86, 163–64 and accompanying text (commenting on the extent of legal knowledge attributed to the hypothetical reasonable observer).

198. See *supra* notes 119, 186 and accompanying text (expressing approval for a presumption of impartiality).

199. See *supra* notes 144–49, 170–76, 188–92 and accompanying text (reviewing court decisions supporting en banc review of recusal determinations).

200. See *R. v. Bow St. Metro. Stipendiary Magistrate (In re Pinochet Ugarte)* (No. 2), [1999] 1 A.C. 119, 137 (H.L.) (ruling on Lord Hoffman's participation).

201. See *Tilmouth & Williams*, *supra* note 173, at 72 (explaining the circumstances surrounding Justice Callinan's rejection of a recusal petition).

202. See *Pres. of the Rep. of S. Afr. v. S. Afr. Rugby Football Union*, 1999 (7) BCLR 725 (CC), 1999 SACLX 18, at *120–21 (ruling on a motion to disqualify four of the Court's justices).

203. See *supra* Part II.D and text accompanying notes 106–08 (describing recusal procedure in the Supreme Courts of the United States and Canada).

204. See *id.* (explaining the lack of a procedure for review of recusal decisions).

205. See *supra* notes 96, 107, 142, 168, 189 and accompanying text (indicating the role of

IV. *Establishing a Clear Recusal Standard and Procedure for the Supreme Court*

The principles on which a number of foreign courts agree provide a convenient starting point for modifying domestic recusal policy. The Supreme Court's first step, however, does not require any reflection on foreign guidance. Explaining the current system for deciding recusal challenges will help the Court alleviate many of the challenges it faces today.²⁰⁶ Simply codifying the current standard and procedure will reassure the public that the Court is not reinventing the recusal process as new cases arise.²⁰⁷ By modifying their policy to reflect foreign common law precedent, however, the Justices can dramatically improve the way the Supreme Court decides recusal motions.

A. *Proposing a Standard for Questions of Bias*

Finding the right standard for questions of bias requires a delicate balancing of competing interests. Apply too strict a standard, and judicial resolution becomes expensive and time-consuming; apply too relaxed a standard, and judicial solutions arrive under the cloud of unfairness.²⁰⁸ In the Supreme Court, the outer limit of the appropriate standard is dictated by 28 U.S.C. § 455(a).²⁰⁹ Under that federal recusal statute, judges and courts must apply an objective standard to questions of bias.²¹⁰ Whatever modified standard the Court adopts, it must support the general principle that recusal is required whenever "impartiality might reasonably be questioned."²¹¹

the challenged judge in recusal decisions).

206. See Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Committee on Government Reform, and Rep. John Conyers, Jr., Ranking Minority Member, House Committee on the Judiciary, to Hon. William H. Rehnquist, Chief Justice, United States Supreme Court 4 (Jan. 30, 2004) [hereinafter Letter from Rep. Henry A. Waxman] (stating that public confidence in the Supreme Court could erode without a consistent recusal procedure), available at <http://news.findlaw.com/hdocs/docs/scotus/waxrehnq13004ltr.pdf> (last visited Aug. 31, 2005).

207. See Leahy Letter, *supra* note 5 (seeking an explanation of what procedures exist for Supreme Court recusal).

208. See Frank, *supra* note 3, at 608 (discussing the "conflict of values" that accompanies the adoption of a recusal standard).

209. See 28 U.S.C. § 455(a) (2000) (requiring recusal for a reasonable apprehension of bias); see also *supra* Part II.B (explaining and discussing § 455(a)).

210. See H.R. REP. NO. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355 (describing the proposed legislation as adopting an objective standard).

211. 28 U.S.C. § 455(a) (2000).

The reason objective tests have proved so popular is because they enhance the appearance of impartiality while protecting judges from frivolous challenges. By requiring recusal whenever circumstances would lead a reasonable observer to doubt a Justice's impartiality, § 455 focuses on the public's view of the judiciary.²¹² At the same time, requiring that an apprehension be reasonable and based on demonstrable facts ensures that Justices only recuse themselves when doing so is truly necessary to protect the appearance of impartiality.

Despite the widespread application of an objective standard in modern foreign and domestic courts,²¹³ the reasonable apprehension test met with some criticism when initially proposed in the United States. Most of the criticism arose because the reasonable apprehension test imposes more stringent requirements on judges than does a subjective standard and lowers the bar for petitioners to move successfully for recusal of a particular judge.²¹⁴ Some commentators suggested that a strict objective standard would produce a spike in frivolous recusal applications and actually hurt public confidence in the overall impartiality of judges.²¹⁵ At the Supreme Court level, critics have asserted, a less deferential standard creates an increased risk of equally divided courts and undecided constitutional questions.²¹⁶

The best way to address fears of judge-shopping and frivolous recusal motions is to clearly define the reasonable apprehension standard.²¹⁷ Currently, the terminology employed by both federal and state courts to describe the standard varies widely.²¹⁸ The Supreme Court's own decisions reveal an

212. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–60 (1988) (explaining § 455(a)'s primary purpose of promoting public confidence); H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (commenting on the desire to promote public confidence in the judicial process).

213. See *supra* notes 110–17, 133–40, 159–65, 181–86 and accompanying text (surveying the language used to describe recusal standards in Canada, the United Kingdom, Australia, and South Africa).

214. See *Liljeberg*, 486 U.S. at 858 n.7 (stating that the 1974 amendment to § 455 was intended to broaden the grounds on which recusal would be granted); Note, *supra* note 5, at 745 (calling the modified test stricter than the preamendment version).

215. See Note, *supra* note 5, at 747 (describing the concerns expressed by critics of an objective recusal standard, including excessive recusal and overwhelming the Court system).

216. See *id.* at 748–49 (weighing the problems raised by Supreme Court recusal against the benefits of a more stringent test for judges).

217. See *id.* at 747 (noting that the solution to excessively harsh application of the objective standard and frivolous challenges to judges rests in clarity and development of the law).

218. See FED. JUDICIAL CTR., *supra* note 80, pt. 1.IV.A, at 15 (stating that "every circuit has adopted some version of the reasonable person standard"); Abramson, *supra* note 90, at 72–73 (listing the "numerous variations" of the reasonable person standard developed and applied by

inconsistent description of the applicable standard.²¹⁹ Ambiguous characterization of the reasonable apprehension standard creates uncertainty about how a judge will apply the test in a given case.²²⁰

The Supreme Court needs to promulgate a recusal policy that permanently establishes the meaning of the reasonable apprehension test. An appropriate statement of the test would be whether a fair-minded and knowledgeable person, with a full appreciation of the facts and circumstances in question, would reasonably apprehend that the challenged Justice might not act impartially in deciding the matter before the court. This test embodies the moderate, objective standard prevalent in foreign courts,²²¹ and incorporates the Canadian belief that the reasonableness requirement attaches to both the hypothetical observer and the apprehension of bias.²²²

Completing the improvement process requires the Supreme Court to comprehensively define the terminology used in the standard. The first part of the proposed standard explains that judges must assess questions of bias from the viewpoint of a "fair-minded and knowledgeable" hypothetical observer. That statement implies an individual who is aware of the ethical obligations placed on judges and who is aware that judges seek to protect the image of impartiality.²²³ At the same time, the "fair-minded and knowledgeable" observer is a healthy skeptic²²⁴ who is reluctant to defer automatically to a

state courts).

219. See *Liteky v. United States*, 510 U.S. 540, 552 (1994) (describing the test as whether "there exists a genuine question concerning a judge's impartiality"); *id.* at 558 (Kennedy, J., concurring) (describing the test as whether "it appears that [the judge] harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside"); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988) (describing the test as whether "a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge" of facts that would give him an interest).

220. See H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352 (stating that the lack of clarity of previous ethical standards caused problems in application).

221. See discussion *supra* Part III.E (noting the widespread use of an objective standard for questions of bias).

222. See *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, 531 (Cory & Iacobucci, JJ., concurring) (discussing the two-pronged objective test for an apprehension of bias).

223. See *id.* at 503 (L'Heureux-Dubé & McLachlin, JJ., concurring) (expressing the presumption of judicial propriety that underlies any bias analysis); Pres. of the Rep. of S. Afr. v. S. Afr. Rugby Football Union, 1999 (7) BCLR 725 (CC), 1999 SACLX LEXIS 18, at *64-65 (approving of the presumption expressed in *R.D.S.*); Abramson, *supra* note 90, at 70 (stating that a judge's unwillingness to sit in a case in which her impartiality might be questioned is presumed in reviewing a motion to recuse).

224. See *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (noting that "drawing all inferences favorable to the honesty and care of the judge" would undermine the appearance standard).

judge's decision.²²⁵ The next part of the proposed standard explains that the hypothetical observer has a "full appreciation of the facts and circumstances in question." In other words, the bystander has both a full knowledge of the facts giving rise to the recusal challenge,²²⁶ and a deeper, contextual understanding of the circumstances that created the apprehension of bias.²²⁷

Finally, the standard explains that recusal is required only when the reasonable person apprehends that the judge "will not act impartially in deciding the matter before the Court." In this context, impartiality means that each Justice must bring to the case an open mind to the evidence and arguments presented in the case, and that the Justice is not inappropriately predisposed to a certain result.²²⁸ By extension, recusal is not required when a party merely fears an adverse decision,²²⁹ or that the Justice will not bring a totally blank slate to the bench.²³⁰ In other words, recusal is appropriate if external factors would cause the reasonable observer to fear that a Justice will possess a wrongful "aversion or hostility" to one argument or party.²³¹

B. Improving the Supreme Court's Recusal Determination Procedure

Justice Robert Jackson noted that the absence of a uniform practice for recusal made review of an individual Justice's recusal determinations a difficult

225. See *id.* (noting the lack of deference of the general public to questions of judicial bias).

226. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860–61 (1988) (stating that the test for apparent bias is applied from the perspective of a person "knowing all the circumstances"); *Abramson*, *supra* note 90, at 60 (observing that the need for proof is "vital" in apparent bias challenges).

227. See *supra* notes 117, 165 and accompanying text (describing the social knowledge charged to the hypothetical observer).

228. See *SARFU*, 1999 (7) BCLR 725 (CC), 1999 SACLR LEXIS 18, at *78–79 (describing the expectation that a Justice will bring "a mind open to persuasion by the evidence and the submissions of the counsel").

229. See *Liteky v. United States*, 510 U.S. 540, 550–51 (1994) (declaring that not every "unfavorable disposition" towards a case is bias).

230. See *id.* at 552 (rejecting the requirement of "child-like innocence" by judges); Frank, *supra* note 1, at 48 (explaining that "Justices are strong-minded [individuals], and on the subject matters that come before them, they do have propensities; the course of decisions cannot be accounted for in any other way").

231. *Liteky*, 510 U.S. at 558 (Kennedy, J., concurring). See *id.* at 552–56 (affirming the existence of an extrajudicial source factor in determining questions of apparent bias); MARVIN COMISKEY & PHILIP C. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* § 4.6(a), at 78 (1987) (describing the type of situation when apparent bias actually requires recusal).

task.²³² This Note's proposed standard for questions of bias will increase consistency in judicial disqualification, but the lack of an established procedure will continue to undermine public confidence in recusal. Developing a concrete recusal procedure for the Supreme Court will enhance transparency to the parties, provide a means for review of individual decisions, and protect against erroneous disqualification.

The dominant procedural model for deciding questions of bias in the United States and overseas provides for determination by the challenged judge.²³³ The primary benefit of the individual determination model is that the person with the best knowledge of the facts is the person who resolves whether the circumstances support recusal.²³⁴ Individual determination may also reduce the number of recusal "fishing expeditions" because parties will be reluctant to approach an individual Justice with weak evidentiary support for a disqualification motion. The single-judge procedure also enhances judicial efficiency because it avoids prolonged fact-finding hearings before recusal decisions.²³⁵ Furthermore, research on judicial practices suggests that individual determination may actually result in more frequent recusal of Justices than other methods.²³⁶

On the other hand, asking a challenged Justice to rule on a motion to recuse puts that Justice in a precarious position.²³⁷ First, because a Justice is expected to recuse himself *sua sponte* if there is a reasonable apprehension of bias,²³⁸ a successful motion to recuse requires the Justice to admit that he failed

232. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring) (commenting on the lack of uniform practice and authoritative standards for recusal), *denying reh'g* of 325 U.S. 161.

233. See CRANE & BROWN, *supra* note 106, § 4 Recusal, at 45 (describing the practice of referring recusal motions to the challenged judge); FED. JUDICIAL CTR., *supra* note 80, pt. 1.VII.A, at 45 (noting that the weight of authority indicates that the challenged judge should rule on recusal motions).

234. See Abramson, *supra* note 30, at 546 (stating that the judge's full knowledge of his own circumstances provides a rationale for allowing the challenged judge to decide recusal motions).

235. See Tilmouth & Williams, *supra* note 173, at 73 (noting that the High Court of Australia had scheduled time for a hearing in connection with the recusal motion at issue in *Kartinyeri v. Commonwealth* (No. 2)).

236. See JONA GOLDSCHMIDT & JEFFREY M. SHAMAN, AM. JUDICATURE SOC'Y, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1, 10-11 (1995) (discussing the tendency of judges to disqualify themselves in situations in which they would not disqualify a peer).

237. See H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352 (noting that the judge was often forced to decide recusal motions "at his peril").

238. See Abramson, *supra* note 90, at 70 ("To avoid the appearance of impropriety, the judge should be the first to raise the issue by recusing in a particular case.").

in the first instance to adhere to statutory and ethical requirements.²³⁹ Second, the image of a Justice ruling on his own recusal motion raises the specter of self-interest as strongly as if the Justice was ruling on a case in which he has a direct pecuniary interest. If the House of Lords's automatic disqualification reasoning is taken to its logical conclusion,²⁴⁰ it is hard to distinguish a situation when a judge is self-interested philanthropically from one where a judge is self-interested ethically.

In the U.S. federal court system, appellate review is a statutory, not a constitutional, right,²⁴¹ although the circuit courts of appeal have jurisdiction over most final or interlocutory rulings by the district courts.²⁴² Another problem with allowing the challenged Justice to rule on disqualification, therefore, is that the moving party would have its recusal motion decided by a single judge without any recourse for appellate review.²⁴³ In the context of recusal, departure from the general presumption of appellate review undermines public confidence by implying that a single Justice can unilaterally declare himself fit to hear a case.

239. See *Liteky v. United States*, 510 U.S. 540, 548 (1994) (stating that recusal is "required" under § 455 whenever impartiality might reasonably be questioned); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 851 (1988) (finding that a judge's disqualification was required irrespective of the judge's knowledge of the circumstances creating the bias); ABA MODEL CODE OF JUDICIAL CONDUCT, pmbl. (1990) (explaining that when the Code uses the term "shall," as it does in the discretionary recusal provision, Canon 3E, the text "intend[s] to impose binding obligations").

240. See *R. v. Bow St. Metro. Stipendiary Magistrate (In re Pinochet Ugarte)* (No. 2), [2000] 1 A.C. 119, 132–35 (H.L.) (explaining that a judge is automatically disqualified whenever he has an interest in the outcome of the case and asserting that a philanthropic interest is sufficient to trigger automatic disqualification). But see David Robertson, *The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet Case*, in *THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS*, *supra* note 141, at 25–31 (criticizing the House of Lords automatic disqualification formula as an efficient but unworkable solution to the problem of reprimanding a judicial colleague).

241. *United States v. Young*, 544 F.2d 415, 416 (1976).

242. See 28 U.S.C. §§ 1291, 1292 (2004) (establishing the appellate jurisdiction of the federal circuit courts).

243. See Letter from Hon. William H. Rehnquist, Chief Justice, United States Supreme Court, to Sen. Patrick Leahy, Ranking Member, Senate Committee on the Judiciary (Jan. 26, 2004) [hereinafter Letter from Hon. William H. Rehnquist] (stating that there is no Court procedure for review of an individual Justice's recusal determination), available at <http://news.findlaw.com/hdocs/docs/scotus/rehnquist12604ltr.html> (on file with the Washington and Lee Law Review). Although there is no constitutional guarantee, 28 U.S.C. § 1291 creates the presumption of available appellate review. 20 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 303.11(1)(a) (3d ed. 1999).

The second procedural model, and the one largely supported by critics of the current Supreme Court procedure,²⁴⁴ allows the full Court to hear recusal applications. Much of the foreign common law precedent on recusal suggests that such a procedure should be available to applicants.²⁴⁵ Full Court determination ensures that the reasonableness of an apprehension of bias is subject to review from multiple perspectives and from an emotional distance not available to the single challenged Justice.²⁴⁶ This procedure would enhance transparency of the recusal process²⁴⁷ and ensure that the Court does not violate the due process right to a fair and impartial hearing of the party seeking recusal.²⁴⁸

On the other hand, providing for en banc review could unnecessarily burden the Court by requiring oral arguments or extensive motion practice before any resolution of a recusal motion.²⁴⁹ That process could in turn distract the Court from the serious and extensive judicial tasks that already fully occupy its time and attention.²⁵⁰ En banc determination also risks inserting artificial animosity into a collegial and respectful environment²⁵¹ by asking Justices to rule on the propriety of a colleague's conduct. Finally, determination by the full Court may actually detract from the public appearance of impartiality in the event that determination of recusal motions develops along ideological or political lines.

In practice, the most effective procedure for deciding recusal motions combines both individual determination by the challenged Justice and en banc review. The Constitutional Court of South Africa's treatment of the recusal

244. See Letter from Rep. Henry A. Waxman, *supra* note 206, at 4 (urging Chief Justice Rehnquist to adopt a procedure which allowed for review of a Justice's recusal decision).

245. See *supra* Part III.E (discussing availability of en banc review of recusal determinations in overseas courts).

246. See Abramson, *supra* note 90, at 71–72 (commenting on judges' intimate involvement in the judicial process and their reluctance to self-censure).

247. See Abramson, *supra* note 30, at 561 (explaining that allowing a challenged judge to decide a recusal motion "erodes the necessary public confidence in the integrity of a judicial system").

248. See *In re Murchison*, 349 U.S. 133, 136 (1955) (noting that "[a] fair trial in a fair tribunal is a basic requirement of due process"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (declaring that due process is violated by subjecting an individual to a hearing before a judge with a substantial interest in reaching a decision against that individual).

249. See *supra* note 173 and accompanying text (discussing the High Court of Australia's scheduling of times for oral arguments on a recusal motion).

250. See THOMAS G. WALKER & LEE EPSTEIN, *THE SUPREME COURT OF THE UNITED STATES* 67–69 (1993) (describing the Court's growing caseload).

251. See Ginsburg, *supra* note 100, at 1033–36 (describing generally the collegial atmosphere that exists among the Justices).

motion in *SARFU* suggests a three-step procedure that could be applied in the Supreme Court.²⁵² The first step for a party seeking recusal would be an initial, private request to the challenged Justice describing the facts and arguments supporting the party's apprehension of bias. This would allow a Justice to "save face" by voluntarily recusing himself in the event that he had overlooked circumstances giving rise to a reasonable apprehension of bias. The next step for a party seeking recusal would be a formal written motion addressed to the Justice in question and providing the grounds for recusal. Although the chance of success at this stage would be slim given the Justice's prior rejection of the motion, the possibility of a public appeal would increase the pressure on the Justice and provide the Justice's colleagues on the Court the opportunity to offer guidance on the decision.

The final step in the recusal process would be an appeal for en banc review of an individual Justice's decision not to recuse. This would not be an appeal of right for the party seeking disqualification. Under this proposal, the Court would apply a procedure similar to that used to grant writ of certiorari to decide when review of disqualification would be appropriate. The decision to grant en banc review could be by affirmative vote of one-third of the unchallenged Justices or left to the discretion of the Chief Justice in his role as chief administrator of the U.S. court system.

This proposed procedure would help defuse public uncertainty over determination methods and ensure that a party whose recusal motion was denied by a single Justice would have a means to receive judicial review of the decision.²⁵³ This proposal also minimizes the risk of judge-shopping by severely limiting en banc review of recusal decision to cases where several members of the Court felt that one of its Justices had made a clear error. Finally, the proposal reduces interference with the Court's primary responsibilities by allowing the individual most familiar with the facts to make the first ruling on the recusal motion.²⁵⁴

Although the three-step proposal for a Supreme Court recusal procedure will help alleviate many of the problems in the disqualification process, the predicament of affirmation by an equally divided court still remains. One

252. See *Pres. of the Rep. of S. Afr. v. S. Afr. Rugby Football Union*, 1999 (7) BCLR 725 (CC), 1999 SACLR LEXIS 18, at *14-15, *20-21, *51-52 (describing the process by which the petitioner brought the recusal issue before the court and the court's eventual collective response).

253. See Letter from Hon. William H. Rehnquist, *supra* note 243 (stating that there is no Court procedure for review of an individual Justice's recusal determination).

254. See Abramson, *supra* note 30, at 546 (stating that the judge's full knowledge of his or her own circumstances provides a rationale for allowing the challenged judge to decide recusal motions).

solution to this problem applied by other courts of last resort is designation of replacement Justices who could sit in a case from which a regular Justice is disqualified.²⁵⁵ Some domestic scholars have suggested replacements for recused Justices in connection with petitions for certiorari.²⁵⁶ The chief judge of either the D.C. Circuit or the referring circuit court, or a retired Supreme Court Justice, could be viable candidates to serve as a recusal replacement.²⁵⁷

V. Application and Conclusion

Application to Justice Scalia's duck-hunting trip with Vice President Cheney presents a convenient test for this Note's proposed changes to recusal policy. In that context, the issue presented is whether a fair-minded and knowledgeable person, with a full appreciation of the facts and circumstances in question, would reasonably apprehend that Justice Scalia might not act impartially in deciding the matter before the court. On the basis of the details provided in Justice Scalia's memorandum, this Note concludes that the facts do not support a reasonable apprehension of bias.

The fair-minded and knowledgeable individual is generally aware of the ethical requirements imposed by federal law and the Model Code of Judicial Conduct.²⁵⁸ In this particular case, the hypothetical observer brings a balanced approach to the issue of Justice Scalia's judicial tendencies.²⁵⁹ In accordance with the proposed standard, the reasonable observer in this case is also imbued with complete awareness of the facts surrounding the Sierra Club's recusal

255. See *SARFU*, 1999 SACLX LEXIS 18, at *76-77 (discussing the ability of the President of South Africa to appoint acting replacement justices to the Constitutional Court); Simone Rozes, *Independence of Judges of the Court of Justice of the European Communities*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE, *supra* note 194, at 504 (commenting on the availability of a predetermined tiebreaker judge).

256. See, e.g., Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 673-75 (1996) (arguing that congressional authorization for a substitute Justice provision could alleviate problems created by disqualification of Supreme Court justices).

257. See *id.* at 673, 675 (suggesting the Chief Judge of the District of Columbia Circuit or a retired Supreme Court Justice as potential recusal substitutes).

258. See discussion *supra* Part II.B (describing the ethical requirements imposed on judges by federal statute and the ABA).

259. See *Cheney v. United States Dist. Court*, 541 U.S. 913, 928-29 (2004) (Scalia, J., as single Justice) (stating that the question of recusal must be assessed from the view of a person who believed in Justice Scalia's impartiality prior to his hunting trip with the Vice President). But see Maureen Dowd, Editorial, *Quid Pro Quack*, N.Y. TIMES, Mar. 21, 2004, at D11 (alluding to the 2000 election controversy and commenting that Justice Scalia's decision not to recuse was unsurprising because the Justice had "put Dick Cheney in the White House").

motion.²⁶⁰ The factual knowledge attributed to the hypothetical observer includes at least the details of the travel and boarding arrangements, the extent of interaction between the two men while in Louisiana, and the value of any benefits incurred by Justice Scalia.²⁶¹

The most difficult question, and the one most critical to resolving the recusal motion, is whether to imbue the hypothetical observer with an understanding of the distinction between suits against government employees in their official capacity and suits against government employees as private individuals.²⁶² The Sierra Club's recusal motion required Justice Scalia to decide whether an observer would reasonably fear that the Justice's experience in Louisiana might interfere with his ability to impartially consider the arguments presented. Any determination of whether such an apprehension would be reasonable must take into consideration what is at stake in the particular suit before the Court.²⁶³ If that was not the case, the implication would be that an observer is equally likely to apprehend bias in a case alleging graft or murder as in a case alleging violation of the Federal Advisory Committee Act.²⁶⁴ Although still unlikely, it is more probable that a Supreme Court Justice would protect the financial or liberty interests of a social acquaintance²⁶⁵ than ignore the law to avoid a friend's political embarrassment.²⁶⁶

In other words, the extent of Justice Scalia's interaction with Vice President Cheney must be sufficient to reach the higher threshold of apparent

260. See *supra* note 226–27 and accompanying text (describing the knowledge prong of the proposed standard for questions of apparent bias).

261. See *Cheney*, 541 U.S. at 914 (noting that consideration of bias must occur in light of the facts as they existed).

262. See *id.* at 916–20 (explaining the distinction between official action and private action cases).

263. Concluding that the standard for apprehending bias in a private suit against a government official is the same as in an official capacity case could have staggering implications for recusal of Justices. During the October 2002 Term, for example, the Supreme Court considered 61 cases in which former Attorney General John Ashcroft was a named party. See 536 U.S. ix (2004) (listings cases in which Attorney General Ashcroft was named as a party); 537 U.S. xxxviii–xxxix (2004) (same). If the standard for questions of bias did not acknowledge the distinction between personal and official capacity, a Justice with a social relationship with Mr. Ashcroft might be disqualified from all of those cases.

264. See *Cheney*, 541 U.S. at 919 & n.1 (mentioning that the issue before the Supreme Court was whether the Federal Advisory Committee Act could be construed to authorize discovery from the Vice President).

265. See *id.* at 916 (stating that friendship is a ground for recusal when "the personal fortune or the personal freedom" of the friend is at stake in the case).

266. See *id.* at 920 (declaring that "political consequences" are not sufficient to convert an official action suit into a private action suit for the purpose of recusal).

bias necessary to support a reasonable apprehension in an official action suit, or the evidence must show that the risk of political damage was significant enough to treat the case as a personal action suit. In this case, however, the nature of the duck-hunting trip does not show sufficient personal interest on the part of Justice Scalia to reasonably apprehend bias in an official action suit against Vice President Cheney. For that reason, it is not reasonable to think that a fully informed, fair-minded, and knowledgeable observer would apprehend bias on the part of Justice Scalia, and the Justice was correct in denying the motion to recuse.

Under the modified procedure for addressing recusal questions proposed in Part IV.B of this Note, the Sierra Club could apply to the full Court for review of Justice Scalia's determination. It is unlikely that the Court would grant such a request. Chief Justice Rehnquist described the backlash against Justice Scalia as "ill considered,"²⁶⁷ and Justice Ginsburg, although not directly addressing the correctness of his decision, implied that Justice Scalia's situation presented a difficult question.²⁶⁸ The procedure proposed here suggests that full Court review of recusal determination is reserved for situations when there is a compelling reason for intervention.²⁶⁹ When reasonable minds may differ on recusal, as appears to be the case with Justice Scalia's decision, there is not clear evidence of error to support the Court's intervention.

It would be unreasonable to expect that any standard and procedure for recusal in the Supreme Court would guarantee the most popular result in every situation. The proposed changes made here are intended to advance the goals of uniformity and clarity while ensuring that parties are protected from any abuse of discretion. Solidifying the applicable standard for questions of bias ensures that every recusal challenge is dealt with according to the same principles, and that parties will have confidence in the result and how it was reached. Establishing a concrete procedure for making and reviewing recusal determinations allows the Court to protect parties from the risk of judicial abuse and the appearance of bias. The hope is that the modifications proposed here will ensure that recusal of Justices returns to being a process to improve, rather than hinder, the appearance of impartiality in the Supreme Court.

267. Letter from Hon. William H. Rehnquist, *supra* note 243.

268. See Ginsburg, *supra* note 100, at 1039 (explaining that Justice Scalia's recusal question would have been an "easy call" at the appeals court level, but indicating that the unique situation in the Supreme Court presented a more difficult decision).

269. See discussion *supra* Part IV.B (proposing a modified procedure for reviewing recusal determinations by single Justices).

