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Congress, the Constitution, and Supreme Court Recusal

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Abstract

Recusal is one of the most hotly contested issues facing the Supreme Court. From the wide-ranging debate over Supreme Court recusal, however, a singular theme has emerged: Congress must do more to protect the integrity and legitimacy of the Court by regulating the Justices' recusal practices. Herein lies the problem. Rather than solve the puzzle of Supreme Court recusal, direct congressional regulation has created an impasse between Congress and the Court that has consequences for the reputation, efficacy, and legitimacy of both Branches. In a precursor to this Article, I recast the issue of Supreme Court recusal as a constitutional question and argued that direct congressional regulation of Supreme Court recusal violates the separation of powers. This Article builds on that prior work and argues that separation of powers principles are critical to understanding and alleviating the inter-branch impasse over recusal. It contends that Congress, rather than the Court, should take the lead in resolving that impasse and that the separation of powers requires Congress to use indirect constitutional mechanisms to do so. Specifically, Congress should repeal the current statutory provision directly regulating Supreme Court recusal and focus instead on more

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indirect constitutional tools—such as impeachment, procedural reform, judicial confirmation, appropriations, and investigation—to influence the Justices' recusal practices. This effort to frame the recusal debate within its proper constitutional context permits a more robust and productive dialogue about both the Justices' recusal practices as well as the broader question of the nature and dynamics of inter-branch relations in our tripartite government.

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I. Introduction

Supreme Court recusal[1]—the question of whether an individual Justice may participate in a case—is currently among the most high profile and controversial issues involving the Court.[2] Chief Justice Roberts's *2011 Year-End Report on the Federal Judiciary* ("Year End Report") focused entirely on Supreme Court ethics and recusal,[3] and was immediately met with sharp criticism by legislators and commentators.[4] Sitting

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1. As has become common practice in discussions about the disqualification of judges, the term recusal in this instance will be used interchangeably to include both the terms "disqualification," which traditionally refers to involuntary removal of a judge from a case, and "recusal," which is generally limited to a judge's voluntary decision to withdraw from a case. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 4 (Banks & Jordan, 2d ed. 2007) ("In fact, in modern practice 'disqualification' and 'recusal' are frequently viewed as synonymous, and employed interchangeably.").

2. *See* Letter from 138 Law Professors to the House & Senate Judiciary Comms., Changing Ethical and Recusal Rules for Supreme Court Justices (Mar. 17, 2011) [hereinafter Law Professor Letter], *available at* http://www.afj.org/judicial_ethics_sign_on_letter.pdf (calling for congressional reform of Supreme Court ethical and recusal standards, and explaining that "[r]ecent media reports have focused public attention" on the issue).

3. *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011) [hereinafter 2011 YEAR-END REPORT], *available at* http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

4. *See* Letter from Five Senators to Chief Justice Roberts (Feb. 13, 2012) [hereinafter Senator Letter], *available at* http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/letter-to-supreme-court-2-13-12.pdf (asking the Court to formally adopt the ethical and recusal requirements in the Judicial Conference of the United States Code of Conduct for United States Judges); Howard Bashman, *A Way Forward on Judicial Ethics*, N.Y. TIMES, Mar. 11, 2012, at A20 ("[A]n alliance of government watchdog groups delivered 100,000 signatures to the Supreme Court . . . calling on the justices to voluntarily . . . reform how they handle requests for recusals."); Sherrilyn Ifill, *The Chief Strikes Out*, CONCURRING OPINIONS (Jan. 4, 2012, 12:14 PM), http://www.concurringopinions.com/archives/2012/01/sherrilyn-ifills-the-chief-strikes-out.html (last visited Sept. 18, 2012) [hereinafter Ifill, *The Chief Strikes Out*] ("Justice Roberts has not yet made the case for why the Supreme Court should be exempt from the same ethics and recusal standards that govern [other federal] judges.") (on file with the Washington and Lee Law Review); William Yeomans & Herman Schwartz, *Roberts to America: Trust Us*, POLITICO.COM (Jan. 24, 2012, 10:26 PM), http://www.politico.com/news/stories/0112/71895.html (last visited Sept. 18, 2012) (arguing that declining to explain recusal decisions "denies the American people their right to know whether the justices are doing

Justices were called to testify before Congress twice in the past year about recusal issues,[5] and more than 135 law professors signed a letter to the House and Senate Judiciary Committees in March of 2011 outlining the need for new recusal legislation to "protect the integrity of the Supreme Court."[6] That letter led to the introduction of a bill in the House of Representatives that would establish new substantive and procedural recusal standards for the Court.[7] The Justices' individual conduct has also been the subject of recent criticism,[8] including a heated

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their job as they should") (on file with the Washington and Lee Law Review).

5. Justices Breyer and Kennedy were asked about Supreme Court ethics and recusal standards as part of their testimony before a House subcommittee on April 14, 2011. *See* Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules, Kennedy, Breyer Say*, 79 U.S. L. WK. 2389, 2389 (2011). On October 5, 2011, Justices Breyer and Scalia testified on a similar topic before the Senate Judiciary Committee. *See Considering the Role of Judges under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4–41 (2011).

6. Law Professor Letter, *supra* note 2, at 1.

7. *See* Supreme Court Transparency Disclosure Act of 2011, H.R. 862, 112th Cong. (2011).

8. Justices Samuel Alito, Stephen Breyer, Ruth Bader Ginsburg, Antonin Scalia, Sonia Sotomayor, and Clarence Thomas have all recently been criticized for their interactions with politically interested entities that either have been or are likely to come before the Court. Justices Scalia and Thomas were criticized for attending Federalist Society fundraisers and dinners sponsored by the conservative Koch brothers on the basis that ties to politically active organizations could negatively impact their ability to remain impartial in future cases. *See* Nan Aron, *An Ethics Code for the High Court*, WASH. POST, Mar. 14, 2011, at A19; Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, NPR (Aug. 17, 2011), http://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices (last visited Sept. 18, 2012) (on file with the Washington and Lee Law Review); Yeomans & Schwartz, *supra* note 4 (demanding a "reasoned explanation . . . of the propriety of the recent decision by Justices Clarence Thomas and Scalia to headline a fundraiser for the Federalist Society"). Justice Thomas was similarly critiqued for his relationship with a wealthy conservative contributor who allegedly provided funding for projects of interest to the Justice and his wife. *See* Mike McIntire, *The Justice and the Magnate*, N.Y. TIMES, June 19, 2011, at A1. Justice Alito has drawn scrutiny for his attendance at fundraising dinners for the conservative *American Spectator* magazine. *See* Yeomans & Schwartz, *supra* note 4. Justices Breyer, Ginsburg, and Sotomayor were singled out for having accepted paid trips from organizations with political viewpoints. *See The Justices' Junkets*, WASH. POST, Feb. 21, 2011, at A14 (noting that Justices Breyer, Ginsburg, and Sotomayor accepted trips paid for by the American Bar Association, the American Sociological Association, and the American Civil Liberties Union, respectively).

public debate over Justices Elena Kagan and Clarence Thomas's participation in the Court's review of the controversial Affordable Care Act.[9] Finally, exhaustive coverage in the news media and legal academy has made recusal an unavoidable part of any modern discussion of the Court.[10]

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9. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C); Eric Segall & Sherrilyn Ifill, *Debate, Judicial Recusal at the Court*, 161 U. PA. L. REV. PENNUMBRA 131 (2012); Arlen Specter, *Judging the Justices Over Conflicts of Interest*, WASH. POST, Mar. 22, 2012, at A17. Even before the Court agreed to take the case, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), Justices Kagan and Thomas were publicly encouraged to recuse themselves. Senator Orrin Hatch stated publicly that Justice Kagan should recuse herself because "he is sure that Kagan participated in discussions about the law and challenges to it while she served in the Justice Department as [Solicitor General]." Mark Sherman, *Sen. Hatch: Kagan Should Sit Out Health Care Case*, USA TODAY (Feb. 4, 2011, 3:49 PM), http://www.usatoday.com/news/topstories/2011-02-04-3661380121_x.htm (last visited Sept. 18, 2012) (on file with the Washington and Lee Law Review). Around the same time, seventy-four House Democrats sent a letter to Justice Thomas asking him to recuse himself from the case "because of his wife's ties to a lobbying group that opposes the health care law." Huma Khan, *Should Supreme Court Justices Clarence Thomas, Elena Kagan Sit Out Health Care Case?*, ABCNEWS (Feb. 10, 2011), http://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-sit-health-care/story?id=12878346 (last visited Sept. 18, 2012) (on file with the Washington and Lee Law Review).

10. In addition to those cited above, several prominent media outlets carried pieces addressing Supreme Court recusal in 2011 and 2012. *See, e.g.*, John Gibeaut, *Sitting This One Out*, ABA J., Mar. 2012, at 18 (noting that "the debate" regarding recusal law "will likely continue"); Joan Biskupic, *Calls for Recusal Intensify in Health Care Case*, USA TODAY, Nov. 21, 2011, at 6A (discussing the calls for Justices Thomas and Kagan to recuse themselves from hearing challenges to the Affordable Care Act); Editorial, *Cloud over the Court*, N.Y. TIMES, June 23, 2011, at A26 (addressing an alleged conflict of interest between Justice Thomas and a Dallas real estate magnate); Michael B. Mukasey, *The ObamaCare Recusal Nonsense*, WALL ST. J., Dec. 5, 2011, at A17 (relating recent calls for recusal to the political process of appointing and confirming judges); Editorial, *Supreme Court: The Recusal Question*, L.A. TIMES, Jan. 3, 2012, at A14 (arguing that "the public deserves an explanation" when a Supreme Court Justice complies with or rejects a request to recuse); David Jackson, *Obama Health Care Politics Hits High Court*, USA TODAY (Nov. 15, 2011 4:03 PM), http://content.usatoday.com/communities/theoval/post/2011/11/obama-health-care-politics-hits-high-court/1 (last visited Sept. 18, 2012) (discussing letters written to Justices Thomas and Kagan, calling for their recusal in the case challenging the Affordable Care Act) (on file with the Washington and Lee Law Review); Dahlia Lithwick, *Ethics Are for Other People*, SLATE.COM (Apr. 15, 2011 6:34 PM), http://www.slate.com/articles/news_and_

Unfortunately, this intense focus on Supreme Court recusal largely misses the point. By exclusively treating recusal as a question of judicial ethics, commentators and legislators have overlooked the fundamental constitutional questions that ultimately drive the ongoing conflict between Congress and the Court over the Justices' recusal practices. This Article is the second installment in a project designed to address that oversight by recasting Supreme Court recusal as a constitutional separation of powers issue. The precursor to this Article argued that the separation of powers constitutionally precludes Congress from creating legally binding recusal standards for the Justices—what I will refer to here as direct regulation of Supreme Court recusal decisions.[11] This Article uses separation of powers principles to move past the identification of constitutional issues

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politics/jurisprudence/2011/04/ethics_are_for_other_people.html (last visited Sept. 18, 2012) (arguing that "[i]ndividual judges, faced with questions of compromising judicial conduct, are in the worst possible position to judge themselves) (on file with the Washington and Lee Law Review); Eric J. Segall, *An Ominous Silence on the Supreme Court*, L.A. TIMES (Feb. 12, 2012), http://articles.latimes.com/2012/feb/12/opinion/la-oe-segall-kagan-recusal-20120212 (last visited Sept. 18, 2012) (discussing calls for recusal of Justices in the case challenging the Affordable Care Act) (on file with the Washington and Lee Law Review); Tevi Troy, *Health Care Recusal Is the Judges' Call*, POLITICO.COM (Nov. 22, 2011, 9:24 PM), http://www.politico.com/news/stories/ 1111/68943.html (last visited Sept. 18, 2012) (discussing Justices' recusal in the case challenging the Affordable Care Act) (on file with the Washington and Lee Law Review); Rick Ungar, *Scalia and Thomas Party with Obamacare Challengers on Day Court Takes Up Case*, FORBES (Nov. 15, 2011, 11:57 PM), http://www.forbes.com/sites/rickungar/2011/11/15/scalia-and-thomas-party-with-healthcare-opponents-on-day-court-takes-up-healthcare-challenge/ (last visited Sept. 18, 2012) (discussing the ethics of the Justices and the case challenging the Affordable Care Act) (on file with the Washington and Lee Law Review); Russell Wheeler, *What's So Hard about Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 30, 2011), http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler (last visited Sept. 18, 2012) (discussing recusal of Justices in the case challenging the Affordable Care Act) (on file with the Washington and Lee Law Review); George Zornick, *The Nation: Clarence Thomas Vs. Legal Ethics*, NPR (Nov. 15, 2011), http://www.npr.org/2011/11/15/142339329/the-nation-clarence-thomas-vs-legal-ethics (last visited Sept. 18, 2012) (discussing whether Justice Thomas should recuse himself in the case challenging the Affordable Care Act) (on file with the Washington and Lee Law Review).

11. *See* Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181.

and to offer solutions to the systemic constitutional problems surrounding recusal at the Court. It recognizes that although Congress may be constitutionally prohibited from directly regulating Supreme Court recusal, Congress retains constitutional authority and responsibility to indirectly influence recusal in ways that may better comport with our constitutional scheme.

There are at least three major benefits to reexamining recusal in the light of constitutional structure. First, such a review exposes the most serious problem with the current Supreme Court recusal regime, the (largely overlooked) constitutional impasse between Congress and the Court over recusal.[12] Congress's prior attempts to directly regulate recusal have been met with indifference or polite disregard by the Court,[13] which in turn triggered calls for even more rigorous congressional regulation.[14] There are significant problems with

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12. The constitutional "impasse" advanced here is similar to the first element of a "constitutional showdown" as defined by Professors Posner and Vermeule: "[A] disagreement between branches of government over their constitutional powers." Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008). The conflict over recusal does not yet rise to the level of a "showdown," however, because it neither "ends in the total or partial acquiescence by one branch in the views of the other [nor] . . . creates a constitutional precedent." *Id.*

13. *See* 79 U.S.L.W. 2389 (Apr. 19, 2011) (describing Justice Kennedy's testimony before the House Subcommittee on Financial Services and General Government, in which the Justice expressed the view that "there is a constitutional problem" with Congress prescribing ethical rules for the Court); 2011 YEAR-END REPORT, *supra* note 3, at 7 (noting that "the limits of Congress's power to require recusal [of Supreme Court Justices] have never been tested"). The Court's position was confirmed in its recent refusal of a congressional request to voluntarily adopt its own recusal reforms. *See* 2011 YEAR-END REPORT, *supra* note 3, at 8–9 (explaining that the Justices' recusal decisions are unreviewable by the other Justices or another judicial body, and that those decisions are materially different from those of lower-court judges and thus harder to comport with the existing law on recusal); Letter from Chief Justice Roberts to Five Members of the Senate Judiciary Committee (Feb. 17, 2012) [hereinafter Chief Justice Letter], *available at* http://big.assets.huffingtonpost.com/LtrtoChairmanLeahyonYear-EndReport02172012.pdf (explaining that, despite the Senators' request, "for the reasons explained in my year-end report, the Court does not plan to adopt the Code of Conduct for United States Judges"). For a more detailed discussion of Supreme Court recusal practice, see *infra* Part II.A.2.

14. *See, e.g.*, Supreme Court Transparency Disclosure Act of 2011, H.R.

this approach. Direct regulation of recusal is legally and practically unenforceable against the Justices. Furthermore, the Court has never conceded that Congress has the constitutional authority to directly regulate its recusal practices, and has consistently acted as if that authority is lacking.[15] The result is an effective impasse between Congress and the Court over recusal that has implications for the legitimacy, integrity, and efficacy of both Branches.

Second, reexamining recusal in the light of constitutional structure better reveals the nature and dynamics of the inter-branch conflict over recusal as well as the potential solutions to that conflict. These solutions depend on a fundamental, yet previously unanswered, question relating to Supreme Court recusal—how should the impasse be resolved, and who is responsible for resolving it? The answers lie with the separation of powers and, ultimately, with Congress. Viewing recusal as a separation of powers problem reveals that Congress and the Court are not equally capable of facilitating a successful resolution of the current impasse over recusal. The judicial options delegated to the Court by the Constitution are likely to harm the public perception, and thus democratic legitimacy, of both Branches by making the Court seem self-serving or obstinate. The constitutional choices assigned to Congress, by contrast, offer greater possibilities for coordinated efforts between the two Branches in pursuing their respective agendas regarding recusal. In terms of how a resolution should be achieved, focusing on Congress's role as a constitutional actor allows us to see the entire range of constitutional options available to it, including

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862, 112th Cong. § 3 (2011) (requiring recusal reform); Robert Barnes, *Roberts: Justices Won't Adopt Code of Conduct*, WASH. POST, Feb. 22, 2012, at A7. (explaining that "[m]embers of Congress, a group of law professors and outside groups have called upon the court to adopt" ethics reform); Law Professor Letter, *supra* note 2, at 1 (advocating for recusal reform); Senator Letter, *supra* note 4 (requesting the Supreme Court to formally adopt the Code of Conduct for United States Judges).

15. These factors are also relevant to the constitutional question of whether Congress has the authority to directly regulate Supreme Court recusal in the first instance, a question that is addressed *infra* at Part II.A and in my previous work. *See* Virelli, *supra* note 11, at 1185 (stating that separation of powers principles prevent Congress from directly regulating Supreme Court recusal).

various indirect approaches—such as impeachment, procedural reforms, judicial confirmation, appropriations, and investigations—that permit Congress to influence the Justices' recusal decisions without upsetting the delicate balance and coordination between the Branches that our constitutional scheme requires.

Third, reevaluating recusal in terms of constitutional structure provides insights into much larger questions about how best to handle inter-branch disputes. The separation of powers anticipates conflict among the coordinate Branches of the federal government, but it does not always provide easy answers as to how those conflicts should be treated or resolved. When two Branches reach an impasse over which has the power to act, is the answer a matter of law or constitutional politics? Which branch must or should take the initiative in promoting an amicable and workable resolution? Is the answer more difficult when the disagreement involves the Court? The answers to these questions are pivotal to understanding more fully the intricacies of our constitutional structure, as well as to maintaining a legitimate and effective constitutional democracy. The instant analysis of the impasse between Congress and the Court over recusal offers a useful view into the various approaches to be taken and political and institutional benefits to be sought with regard to other inter-branch conflicts.

This Article draws on the literature regarding Congress's role as a constitutional interpreter to argue that the separation of powers is critical to resolving the current impasse between Congress and the Court over recusal because it offers unique answers as to both why Congress must take the lead in resolving the impasse and how that resolution should be achieved. It contends that Congress should use *indirect* constitutional approaches, rather than *direct regulation*, to influence the Justices' recusal practices because doing so will alleviate the intractable tension created by direct congressional regulation of the Court and promote the democratic legitimacy of both Branches by reflecting a better balance of power between them. Part II describes the current Supreme Court recusal debate, including the constitutional impasse that has arisen between Congress and the Court over recusal. Part III draws on the literature regarding Congress's role as a constitutional interpreter to more closely examine its role regarding recusal. It

identifies the constitutional limits on Congress's power over recusal and explains why Congress, rather than the Court, must be primarily responsible for breaking the constitutional impasse over recusal, albeit through indirect measures. Part IV addresses the array of indirect constitutional tools available to Congress regarding recusal and makes the normative case for why Congress should take the initiative to resolve the current impasse over recusal at the Court. Part V concludes and discusses some of the broader implications of the recusal analysis for the separation of powers.

II. The Debate over Recusal at the Court

The debate over recusal at the Supreme Court can be described in terms of two distinct viewpoints. The first is a reformist view. The overwhelming majority of commentary from legal academics, members of Congress, and journalists supports some measure of recusal reform for the Court. Proponents of reform express concern about the impact of the Justices' recusal practices on the legitimacy of the Court and on the due process rights of individual litigants. The opposing view is focused on judicial independence. It is primarily represented—and occasionally, if rarely, put forth—by the Justices themselves. It is grounded in concerns about constitutional structure and function, and as such, centers on the unique role of the Court within our constitutional system. The interaction of these differing perspectives has created not only a heated controversy, but also an impasse in the conversation about Supreme Court recusal that, in my view, must be addressed if either set of concerns is to be alleviated.

A. Supreme Court Recusal in Action

Before fleshing out these contrasting views on Supreme Court recusal, it is useful to explain how recusal at the Court works. Supreme Court recusal has consistently operated on parallel tracks of congressional regulation and Supreme Court adjudication.

1. Congressional Regulation of Supreme Court Recusal

Since the beginning of the Republic, Congress has engaged in direct regulation of federal judges' recusal practices. The Judiciary Act of 1792 contained the first statutory recusal standards.[16] From 1792 through 1948, Congress revised the recusal standards for federal judges several times, and "'in each instance . . . enlarged the enumerated grounds for seeking disqualification.'"[17] None of these revisions, however, applied to Supreme Court Justices. In 1948, Congress amended the existing recusal statute to include "justices" in addition to "judges" and required recusal where a judge or Justice had been a material witness or of counsel, possessed a "substantial" interest in the case, or was related to an attorney or party in the case such that it would be "improper, *in [the judge's] opinion*" for the judge to hear that case.[18] In 1972, the American Bar Association (ABA) adopted a new recusal rule in its Model Code of Judicial Conduct that, *inter alia*, required recusal of a judge "in a proceeding in which the judge's impartiality might reasonably be questioned."[19] Two years later, Congress amended the federal recusal statute to codify the ABA Model Code's objective reasonableness standard.[20] This is the version of the federal recusal statute that applies to Supreme Court Justices today.

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16. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79. It was not until 1821 that Congress offered recusal standards that added anything significant to the common law criteria for judicial recusal, and even then the question of enforcement was left entirely to the judge being asked to recuse himself and was not applied to the Justices of the Supreme Court. *See* Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.

17. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 664 (2004–05) (quoting RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 23.1, at 672 (1996)).

18. *Id.* (emphasis added).

19. MODEL CODE OF JUDICIAL CONDUCT Canon 3E (2004). The Code also mandated recusal when a judge was personally biased, had served as a lawyer in the controversy, had a financial interest in the outcome of the case, or was within the third degree of relationship with a party, lawyer, interested person, or material witness in the case. *See id.* at 3E(1)(a)–(e).

20. *See* Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (codified as amended at 28 U.S.C. § 455(a) (2006)) (requiring that a justice, judge, or magistrate disqualify himself or herself, *inter alia*, "in any proceeding in which his impartiality might be questioned").

In March 2011, however, thirty-three members of the House of Representatives sought to further expand the requirements for Supreme Court recusal with the introduction of the Supreme Court Transparency and Disclosure Act.[21] The bill was inspired in part by a letter from 138 law professors to the House and Senate Judiciary Committees outlining the need for legislation to "protect the integrity of the Supreme Court."[22] The letter argued that the Code of Conduct for United States Judges should be applied to Supreme Court Justices.[23] It then stated that "justices must be subject to an enforceable, transparent process governing recusal"[24] and suggested some procedural reforms to achieve that goal, such as requiring a "written opinion when a Supreme Court justice denies a motion to recuse" and instituting "a procedure . . . for review of a decision by a Supreme Court justice not to recuse."[25] The bill, in turn, mandated that "[t]he Code of Conduct for United States Judges . . . shall apply to the justices of the United States Supreme Court."[26] It required the Justices to disclose "in the public record of the proceeding the reasons for the denial of [a recusal] motion" and established "a process under which . . . other justices or judges of a court of the United States" shall review a Supreme Court Justice's denial of a recusal motion.[27] Although the bill has not yet been adopted, it evidences

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21. *See* Supreme Court Transparency Disclosure Act of 2011, H.R. 862, 112th Cong. (2011).

22. Law Professor Letter, *supra* note 2, at 1.

23. *Id.* at 2.

24. *Id.*

25. *Id.* at 3.

26. H.R. 862, § 2(a).

27. *Id.* § 3(a)(2), (b). In addition to attempting to regulate Supreme Court recusal directly, Congress has begun in recent months to utilize some of its other constitutional tools with regard to the Justices' recusal practices, including asking sitting Justices to testify about recusal matters. On April 14, 2011, Justices Breyer and Kennedy testified before a House subcommittee about Supreme Court ethics and recusal standards, and on October 5, 2011 Justices Breyer and Scalia testified about the same topic before the Senate Judiciary Committee. *See supra* note 5. Although both instances added public attention and awareness to the question of Supreme Court ethics and recusal as well as engaged the Court and its individual members actively and personally in the debate in a way that statutory prescriptions do not, they were relatively low-profile events that were not entirely dedicated to ethics and recusal questions.

the ongoing interest in legislative solutions to Supreme Court recusal issues.

Congress's focus on direct regulatory solutions to the perceived problems with Supreme Court recusal represents a popular and well-intentioned attempt to promote the important features of legitimacy and integrity at the Court. This regulatory approach has nevertheless failed to effectively constrain the Justices.

2. The Justices' Recusal Practices

A brief examination of the history of the Court's recusal practices reveals that Supreme Court recusal operates in almost precisely the same way today as it did at the Founding—as a personal, independent, unreviewable decision by an individual Justice whether to participate in an individual case. Around the time of the Founding, recusal was both procedurally and substantively a purely judicial question. Recusal doctrine was the product of judge-made common law,[28] and judges were empowered to make the initial (and, in the case of United States Supreme Court Justices, the final) ruling as to their own recusal.[29]

Decisions by prominent members of the Court also reflect the Justices' unfettered approach to recusal. Chief Justice John

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As such, they did not have the full impact that more formal, targeted hearings may provide. For a more detailed discussion of the promise of congressional hearings for seeking resolutions to the impasse over recusal at the Court, see *infra* Part IV.A.4.

28. *See* FLAMM, *supra* note 1, §§ 1.2–1.4, at 5–8 (describing recusal practices as developing in the English common law and being adopted by the American colonial courts and, later, the federal Judiciary).

29. All of this information is consistent with historical accounts of the importance placed on the independence of judges in the period. As Professor Gerber explains in his detailed account of judicial independence in the colonial courts, a separate and independent judiciary was vitally important to each of the colonial and state systems that functioned as precursors to our federal government under the Constitution, as well as to the Framers as a check against potential overreaching by the Legislature, especially in the area of federal state relations. *See* SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, 34–37 (2011).

Marshall presided over and wrote his famous opinion in *Marbury v. Madison*[30] despite the fact that he was personally responsible for failing to deliver the judicial commission that gave rise to the case. Justice Oliver Wendell Holmes reviewed several cases as a Supreme Court Justice that he had participated in as a member of the Supreme Judicial Court of Massachusetts.[31] Similarly, Justice Hugo Black sat for multiple cases reviewing legislation he had been instrumental in passing as a member of the Senate.[32] Finally, Chief Justice Harlan Stone retracted his own recusal decision in a case, not because his views changed regarding his fitness to participate, but because he was concerned that without his participation the Court would not be able to achieve a quorum.[33]

This sort of independent decision-making by the Justices did not change after Congress amended the recusal statute in 1948 to purportedly include Supreme Court Justices.[34] The Justices continued to determine their own recusal status without any review or, in most cases, any public explanation for their decision. The rare instances where the Justices chose to publicly disclose

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30. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

31. *See generally* Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539 (1905), *aff'g* 64 N.E. 581 (Mass. 1902); Dunbar v. Dunbar, 190 U.S. 340 (1903), *aff'g* 62 N.E. 248 (Mass. 1901); Glidden v. Harrington, 189 U.S. 255 (1903), *aff'g* 61 N.E. 54 (Mass. 1901); Williams v. Parker, 188 U.S. 491 (1903), *aff'g* 55 N.E. 77 (Mass. 1899).

32. *See generally* Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161 (1945) (construing the Fair Labor Standards Act); United States v. Darby, 312 U.S. 100 (1941) (upholding the constitutionality of the FLSA). Justice Black authored the FLSA while in the Senate. *See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 611 (1987). His decision to participate in a case argued before the Court by a former law partner even drew the public ire of Justice Robert Jackson in the only documented dispute among Supreme Court Justices about recusal. *See generally Jewell Ridge*, 325 U.S. at 897 (Jackson, J., concurring); *see also* Dennis J. Hutchison, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 203 (1988) (noting that Justice Jackson's public disagreement "shocked the country").

33. *See* N. Am. Co. v. SEC, 327 U.S. 686 (1946); Stempel, *supra* note 32, at 618–19 (describing Chief Justice Stone's standards for disqualification as "flexible").

34. *See* Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908 (codified as amended at 28 U.S.C. § 455 (2006)) (including any "justice or judge of the United States" in recusal requirements).

their views regarding recusal confirm that the Justices' decisions were made individually and independently. In *Laird v. Tatum*,[35] then-Associate Justice Rehnquist published a memorandum explaining his decision not to recuse himself from a case challenging the constitutionality of a domestic surveillance program that he had been involved with (and testified about before Congress) during his time in the Justice Department's Office of Legal Counsel.[36] Although Justice Rehnquist cited the relevant recusal statute, he went on to remind the reader that "under the existing practice of the Court disqualification has been a matter of individual decision,"[37] and pointed out that the unique nature of the Court makes Supreme Court recusal difficult as an institutional matter.[38] In light of these special considerations, Justice Rehnquist argued that a Supreme Court Justice has a "duty to sit where not disqualified,"[39] and as such should not "bend[] over backwards" to recuse himself.[40] Justice Scalia described a similar process more than twenty years later in his memorandum in *Cheney v. U.S. District Court*.[41] Justice Scalia was asked to recuse himself as a result of his recent participation in a hunting trip with the Vice President, who was a named party in the suit. In explaining his reasons for not recusing himself,

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35. Laird v. Tatum, 408 U.S. 1 (1972).

36. *See* Stempel, *supra* note 32, at 592 (discussing Justice Rehnquist's participation in *Laird v. Tatum*). *See generally Laird*, 408 U.S. at 2 (demonstrating that Justice Rehnquist participated in determining the constitutionality of a domestic surveillance program).

37. Laird v. Tatum, 409 U.S. 824, 833 (1972) (Rehnquist, J., mem.).

38. *See id.* at 837 (denying a motion for the Court to withdraw its opinion in *Laird*, 408 U.S. 1). Justice Rehnquist made the identical argument in another memorandum explaining a decision not to recuse himself in *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000):

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

39. *Laird*, 409 U.S. at 837.

40. *Id.* at 838 (internal quotation marks omitted).

41. Cheney v. U.S. Dist. Court, 541 U.S. 913 (2004) (Scalia, J., mem.).

Justice Scalia rejected the statutory presumption that he should "resolve any doubts in favor of recusal" because "the Supreme Court . . . is different."[42]

The Court reinforced the idea that the Justices have their own permissive view of recusal in its 1993 Statement of Recusal Policy.[43] The Statement was signed by seven of the nine sitting Justices and only addressed cases where a Justice's relative participates in a matter before the Court.[44] As Professor Sherrilyn Ifill described it, "the Recusal Policy simply reflects the Justices' own sense of what to them would constitute a reasonable basis upon which to question a judge's impartiality."[45] Most recently, Chief Justice Roberts explained in his Year-End Report that "[l]ike lower court judges, the individual Justices decide for themselves whether recusal is warranted."[46] He went on to explain that due to institutional differences between the Supreme Court and the lower courts, a "Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case."[47] All of these examples demonstrate that, at minimum, the Justices consider a host of prudential factors in making their recusal decisions, and they do so unencumbered by the prospect of review or the presence of statutory requirements. As Professor Jeffrey Stempel so aptly described it, "Supreme Court recusal practice provides an almost unique illustration in American government of substantive law without force when applied to a certain institution."[48]

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42. *Id.* at 915.

43. *See* Press Release, U.S. Supreme Court, Statement of Recusal Policy (Nov. 1, 1993), *reprinted in* FLAMM, *supra* note 1, app. D, at 1101–03 [hereinafter Statement of Recusal Policy].

44. Justices Blackmun and Souter did not sign the policy. *See id.* at 1101–03 & n.1.

45. Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 626 (2002) [hereinafter Ifill, *Do Appearances Matter?*] (emphasis omitted).

46. 2011 YEAR-END REPORT, *supra* note 3, at 8.

47. *Id.* at 9.

48. Stempel, *supra* note 32, at 642.

B. The Arguments over Reform

The Justices' longstanding practice of making individualized, unreviewable recusal decisions has not, however, gone unnoticed. Critics of the Court's recusal practices argue that the Justices' failure to submit their decisions to more traditional legal processes has damaged the integrity and reputation of the Court. The Justices' increasingly publicized involvement in political causes and organizations has highlighted concerns about the fairness and impartiality of the Justices' decisions and has resulted in calls for more stringent ethics and recusal standards.[49] The fact that the Justices' recusal decisions are unreviewable has incited discussion about the quality of those decisions, especially in fact-specific inquiries like recusal in which a Justice functions as both fact finder and adjudicator.[50] Advocates of recusal reform have suggested mandating review of an individual Justice's decision not to recuse by the remainder of the Court or by a special committee of federal judges assembled specifically for that purpose. Professor Stempel has proposed a standard of review under which "[a]ny party aggrieved by the refusal of a Supreme Court Justice to disqualify himself may, on timely motion, obtain review by the full Supreme Court."[51] The

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49. The most recent and popular movement in this regard is to apply the Code of Conduct for United States Judges to the Justices. *See* Supreme Court Transparency Disclosure Act of 2011, H.R. 862, 112th Cong. § 2(a) (2011); Law Professor Letter, *supra* note 2, at 2.

50. As Professor Stempel explained:

> The Court also lacks any formal rule, mechanism, or custom of permitting fact development in aid of a recusal motion . . . [T]o this author's knowledge, litigants questioning the impartiality of a Supreme Court Justice have never been permitted to develop the facts of the alleged conflict under the auspices of the Court. Occasionally, as in *Tatum*, a Justice will offer a version of the facts in answer to the motion, which hardly passes as meaningful discovery or even scrutiny.

Stempel, *supra* note 32, at 642; *see also* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 576 (2005) (noting how in his memorandum in *Cheney v. U.S. District Court*, "Justice Scalia revealed facts about circumstances and logistics of the trip that previously had been unknown" as part of his explanation for deciding not to recuse himself from the case).

51. Stempel, *supra* note 32, at 644.

2011 House bill on Supreme Court ethics and recusal went further, allowing for review of a Justice's decision not to recuse by "other justices *or judges* or a court of the United States, among whom retired justices and senior judges . . . may be included."[52]

The most compelling criticism of the Court's recusal practices involves the Justices' reluctance to explain their decisions. The Court offers public explanations of its decisions as a means of remaining accountable and protecting its own legitimacy. The Justices' reluctance to explain their recusal decisions imperils that accountability and legitimacy, especially because the practice is out of step with judicial behavior more broadly. The lack of transparency in the Court's current recusal practices has been described as indefensible in a modern democratic society, particularly in an age where other information about the Justices' practices is so readily available, and has inspired calls for statutory requirements that Justices publish their reasons for denying a recusal motion.[53] Professor Debra Lynn Bassett has advocated for greater disclosure of the Justices' reasons for recusal through "statements of interest."[54] More recently, Professors William Yeomans and Herman Schwartz have argued that:

> [T]he courts' fundamental legitimacy rests on the notion that judges . . . explain what they have done in reasoned opinions for all to read. . . . This same transparency is even more essential when Justices apply the law to themselves. . . . Courts obviously need secrecy for their deliberations and decision making. But there can be no harm in a justice explaining why he or she withdraws from a case or refuses to withdraw.[55]

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52. H.R. 862, § 3(b) (emphasis added). The prospect of allowing lower court judges to review Supreme Court recusal decisions potentially runs afoul of the constitutional requirement that there be "one supreme Court." U.S. CONST. art. III, § 1.

53. *See* H.R. 862, § 3(a)(2) ("If a justice of the Supreme Court denies a motion . . . that the justice should be disqualified . . . the justice shall disclose . . . the reasons for the denial of the motion."); Law Professor Letter, *supra* note 2, at 2.

54. Bassett, *supra* note 17, at 695.

55. Yeomans & Schwartz, *supra* note 4.

Finally, the above complaints evoke a common concern about the effects of the Justices' recusal practices on the public perception of, and confidence in, the Court. For an institution like the Supreme Court that depends so heavily for its institutional effectiveness on public confidence,[56] any damage done to that perception presents a significant problem for the Court specifically, for the other institutions of government, and for the principle of separation of powers more generally.

The responses to these arguments for recusal reform come principally from the Justices themselves. They focus, perhaps not surprisingly considering their source, less on the nature of the Justices' recusal decisions and more on the effects of those decisions on the Court's institutional mission. The central theme of this viewpoint is derived from the common law "rule of necessity," under which a judge's decision to recuse is overridden by the lack of an adequate replacement to hear the case.[57] In the context of the lower federal courts, the rule of necessity is effectively a nullity. Congress has provided, pursuant to its power to create the lower federal courts, myriad options for calling into service replacement judges in the event a judge is recused.[58] The

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56. *See, e.g.,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865–66 (1992)

> The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. . . . Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

57. *See* United States v. Will, 449 U.S. 200, 213 (1980) ("'[A]lthough a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'"(quoting F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929))); *see also* FLAMM, *supra* note 1, § 20.2, at 576–77 (explaining that the "rule of necessity" involves the principle that disqualification will not be permitted to destroy the only tribunal with power to act in the premises—that is, "where disqualification would result in an absence of judicial machinery capable of dealing with a matter, . . . disqualification must yield to necessity").

58. *See* 28 U.S.C. §§ 291, 292, 294 (2006) (permitting active circuit court judges, active district court judges, and retired judges or Justices, respectively, to sit by designation).

Supreme Court, however, is different. The constitutional mandate that there be "one supreme Court"[59] creates significant—if not impenetrable—barriers to the availability of replacement Justices.[60] The lack of replacement Justices in turn creates the possibility that the recusal of a single Justice will facilitate a tie vote, resulting in a non-precedential affirmance of the decision below that does not "resolve the significant legal issue presented by the case."[61] Recusal is also problematic for the litigants, the argument goes, because a decision by an irreplaceable Justice to recuse himself is "effectively the same as casting a vote against the petitioner."[62] In cases involving at least one recusal, the petitioner must garner a larger percentage of the available Justices' votes both on the merits (five out of eight rather than five out of nine) and at the certiorari stage (four out of eight rather than four out of nine for a certiorari petition).[63] The recusal of multiple Justices is even more problematic for the Court, as it could defeat quorum in a specific case and thus make the Court powerless to exercise its constitutional function as the final adjudicator of the "cases or controversies" properly before it.[64]

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59. U.S. CONST. art. III, § 1.

60. *See* Letter from Chief Justice Hughes to Senator Wheeler, Mar. 22, 1937, *available at* http://newdeal.feri.org/court/hughes.htm ("The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."); *see also* Ruth Bader Ginsburg, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) (explaining that "there's no substitute for a Supreme Court Justice"); Wheeler, *supra* note 10, at 2 (contending that a court of lower court judges sitting in review of Supreme Court recusal decisions "would most likely violate the Constitution's 'one Supreme court' mandate"). *But see* Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 104 (2011) (arguing that retired Justices, but not those that have resigned their commissions, may be eligible to substitute for recused Justices in Supreme Court cases).

61. Cheney v. U.S. Dist. Court, 541 U.S. 913, 915 (2004) (Scalia, J., mem.). *See also* Statement of Recusal Policy, *supra* note 43, at 1103.

62. *Cheney*, 541 U.S. at 916.

63. Professor Lubet described this phenomenon as the "Certiorari Conundrum." Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 661–65 (1996).

64. Virelli, *supra* note 11, at 1213–17. These same arguments may apply in

There are other reasons to support the Justices' retaining control over recusal that are not grounded in concerns about a lack of eligible replacements for a recused Justice. Justice Scalia has argued that limiting the Justices' independence over recusal decisions could lead to politically motivated attacks designed to influence the outcome of a case by forcing unsympathetic Justices to recuse themselves.[65] He explains that "[t]he people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults."[66] The Justices have also raised constitutional concerns about congressional influence over recusal decisions at the Court. While testifying before the House Subcommittee on Financial Services and General Government,[67] Justice Kennedy pointed out that "there is a constitutional problem" with making statutory recusal standards binding on the Court.[68] In his Year-End Report, Chief Justice Roberts made a point of explaining that "the limits of Congress's power to require recusal [of Supreme Court Justices] have never been tested. The Justices follow the same general principles with respect to recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court."[69]

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other contexts, such as the prompt filling of vacancies on the Court, but do not raise the same constitutional problems focused on here, as vacancies are not (except in the nearly unprecedented case of impeachment) created by Congress and thus are not an example of an exercise of congressional power rendering the Court inoperable. *See infra* Part III.B.

65. This phenomenon is considered by many to be the driving force behind the recent calls for Justices Kagan and Thomas to recuse themselves from cases reviewing the Affordable Care Act. *See, e.g.*, Mukasey, *supra* note 10 ("The persistence of recusal issues appears to have little to do with the legal merits . . . but a great deal to do with . . . agenda-driven politics . . . .").

66. *Cheney*, 541 U.S. at 928.

67. Malloy, *supra* note 5, at 2389.

68. *Id.*

69. 2011 YEAR-END REPORT, *supra* note 3, at 7.

C. The Impasse

The ongoing debate over the proper role of legislative involvement in Supreme Court recusal practice reflects a constitutional impasse between Congress and the Court. Although proponents of statutory recusal standards acknowledge the important differences between recusal in the lower courts and the Supreme Court,[70] concerns over the integrity, fairness, and transparency of the Court have caused them to look to Congress to standardize and strengthen the Court's recusal standards. But Congress's attempts to regulate the Court's recusal practices have inspired both direct and indirect resistance from the Justices. In February of 2012, Chief Justice Roberts responded to a request from five members of the Senate Judiciary Committee asking the Court to formally adopt the Judicial Conference of the United States Code of Conduct for United States Judges, which sets ethical and recusal standards for the lower federal courts. The Chief Justice plainly stated in a letter to the Senators that "the Court does not plan to adopt the Code of Conduct." The Chief Justice's remarks came in the wake of his Year-End Report, in which he highlighted the unique role of the Supreme Court within the Judiciary and made clear that the Justices consider their ethical and recusal obligations to be individual and independent.[71]

These recent (and defiant) comments about recusal are the most direct in a long list of indications that the Justices do not feel bound by congressional attempts to regulate their recusal decisions. For instance, the Court has never conceded that Congress has the constitutional authority to set recusal standards.[72] Moreover, although recusal remains a relatively

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70. *See, e.g.*, FLAMM, *supra* note 1, § 29.4, at 916–17 (suggesting that there may be a "more compelling 'duty to sit' for Supreme Court Justices than for other judges"); Bassett, *supra* note 17, at 682–93 (discussing proposals for standards of Supreme Court recusal); Ifill, *Do Appearances Matter?*, *supra* note 45, at 619 ("To be certain, Justices on the Supreme Court face legitimate concerns that are not at issue for judges on other courts who are faced with recusal motions.").

71. 2011 YEAR-END REPORT, *supra* note 3, at 9.

72. *See id.* at 7 ("[T]he limits of Congress's power to require recusal have never been tested.").

common practice at the Court,[73] the Justices rarely explain their decisions.[74] When explanations are proffered, institutional concerns about the effective functioning of the Court predominate over the statutory standards put forth by Congress.[75] Most importantly, because the statutory standards are not enforceable against the Court and because the Court's decisions are not reviewable, there is no coercive legal action available to Congress to force the Justices to change their practices. In the words of Professor Ifill, "the Justices encourage and protect a fiercely independent approach to their recusal determinations."[76]

This impasse is more than a legal abnormality or inconvenience. In many ways, it is the source of much of the public frustration with, and criticism of, the Court and Congress over recusal. On a small scale, the impasse makes it more difficult to achieve any sort of lasting resolution or thoughtful treatment of the recusal question as the two sides effectively talk past one another. On a much grander scale, the impasse over recusal raises the same systemic problem as any seemingly irreconcilable dispute between two coequal Branches—doubts about the legitimacy of our constitutional democracy. As the two Branches continue to appear at odds over when and how Supreme Court Justices should refrain from participating in specific cases, both sides appear to be obstinate, arbitrary, ineffective, or some combination thereof. This promotes an air of lawlessness around the issue that weakens confidence in our public institutions and creates problems for our constitutional structure. Finally, the recusal impasse is significant because it could be the first step in what Professors Posner and Vermeule

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73. *See* McElroy & Dorf, *supra* note 60, at 99 (explaining that "Justices would almost certainly recuse themselves in clear-cut conflict situations"); *see also* Times Topics, *Elena Kagan*, NYTIMES.COM (Oct. 4, 2010) http://topics.nytimes.com/top/reference/timestopics/people/k/kagan_elena/index.html (last visited Sept. 18, 2012) (noting that "[b]ecause of her tenure as solicitor general, Justice Kagan has recused herself from about half of the 54 cases" so far on the Court's docket for the 2010 term) (on file with the Washington and Lee Law Review).

74. *See, e.g.*, Frost, *supra* note 50, at 569 ("Judges who recuse themselves rarely issue a decision explaining why.").

75. *See infra* notes 111–17 and accompanying text.

76. Ifill, *Do Appearances Matter?*, *supra* note 45, at 622.

call "constitutional showdowns"—inter-branch disputes over constitutional authority that end in the development of new constitutional precedents.[77]

The harmful effects of the impasse over recusal represent a serious and heretofore unforeseen or unmentioned problem within Supreme Court recusal. The existing debate over what the Court should be required to do and whether those requirements would lead to untenable consequences largely misses the point. The impasse between Congress and the Court over recusal should first be viewed as a constitutional separation of powers problem in order to properly contextualize the entire range of tensions and issues at stake. Only then can we envision a solution that is worthy of a conflict between two coequal Branches of government.

III. Recusal and the Separation of Powers

A. Congress's Constitutional Responsibilities

Resolving a conflict between two Branches of government necessarily evinces the separation of powers. The Framers' concept of the separation of powers is often attributed to Montesquieu,[78] and is embodied in a tripartite constitutional structure that envisions constitutional responsibilities for each branch that are separate and apart from its counterparts in order to protect against overreaching or aggrandizement by any single branch. This has remained a foundational principle of American

77. *See* Posner & Vermeule, *supra* note 12, at 997.

78. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 149–62 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748) (discussing separation of powers as a concept for ensuring liberty). In addition to being an implicit part of many of the arguments about governmental structure at the Convention, Montesquieu's views regarding the separation of powers were explicitly relied upon by several of the delegates. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 391 (Max Farrand ed., 1911) (remarks of Butler) ("The great Montesquieu says, it is unwise to entrust persons with power, which by being abused operates to the advantage of those entrusted with it."); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34 (Max Farrand ed., 1911) (remarks of Madison) ("[A]ccording to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.").

government ever since. As the Court recently reiterated in *Stern v. Marshall*,[79] the separation of powers, at minimum, anticipates a division of labor among the Branches, such that some spheres of authority are reserved exclusively to individual Branches.[80] The *Stern* Court went on to acknowledge, however, that "the three Branches [of the federal government] are not hermetically sealed from one another."[81] In fact, some redundancies are necessary in order to effectively protect against the aggrandizement and encroachment that the Framers saw as crucial to warding off tyranny.[82] Chief among these redundancies is the shared responsibility of all three constitutional Branches of government to interpret the Constitution, especially with regard to the separation of powers.[83] As James Madison explained:

> I beg to know upon which principle it can be contended that any one department draws from the Constitution greater powers than another in marking out the limits of the powers of the several departments. The Constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see than any one of these independent departments has more right than another to declare their sentiments on that point . . . .[84]

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79. Stern v. Marshall, 131 S. Ct. 2594 (2011).

80. As Chief Justice Roberts articulated in *Stern*:

> Under "the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government" adopted in the Constitution, "the 'judicial Power of the United States' . . . can no more be shared" with another branch than "the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."

Id. at 2608 (alteration in original) (citations omitted).

81. *Id.* at 2609.

82. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 617 (1984) ("This checks-and-balances inquiry—a comparison of impacts on 'essential functions'—is . . . at the heart of the framers' [separation of powers] formula.").

83. *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1966 (2003) ("Both the Court and Congress interpret the Constitution from the perspective of a particular institution.").

84. 12 THE PAPERS OF JAMES MADISON 238–39 (William T. Hutchinson et al.

Madison's view was echoed by Presidents Jefferson and Jackson[85] and nearly two centuries later by the Supreme Court in *United States v. Nixon*:[86] "In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[87]

The scholarly literature on Congress's interpretive responsibilities is, not surprisingly, wide-ranging and diverse. Questions abound about, *inter alia*, Congress's institutional competency to interpret the Constitution,[88] the role of institutional design in improving that core competency,[89] and how to balance the interpretive role of nonjudicial actors like Congress against that of the Judiciary.[90] This robust debate, however, does

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eds., 1962–91). *See also* THE FEDERALIST NO. 49, at 277 (James Madison) (Colonial Press ed, 1901) ("The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

85. Jefferson wrote that "nothing in the Constitution has given [the judges] a right to decide for the Executive, more than to the Executive to decide for them." Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50 (Andrew A. Lipscomb ed., 1905); *see also* President Jackson's Veto Message to the Senate (July 10, 1832), *in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 582 (James D. Richardson ed., 1908) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").

86. United States v. Nixon, 418 U.S. 683 (1974).

87. *Id.* at 703.

88. *See, e.g.*, Symposium, *The Most Disparaged Branch: The Role of Congress in the Twenty-First Century, Panel III: Is Congress Capable of Conscientious Responsible Constitutional Interpretation?*, 89 B.U. L. REV. 499, 449–538 (2009) (featuring commentary by Professors Hugh Baxter, Michael Gerhardt, Mark Tushnet, and Jeffrey Tulis); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 707 (1985) (arguing that Congress "is fulfilling the duty it shares with the judiciary and the chief executive to uphold the Constitution"); Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 590 (1983) ("Congress should make more of an effort to screen legislation for possible constitutional shortcomings and to clarify its motives as an aid to the courts.").

89. *See, e.g.*, Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1278 (2001) (arguing that Congress can be improved by focusing "upon questions of institutional design").

90. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial*

not ultimately take issue with the narrower conception of legislative constitutional interpretation articulated by the Founding Fathers and the Court. As Professor James Bradley Thayer stated in his seminal article *The Origin and Scope of the American Doctrine of Constitutional Law*,[91] "it is the legislature to whom this power is given—this power, not merely of enacting laws, but of putting an interpretation on the [C]onstitution which shall deeply affect the whole country."[92] In the more than 100 years since Professor Thayer's pronouncement, a general consensus has emerged that the separation of powers includes an obligation of Congress to consider the constitutionality of its actions vis-à-vis the other Branches.[93] That is not to say that Congress is a better source of constitutional understanding than the courts, or that Congress as a descriptive matter engages in robust constitutional interpretation regularly. None of these far more controversial issues is necessary to the task at hand. Because Supreme Court recusal has created an impasse between Congress and the Courts, it is enough for the present discussion to acknowledge that Congress is constitutionally authorized and (at least in part) responsible for evaluating the constitutionality

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Constitutional Interpretation, 110 HARV. L. REV. 1359, 1362 (1997) (discussing extrajudicial constitutional interpretation and arguing for "judicial primacy without qualification").

91. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

92. *Id.* at 136.

93. Professors Alexander and Schauer put it thusly:

> A recurrent claim in American constitutional discourse is that judges should not be the exclusive and authoritative interpreters of the Constitution. The Constitution speaks to all public officials, it is said, and thus all officials, not just judges, must make their own decisions about what the Constitution commands. To hold otherwise, it is argued, is to fail to recognize the constitutional responsibilities of officials who happen not to be judges.

Alexander & Schauer, *supra* note 90, at 1359–60; *see also* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343–45 (1994) (maintaining that executive officials should not defer to constitutional decisions of the Judiciary that they believe are wrong); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25–28 (1996) (arguing that non-exclusivity is the route to a socially desirable "populist" constitutional law).

of its actions and, in turn, for resolving the constitutional tension created by Supreme Court recusal.

Reorienting Supreme Court recusal in a constitutional framework and acknowledging Congress's constitutional responsibilities with regard to the separation of powers highlights two significant constitutional questions about the impasse over recusal. The first is whether Congress has the constitutional authority to limit a Justice's participation in a specific case. The second is which branch of government is best suited to resolve that impasse. In answering each of these questions, the remainder of this Part highlights the need—as a matter of both constitutional law and policy—for alternative approaches by Congress to the issue of recusal at the Court.

B. Constitutional Limits on Congressional Regulation

Congressional regulation of Supreme Court recusal triggers serious concern about the separation of powers;[94] may Congress pass legislation affecting the Court's recusal decisions, or does the Constitution vest sole authority for those decisions in the Justices themselves? Article III unequivocally vests the "judicial Power of the United States" in the Supreme Court and "in such inferior Courts as the Congress may . . . ordain and establish."[95] It does not, however, offer any further explanation of the scope or substance of the judicial power, much less whether and to what extent that power includes the authority of Supreme Court Justices to decide questions of their own recusal. Without greater textual guidance on the matter, constitutional history, practice,

94. *See* Virelli, *supra* note 11 (advancing this argument in greater detail).

95. U.S. CONST. art. III, § 1. This express congressional power over the lower federal courts is not applicable to the Supreme Court, and is a significant limit on the inherent power of those lower courts. It shifts the balance of power between Congress and the lower courts toward Congress while leaving the balance between Congress and the Supreme Court undisturbed. This difference in the constitutional power sharing arrangement between Congress and the Supreme Court versus the lower federal courts is the main reason why the instant analysis focuses solely on recusal at the Supreme Court, rather than federal courts in general.

and structure become crucial to understanding the constitutional status of Supreme Court recusal.

The records of the Constitutional Convention and state ratifying debates are virtually silent on the meaning of the "judicial Power" generally, let alone the power of judges and Justices to decide questions about recusal.[96] A historical analysis of Supreme Court recusal under Article III must therefore be based both on the sources of information most commonly understood to have been relied upon by the Framers in fashioning the judicial power—the "business of the Colonial courts and the courts of Westminster when the Constitution was framed"[97]—as well as on "early congressional and judicial precedent" interpreting Article III.[98] Although little direct evidence exists of the Framers' view of Supreme Court recusal specifically, the evidence that is available supports the idea that recusal was, in and around the Founding, both procedurally and substantively a question for an independent Judiciary. English and colonial judges developed highly permissive common law standards for recusal[99] and used those standards to decide their own recusal

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96. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708 (1998) (offering compelling evidence of the meaning of various terms in Article III pertaining to judicial power, but concluding that little if any information from the period provides useful insight into the meaning of "judicial Power" specifically); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 767 (1997) ("In fact, the records of the Convention contain absolutely no discussion of the phrase 'judicial Power' . . . ."); *see also* Felix Frankfurter & James Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1018 (1924) ("[T]he Constitution has prescribed very little in determining the content . . . of judicial power.").

97. Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1518 (2000) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring)); *see also* Frankfurter & Landis, *supra* note 96, at 1017 ("'Judicial power' sums up the whole history of the administration of justice in English and American courts through the centuries.").

98. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 822 (2001).

99. *See* FLAMM, *supra* note 1, § 1.4, at 8 ("In the pre-Revolutionary American Colonies, as in England, the only accepted ground for disqualifying a judge was pecuniary interest in a pending cause; and for years following

matters.[100] With regard to the Supreme Court in particular, the early Congresses chose not to intervene in the Justices' exercise of their recusal power even after they chose to do so for the lower federal courts.[101] This practice indicates that, at the time the Constitution was drafted, Supreme Court recusal was a matter for the Court through its exercise of the judicial power granted to it by Article III.

Longstanding governmental practice further corroborates this view.[102] Although the most well-known examples occur in disputes between the Legislative and Executive Branches,[103]

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independence American law, like that of the mother nation, admitted of very few grounds for seeking judicial disqualification.").

100. *See, e.g.*, John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 612 (1947) ("In the Supreme Court disqualification has always been the prerogative of each individual Justice . . . .").

101. *See* Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (regulating only federal "judges," rather than "justices").

102. As Justice Frankfurter and Professor Landis explained: "The scope and qualities of a power which has been voluminously exercised since 1789 must be looked for in the cumulative proof of its exercise." Frankfurter & Landis, *supra* note 96, at 1018. The Court has continually relied on traditional understandings and practices of the three Branches of government to determine the proper constitutional balance among them. Perhaps the most well-known statement regarding the division of authority between the Legislative and Executive Branches is found in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, in which he articulated a three-tier system for resolving separation of powers disputes. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Justice Jackson's famous system considered evidence of historical congressional "inertia, indifference or quiescence" to the challenged executive action as important to understanding the proper balance of power between the Branches. *Id.* at 637. Although congressional intent regarding the conduct of a coordinate branch is difficult to determine, its relevance in Justice Jackson's framework highlights the important fact for present purposes: that constitutional meaning in separation of powers disputes can be gleaned from established governmental practices in the contested area. Justice Frankfurter made this clear in his own *Youngstown* concurrence:

> In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

Id. at 610–11 (Frankfurter, J. concurring).

103. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); Pocket Veto

government practice has also played an important role in resolving conflicts between legislative and judicial power.[104] In the case of Supreme Court recusal, longstanding legislative and judicial custom indicates that the decision to recuse a Supreme Court Justice is not only a judicial decision, but also one that is constitutionally protected from legislative interference.

Congress did not seek to regulate Supreme Court Justices' recusal practices for the first 150 years of the Republic. In 1948, Congress amended the federal recusal statute to include, for the first time, "[a]ny justice . . . of the United States,"[105] but it did not set any procedural standards for deciding recusal questions, disrupt the ongoing practice of judges resolving their own recusal questions in the first instance, or address the review of those initial decisions. With regard to the Supreme Court, the amended statute has led to the seamless continuation of the Justices' historical recusal practices—unreviewable, individualized determinations by each Justice of their own qualification to sit in a particular case, without any obligation to justify or otherwise explain their decisions. As Professor Ifill described it, "[i]t appears that the Justices on the Court enjoy the unreviewable power to determine individually whether and when to disqualify themselves."[106] Nevertheless, in light of ample historical and

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Case, 279 U.S. 655 (1929); Myers v. United States, 272 U.S. 52 (1926); United States v. Midwest Oil Co., 236 U.S. 459 (1915).

104. In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Court confirmed judges' ability to impose sanctions for bad faith conduct in the absence of any statutes or regulations to that effect. *See id.* at 42, 58. The *Chambers* Court explained that "[i]t has long been understood that '[c]ertain implied powers must necessarily result to our Courts . . . from the nature of their institution.'" *Id.* at 43 (alteration in original) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)). In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), the Court also relied on longstanding practice to uphold judicial power to *sua sponte* dismiss for failure to prosecute despite an existing rule ostensibly requiring a motion by defendant to trigger dismissal. *See id.* at 628–30.

105. 28 U.S.C. § 455(a).

106. Ifill, *Do Appearances Matter?*, *supra* note 45, at 620. *See also* R. Matthew Pearson, Note, *Duck, Duck Recuse: Foreign Common Law Guidance and Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1813–14 (2005) ("The 'historic practice' of the United States Supreme Court has always been to refer motions for recusal to the Justice whose disqualification is sought. Thus . . . the actual procedure by which the decision is made is truly a creature of tradition.").

modern evidence of the Court's erratic and at times seemingly unprincipled recusal decisions, Congress has not taken any definitive steps to enforce its statutory requirements or to indicate that it considers the Court's ongoing recusal practices problematic.[107] This acquiescence or indifference to Supreme Court recusal practice is evidence of the Justices' constitutional authority to decide recusal questions independently.[108]

The Justices' longstanding practices suggest a similar constitutional interpretation. Prior to the recusal statute being amended to include them, several of our most esteemed Justices made highly controversial recusal decisions without any interference or objection from Congress.[109] A similar pattern emerged after the statute was amended, as the Justices continued to make controversial decisions that were at best tangentially faithful to the statutory standard.[110] In their memoranda in *Laird*[111] and *Cheney*,[112] respectively, Justices Rehnquist and Scalia relied heavily on extrastatutory factors in justifying their decisions not to recuse.[113] They cited the Justices' individual power to make recusal decisions,[114] the recusal

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107. *But see* Supreme Court Transparency Disclosure Act of 2011, H.R. 862, 112th Cong. (2011) (proposing substantive and procedural overhaul of Supreme Court recusal).

108. The instant example of the Justices retaining dominion over their own recusal decisions despite congressional action to the contrary provides even stronger support for the Supreme Court's exclusive power over recusal than evidence of judicial power in the *absence* of legislative activity. *See generally* Dames & Moore v. Regan, 453 U.S. 654 (1981).

109. *See supra* notes 30–33 and accompanying text (describing controversial recusal decisions by Chief Justices Marshall and Stone and Justices Holmes and Black).

110. The Court has never taken a case in which it has applied the federal recusal statute to one of its own members. *See* Bassett, *supra* note 17, at 676–80 (outlining the "four major opinions touching on section 455," all of which dealt with recusal decisions by a lower court judge).

111. 409 U.S. 824 (1972).

112. 541 U.S. 913 (2004).

113. *See* Cheney v. United States Dist. Court, 541 U.S. 913, 915–29 (2004) (giving Justice Scalia's reasons for nonrecusal); Laird v. Tatum, 409 U.S. 824, 824–39 (1972) (explaining Justice Rehnquist's reasons for denying the motion to recuse).

114. *See Laird*, 409 U.S. at 833 (reminding the reader that "under the existing practice of the Court disqualification has been a matter of individual

precedents of other Justices,[115] and the Court's unique institutional features—such as its lack of substitute Justices and the problems created when it issues equally divided decisions[116]—to support their conclusion that the Justices should employ an effective presumption against recusal.[117] These memoranda

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decision").

115 *See Cheney*, 541 U.S. at 924–26 (citing decisions by Justices White and Jackson not to recuse themselves despite their close friendships with high-ranking members of the Administration); *Laird*, 409 U.S. at 829–30, 31 (explaining that "different Justices who have come from the Department of Justice have treated the same or very similar situations differently" from one another, and Justice Rehnquist's "impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves" in analogous cases). It is worth noting that one of the decisions that Justice Scalia cited as useful precedent occurred before the federal recusal statute was amended to include Supreme Court Justices.

116. *See Cheney*, 541 U.S. at 915 (identifying the potential problem of a "tie vote [leaving the Court] unable to resolve the significant legal issue presented by the case"); *id.* at 916 (explaining that recusal is "effectively the same as casting a vote against the petitioner"). Some proponents of congressional reform of Supreme Court recusal, including H.R. 862, the recent proposal introduced in the House, have suggested using circuit court judges to review Supreme Court recusal decisions. *See* Supreme Court Transparency Disclosure Act of 2011, H.R. 862, 112th Cong. (2011). While such an arrangement may appeal to those concerned with the ethical ramifications of current Supreme Court recusal practices, there are significant constitutional problems with such an arrangement, including Article III's mandates that there be only "one supreme Court," and that Congress have power to create only "inferior courts." U.S. CONST. art. III, § 1. Justice Rehnquist made the identical argument in another memorandum explaining a decision not to recuse himself in *Microsoft v. United States*:

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

530 U.S. 1301, 1303 (2000).

117. More specifically, Justice Rehnquist argued that a Supreme Court Justice has an "even stronger" "duty to sit where not disqualified," *Laird*, 409 U.S. at 837, and as such Justices should not "bend [] over backwards" to recuse themselves. *Id.* at 838; *see also Cheney*, 541 U.S. at 915 (rejecting the federal recusal statute's presumption in favor of recusal because the "Supreme Court . . . is different"). Justice Scalia added a warning that recusal would "harm the Court" by encouraging the use of recusal as a means of influencing the outcome of cases before the Court. *Cheney*, 541 U.S. at 927 (expressing

reveal the Justices' general disregard for the statutory recusal standards. Although both Justices referred to the statutory text in their analyses, they did not employ any of the traditional tools of statutory interpretation; they did not parse the statutory language, attempt to divine congressional intent, examine legislative history, or evaluate lower court interpretations of the statute. Apparently, neither Justice thought of their analysis as primarily statutory, but instead as a broader, independent examination of their fitness to participate in the case at hand.[118]

The Court's 1993 "Statement of Recusal Policy"[119] confirms the Justices' commitment to independent, extrastatutory recusal decisions. The Policy claimed to apply the relevant statute, but ultimately relied on institutional concerns to read it very narrowly.[120] As Professor Bassett observed, the Court's Recusal Policy "re-emphasized [the Justices'] negative view of recusal" by "simply reflect[ing] the Justices' own sense of what to them would constitute a reasonable basis upon which to question a judge's impartiality and appl[ying] that standard across the board."[121] Justices Breyer and Kennedy reinforced the idea that the Supreme Court feels ultimately unrestrained in its recusal practice, and that this feeling may be constitutionally justified, during their congressional testimony in April of 2011,[122] and

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concern that recusal in the instant case would effectively "give elements of the press a veto over participation of any Justices who had social contacts with . . . a named official," and encourage "so-called investigative journalists to suggest improprieties and demand recusals").

118. This is particularly noteworthy in the case of Justice Scalia, whose well documented views on statutory interpretation seek to avoid, seemingly at all costs, policy-based analyses of statutory issues. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) ("[T]he main danger in judicial interpretation . . . of any law . . . is that the judges will mistake their own predilections for the law.").

119. *See* Statement of Recusal Policy, *supra* note 43, App. D, at 1101–03.

120. *See id.* at 1103 (citing as support for its position the fear of strategic recusal motions, "the possibility of an even division on the merits of a case," and a "distorting effect on the certiorari process" in cases where recusal occurs).

121. Bassett, *supra* note 17, at 681 (quoting Sherrilyn A. Ifill, *Do Judicial Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 625, 626 (2002)).

122. *See* 79 U.S.L.W. 2389, 2389 (Apr. 19, 2011). During the hearing, Justice Kennedy testified that "there is a constitutional problem" with making ethics rules binding on the Court, and Justice Breyer reiterated "that it is a more

Chief Justice Roberts did the same in his Year-End Report.[123] In sum, the Justices' conduct and statements regarding recusal have consistently indicated that the Court, as a matter of constitutional practice, considers recusal an individual matter to be decided independently by each Justice, free from congressional interference.

Constitutional structure offers a more complex analysis, but one that leads toward the same conclusion. There are no provisions in Article III that limit the Court's exercise of its "judicial Power" over recusal. Neither of the two provisions that are commonly thought of as qualifying the judicial power, the provision empowering Congress to "ordain and establish" the inferior courts,[124] and the clause enabling Congress to make "Exceptions" to the Court's appellate jurisdiction,[125] have any significant bearing on the Court's power over recusal. The provision accounting for congressional creation of the inferior courts simply does not apply to the Supreme Court. The Exceptions Clause deals only with appellate jurisdiction, which is neither synonymous with recusal[126] nor broad enough to include cases arising under the Court's original jurisdiction. Finally, the Framers' choice to empower Congress to affect Supreme Court

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complex decision for Supreme Court justices to decide whether to recuse themselves" than it is for lower court judges (who presumably are governed by § 455) due to a lack of replacements for the Justices. *Id*. at 2389, 2390.

123. *See* 2011 YEAR-END REPORT, *supra* note 3, at 3–5 (discussing the "fundamental difference between the Supreme Court and the other federal courts").

124. U.S. CONST. art. III, § 1.

125. U.S. CONST. art. III, § 2, cl. 2.

126. Professor James Liebman and William Ryan have demonstrated that the Framers did not equate judicial power with jurisdiction. *See* Liebman & Ryan, *supra* note 96, at 708 ("We can confidently report . . . that . . . when Article III says 'judicial Power,' its drafters meant just that and not, e.g., 'jurisdiction' . . . ."). This is consistent with our common understanding of judicial authority; there are many instances where judges exercise their judicial authority that do not bear on whether the court has the power to decide the case before it. *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010) ("'Jurisdiction' refers to 'a court's adjudicatory authority.' Accordingly, the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating that authority." (citations omitted) (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004))). Recusal is precisely one of those instances.

appellate jurisdiction suggests a countervailing intent to preclude congressional intrusion into those exercises of the Judicial power—like recusal—that are not expressly subjected to congressional authority under Article III.[127]

The Impeachment Clauses in Article I[128] are relevant to understanding the Justices' constitutional authority over recusal because impeachment is the only textual authority for the removal of Article III judges, including Supreme Court Justices.[129] This fact, however, triggers the interpretive canon of *expressio unius est exclusio alterius* ("to state the one is to exclude the other"); since recusal is not included along with impeachment as one of Congress's constitutional powers over the Judiciary, it should not be treated as such.[130] Separation of powers principles also preclude treating the Impeachment Clauses as relevant to the Court's recusal powers. The severity and permanence of impeachment and the cumbersome procedures required to effectuate it are carefully designed to allow the Legislature to check judicial power without unduly threatening judicial independence.[131] Permitting Congress to remove Justices from a

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127. This argument evokes the interpretive canon of *expressio unius est exclusio alterius* ("to state the one is to exclude the other").

128. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

129. Congress does of course have the authority to create official positions within the federal government that function as at-will employment (individuals who serve at the pleasure of the President) or that expire after a term of years, in the case of many independent agencies. In these cases, however, the separation of powers calculus is different because the officials being removed by means other than impeachment are not constitutionally guaranteed to hold those offices "during good Behaviour." *Id.* art. III, § 1.

130. *See* McElroy & Dorf, *supra* note 60, at 99 ("[I]mpeachment is the only available remedy for clearly unethical decisions not to recuse . . . ."). That is not to say that other issues about which the Constitution is silent, such as judicial review, are all equally problematic. Unlike judicial power, congressional power is carefully enumerated in eighteen clauses in Section 8 of Article I. It is therefore easier to assume that an omission of an aspect of legislative power from this list of eighteen sources is more significant than the exclusion of a specific aspect of judicial power from Article III, which limits its explanation of the authority of the federal courts to its grant of the "judicial Power" to the Supreme Court and any "inferior courts Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1; *id.* art. III, § 2, cl. 2.

131. *See* U.S. CONST. art. III, § 1 (protecting judicial independence by providing federal judges with life tenure and salary protections).

particular case by a simple legislative mandate, rather than the full Article I impeachment process, threatens the independence of the Judiciary in a way not anticipated by constitutional text or structure.[132] As a result, the Impeachment Clauses should be read in connection with Article III to support the proposition that recusal is constitutionally distinct from impeachment, and as such is an artifact of judicial, rather than legislative, constitutional authority.[133]

The Necessary and Proper Clause[134] grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[135] Unlike the provisions previously discussed, the Necessary and Proper Clause appears, at least facially, to grant Congress exceedingly wide latitude to regulate all aspects of government, including the courts. When read against the vesting clause of Article III,[136] however, we see that Congress's power under the Necessary and Proper Clause must end where the "inherent" judicial power bestowed upon the Court by Article III begins. If there is no realm of exclusively judicial power under the Constitution, then the Necessary and

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132. That is not to say that Congress could not constitutionally employ its impeachment powers in an attempt to influence recusal decisions by Supreme Court Justices. *See infra* Part IV.A.1.

133. Congress may still be able to influence recusal standards in the lower courts. The point of introducing the Impeachment Clauses is simply to point out that by defining the impeachment power and assigning it to Congress, the Constitution's structure offers insight into the proper *constitutional* home for judicial recusal. Impeachment is the only method explicitly provided for in the Constitution by which Congress may prevent an individual judge or Justice from performing his or her judicial duties under Article III. We can thus infer that the Constitution does not contemplate any additional congressional authority in the area, especially if those additional methods would expand congressional power to remove judges from cases at the expense of their obligations under Article III.

134. U.S. CONST. art. I, § 8, cl. 18.

135. *Id.*

136. *Id.* art. III, § 1 (assigning the "judicial Power of the United States" to the Supreme Court). Of course Article III also bestows the "judicial Power" on any "inferior courts that Congress may . . . establish," but because the lower federal courts are not the subject of this analysis, the present discussion will focus solely on the inherent power of the Supreme Court. *Id.*

Proper Clause renders Congress supreme among the three Branches of government. Because the absolute supremacy of any one branch is anathema to our constitutional system,[137] there must be some area of judicial power that belongs exclusively to the Justices.[138] The specific issue pertaining to Supreme Court recusal is thus whether the Necessary and Proper Clause empowers Congress to regulate the Court's recusal practices, or whether recusal is within the Court's "inherent power" under Article III such that Congress (along with other governmental entities outside the Court) is precluded from doing so.[139]

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137. *See, e.g.*, THE FEDERALIST NO. 47, at 264 (James Madison) (Colonial Press ed., 1901) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

138. The Court has confirmed this idea on several occasions throughout its history. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) ("'[W]e do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982))); Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65–66 (1924) (explaining that the inherent contempt power of the courts cannot be "abrogated nor rendered practically inoperative" by Congress); United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871) (explaining the importance of maintaining the separation of powers); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our courts of justice from the nature of their institution.").

139. The President and lower federal courts have no constitutional basis for asserting authority over Supreme Court recusal. *See* U.S. CONST. art. III, § 1 (describing all federal courts other than the Supreme Court as "inferior" and therefore without power to command the Supreme Court); *see also* discussion *infra* note 155 (discussing the President's lack of constitutional authority over recusal at the Court). The Judicial Conference of the United States Code of Conduct for United States Judges also does not apply to Supreme Court Justices. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, INTRODUCTION, *available at* http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductunitedstatesjudges.aspx ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges."). A broader consideration of whether recusal in the federal court system as a whole (including the lower federal courts) was part of the inherent judicial power vested by Article III would also need to consider the Tribunals Clause of Article I, by which Congress is expressly empowered "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art I, § 8, cl. 9. The Tribunals Clause, especially when read in conjunction with Article III's vesting of the judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain

The precise boundaries of the Court's inherent power remain an open question, but a narrow consensus has emerged among commentators and the courts around the central features of that power. In addition to concurring that some inherent judicial power exists, there is widespread agreement that this power must at least include the ability to independently and completely decide individual cases that fall within the jurisdiction of the federal courts.[140] As a court of last resort, and one that is singled out in the text of Article III as unique among the federal courts as a whole,[141] the Supreme Court provides the strongest constitutional case for retaining the inherent power to decide cases properly before it. Even when viewed in light of this

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and establish," is evidence that lower federal courts' grant of the judicial power is subject to greater congressional control than that of the Supreme Court. *Id.* art. III, § 1, cl. 1; *see id.* art. I, § 8, cl. 9 (the Tribunals Clause). The issue is, however, beyond the scope of this analysis, which is only concerned with recusal at the Supreme Court.

140. As Professor James Liebman and William Ryan explained:

> [T]he judicial Power means the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case . . . . By independently, finally, and effectually decide, we mean dispositively to arrange the rights and responsibilities of the parties on the basis of independently developed legal reasons, subject to review only by a superior Article III court. By case, we mean a court action that can be resolved on the basis of enforceable law, and by whole case, we mean not only the construction of applicable provisions of law but also their actual application to the facts to reach a decision.

Liebman & Ryan, *supra* note 96, at 771 (emphasis removed) (internal quotation marks omitted); *see also, e.g.*, Caminker, *supra* note 97, at 1519 ("[T]he core of the judicial power . . . is the authority to adjudicate and resolve Article III cases and controversies."); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 84–86 (stating that the vesting clause of Article III is "self-executing" with regard to issues of "judicial potency," which includes the power to "adjudicate claims"); Frankfurter & Landis, *supra* note 96, at 1020 (explaining that Congress's authority does not extend to regulation of fundamental features of courts such as the authority to independently and finally decide cases); Pushaw, *supra* note 98, at 741 ("[T]he constitutional provisions concerning congressional regulation of the judiciary do not pertain to the courts' exercise of their essential function of adjudication.").

141. *See* U.S. CONST. art. III, § 1 (vesting "[t]he judicial Power . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish").

(limited) understanding of inherent judicial power, Supreme Court recusal, at least the substantive standards for determining whether recusal is warranted,[142] falls within the core of inherent judicial power under Article III. Because recusal precludes an individual Justice from participating in a case, the power to mandate recusal is the power to prevent any number of Justices—up to and including the entire Court—from exercising the core judicial function of deciding individual cases. A mandatory recusal statute could thus result in there not being enough Justices to decide a case that is otherwise properly before the Court. This would represent an unconstitutional intrusion into a core judicial power that is possible in every instance in which Congress seeks to provide substantive recusal standards for the Court.[143] The Necessary and Proper Clause is thus not a valid source of congressional regulation of Supreme Court recusal because it has the significant potential to interfere with the power to decide cases that is inherent and exclusively vested in the Court by Article III.[144]

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142. There is one aspect of recusal regulation that does not fall as neatly within the Court's inherent power to decide cases—procedural rules. There is a stronger argument to be made that congressional promulgation of procedural requirements for the Supreme Court's recusal decisions do not interfere with the exceedingly narrow definition of inherent power advanced here. This fact does not, however, change the significance of the present inquiry or its relevance to the question of how a separation of powers analysis can help identify the most effective and constitutionally sound resolution to the current impasse over recusal at the Court. *See* Virelli, *supra* note 11, at 1223–25 (addressing the merits of procedural reform as a means of resolving the inter-branch impasse over recusal).

143. The most common arguments in favor of congressional power over recusal—that Congress could build in exceptions or "fixes" to the recusal statute, that Congress can regulate recusal because it has control over the size and qualifications of the Court, or that Congress can regulate recusal because it has power over the Court's appellate jurisdiction all fall short when confronted with this inherent power argument. *See* Virelli, *supra* note 11, at 1221–22 (identifying the weaknesses in all three of the above arguments defending congressional involvement in Supreme Court recusal).

144. Because at first blush this argument may seem to beg questions about the constitutionality of more significant practices like judicial review, it is worth taking a moment to explain why the instant account of inherent judicial power does not apply equally to judicial interference with any inherent legislative authority of Congress. The answer lies in the fact that judicial review is limited to occasions in which Congress's exercise of its legislative authority has run

It is not necessary that this constitutional analysis be beyond dispute for the subsequent discussion of Congress's constitutional role in its current impasse with the Court over recusal. For present purposes, it is sufficient to acknowledge that there are legitimate constitutional questions about Congress's authority to regulate recusal at the Court, and that constitutional uncertainty contributes significantly to the broader interbranch tensions over recusal. Those tensions include the normative question of how the interbranch conflict over recusal should be resolved within the context of our tripartite government.

C. Why is this Congress's Problem?

Even if congressional regulation of Supreme Court recusal raises constitutional questions that contribute to the ongoing impasse between Congress and the Court over recusal, the question remains: Why is this Congress's problem? Why not focus on the Court's role in alleviating the impasse? The answer, like the question, lies in the separation of powers. The separation of powers depends, at least in part, on the political integrity of the individual Branches and the quality of the relationships among them. Any resolution to the interbranch conflict over recusal should therefore seek to promote a sense of responsibility and comity on behalf of both Congress and the Court.[145] When viewed

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afoul of a constitutional provision or mandate. Congress's power over the Judiciary under the Necessary and Proper Clause is not similarly limited, nor would it be the sole prerogative of the Legislature to establish when the Judiciary has run afoul of the Constitution even in cases in which Congress sought to prevent a constitutional violation; it is, after all, "emphatically the province and duty of the Judicial Department to say what the law is." Marbury v. Madison, 1 U.S. (Cranch) 137, 177 (1803).

145. Professor Paulsen uses the term "coordinacy" to describe the same concept:

> The "coordinacy" of the three branches of the federal government is one of the fundamental political axioms of our federal Constitution. . . . This does not mean that the branches are equal in the quantum of powers assigned to them. . . . Coordinacy is a term of power-*relationship*, not of power-*scope*. . . . It is the idea of *coordinacy*, even more than the cognate concept of separation on which it depends and builds, that fuels the system of "checks and balances" that guards against "a tyrannical concentration of all the powers of government in

in this light, it becomes clear that although the Court possesses the constitutional authority to resolve the recusal conflict, the mechanisms at its disposal are far more potentially damaging to the Court as an institution and to our constitutional system in general than those available to Congress.

The Court has at least three measures at its disposal to resolve its impasse with the Legislative Branch over recusal, none of which are ultimately satisfactory when considered in light of the separation of powers. One is to state openly and explicitly that it will not comply with any statutory mandates regarding recusal because of constitutional concerns, issues of judicial integrity, or some other institutional reason. This approach would bring transparency and accountability to the Court's position and would alleviate concerns that the Court is eluding statutory standards for some less compelling reason like political gain or mere convenience. This approach has, however, some considerable weaknesses in the context of the separation of powers. For one, without grounding its statement in legally binding authority, the Court could be made to look more obstinate than it would in the absence of a public statement. More importantly, a public statement of noncompliance may exacerbate, rather than help resolve, the conflict. Chief Justice Roberts's Year-End Report, which is the closest example to date of a public explanation of the Court's views on the recusal impasse, provoked a largely negative reaction. It prompted a letter from five Senators asking the Court to voluntarily adopt formal recusal standards.[146] Professors Yeomans and Schwartz argued that "Chief Justice John Roberts's response in his year-end report to the increasing controversy over the ethics of Supreme Court Justices served to drive home the need for the high court to adopt reforms immediately,"[147] and Professor Ifill characterized his statement as "far short of an adequate

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the same hands."

Paulsen, *supra* note 93, at 228–29; *see also, e.g.*, Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 226 (1990) ("[T]he separation of powers assumes a minimum level of interbranch comity.").

146. *See* Senator Letter, *supra* note 4.

147. Yeomans & Schwartz, *supra* note 4.

response," primarily because it did not increase the "transparency of [recusal] procedures that go to the very legitimacy of the Court's decisionmaking."[148] These critiques highlight the shortcomings of any mere statement by the Court that it will not comply with statutory recusal standards. In the current debate over recusal, an explanation of the status quo—even one based on high-minded principles like the separation of powers or institutional competence—will simply not suffice.[149]

Alternatively, the Court could use its power as the final expositor on the Constitution to rule that the impasse between Congress and the Court over recusal is not legally justiciable. This relatively common approach in separation of powers cases often leads to positive results. The War Powers Resolution,[150] for instance, has long been a source of interbranch controversy. A debate has persisted for decades regarding whether the Resolution is a constitutional limit on the President's authority to use military force as Commander in Chief under Article II.[151] Although several members of Congress have expressed concern about various presidential decisions in relation to the War Powers Resolution,[152] there have never been any attempts to judicially enforce it against the President,[153] and several

148. Ifill, *The Chief Strikes Out*, *supra* note 4.

149. *See id.* ("I found Justice Roberts' defense of the status quo in the Supreme Court's recusal practice to be the most unsatisfying aspect of his remarks.").

150. War Powers Resolution, 50 U.S.C. §§ 1541–48 (1973).

151. *See* U.S. CONST. art. II, § 2.

152. Members of Congress raised concerns under the War Powers Resolution during President Clinton's bombing of Kosovo in 1999 and President Obama's bombing of Libya in 2011, and in both instances there was much public and scholarly debate over the constitutional basis for those objections. *See, e.g.*, Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1153 (2001) (discussing the debate over the constitutionality of the War Powers Resolution); Jack Goldsmith, *War Power: The President's Campaign Against Libya is Constitutional*, SLATE.COM (Mar. 21, 2011, 6:48 PM), http://www.slate.com/id/2288869/ (last visited Sept. 18, 2012) (same) (on file with the Washington and Lee Law Review). In neither case, however, was there any serious threat of legal action by Congress to enforce the requirements of the Resolution.

153. *See* CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 208 (4th ed. 2009) ("The requirements of the War Powers Resolution were never tested in court. . . . No judicial decision has ever

Presidents have employed military force without strictly adhering to its requirements or challenging the statute in court.[154] But the fact that the conflict between Congress and the Executive over the War Powers Resolution has never been substantively addressed by the Court does not mean that the Resolution is constitutionally problematic. Whether it refuses to do so for undisclosed policy reasons or because it formally concludes that the dispute is nonjusticiable as a matter of constitutional law, the presence of the Court as a neutral arbiter makes the lack of a legal resolution between the other two Branches more constitutionally palatable. A decision by the Court not to intervene legitimizes the otherwise seemingly unruly process of political interchange and compromise between Congress and the President by making it part of the constitutional design, thus creating political space for the Legislative and Executive Branches to better deal with complex questions about the use of military force on a case-by-case basis.

The conflict over Supreme Court recusal, however, would not similarly benefit from a decision by the Court that it is without constitutional power to resolve the dispute. Unlike with the War Powers Resolution, there is no third-party mediator for the

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construed the War Powers Resolution."); *see also, e.g.*, Campbell v. Clinton, 203 F.3d 19, 20–23 (D.C. Cir. 2000) (dismissing a case seeking to enforce the War Powers Resolution against President Clinton on justiciability grounds), *cert. denied*, 531 U.S. 815 (2000).

154. As Professor Jeffrey Tulis explained:

> In the aftermath of the Vietnam War, Congress passed a constitutionally aggressive statute, the War Powers Resolution, which seemed to display just the sort of institutional turf protection that the Federalist theory describes. Nevertheless, since the passage of the Resolution, the President has violated its terms repeatedly without challenge from Congress.

Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515, 516–17 (2009); *see also* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 49 (1993) ("[T]hanks to a combination of presidential defiance, congressional irresolution, and judicial abstention, the War Powers Resolution has not worked."); LOUIS FISHER, PRESIDENTIAL WAR POWER 192 (1995) ("Presidents have generally done what they wanted to do, notwithstanding the War Powers Resolution."); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 39–40, 123 (1990) (discussing the continued use of force by the Executive Branch in defiance of the War Powers Resolution).

interbranch conflict over recusal at the Court.[155] As a result, the same type of political exchange and compromise—such as the Justices citing to the statute in their recusal memoranda despite neither feeling bound by it nor applying it with the same force or rigor as they would other statutes[156]—loses the imprimatur of legitimacy that comes from direct or indirect endorsement of the process by a coequal branch of government. Instead, the Justices' failure to comply makes them appear unprincipled, regardless of the true quality of their decisions. Thus, due to the seemingly inevitable unenforceability of congressional mandates regarding Supreme Court recusal and the absence of a constitutionally recognized third-party arbiter, a constitutional decision by the Court that the dispute is nonjusticiable is not a satisfactory resolution under the separation of powers.

The third way the Court could break the impasse over the Justices' recusal practices is to use its power of judicial review to invalidate the statutory recusal standards on the basis that they are unconstitutional interferences with the judicial power vested in the Court by Article III.[157] This would amount to essentially deleting the word "justices" from the existing statute and returning it to its pre-1948 status, when it purported to cover all federal judges, but not Supreme Court Justices.[158] This is perhaps

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155. There is no constitutional basis for the President to intervene in a dispute between Congress and the Court over recusal, and review by any court other than the Supreme Court would run afoul of Article III's hierarchy of "one Supreme Court" and other "inferior" courts. *See* Russell Wheeler, *Regulating Supreme Court Justices' Ethics—"Cures Worse than the Disease?"*, BROOKING INST. (Mar. 3, 2011), http://www.brookings.edu/opinions/2011/0321_justices_ethics_wheeler.aspx?p=1 (last visited Sept. 18, 2012) (discussing the constitutional concerns surrounding proposals calling for the creation of a court to review recusal decisions) (on file with the Washington and Lee Law Review); *see also* McElroy & Dorf, *supra* note 60, at 107–12 (considering the meaning of Article III's "one supreme Court" requirement in the context of reviewing Supreme Court recusal decisions).

156. *See supra* notes 111–19 and accompanying text (outlining the Court's prior practices of analyzing the federal recusal statute differently from other statutes).

157. For a more detailed treatment of this constitutional issue, see *supra* Part III.B, and see generally Virelli, *supra* note 11 (stating that separation of powers principles prevent Congress from directly regulating Supreme Court recusal).

158. *Compare* 28 U.S.C. § 455 (2006) (governing disqualification of Justices,

the most intuitive response to the problem, as we generally think—at least since Chief Justice Marshall's famous pronouncement in *Marbury*—that matters of constitutional interpretation lie finally, and most comfortably, with the Judiciary.[159] Despite its intuitive appeal, this approach is seriously flawed when viewed from a separation of powers perspective.

As a general matter, Supreme Court review and invalidation of federal statutes is an unremarkable and fundamental feature of our constitutional existence.[160] The stakes become a bit higher, however, when the statutes under review regulate not subordinate government actors or the public at large, but the highest levels of a coordinate branch. In those instances, questions of interbranch comity and cooperation become of paramount importance to ensure the continued functioning and legitimacy of the constitutional design. In the context of congressional regulation of Supreme Court recusal, concerns about comity and legitimacy counsel strongly against the Court striking the recusal statute.

Some examples illustrate the effect of comity concerns on the Court. In *Myers v. United States*,[161] the Court considered a question dividing the other two Branches of government—whether Congress could limit the President's authority to remove an executive official from office. The conflict had all the makings of an impasse: a postmaster who had been removed from office brought suit against the United States alleging that President Wilson's decision to fire him ran afoul of a federal statute requiring the President to obtain "the advice and consent of the Senate" before removal.[162] The President did not claim that the

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judges, and magistrate judges), *with* Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (regulating only federal "judges," rather than "justices").

159. Chief Justice Marshall did, after all, famously explain in *Marbury* that it is "emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 U.S. (Cranch) 137, 177 (1803).

160. *But see* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–29 (1962) (discussing the "counter-majoritarian difficulty" with judicial review).

161. Myers v. United States, 272 U.S. 52 (1926).

162. Act of July 12, 1876, § 6, *as amended by* 39 U.S.C. § 31 (1876).

Senate had consented to the postmaster's removal under the terms of the statute, but simply that Congress was without constitutional authority to interfere with the Executive's prerogative to manage its workforce. The Supreme Court took up the issue and held that the separation of powers precluded Congress from interfering with the President's decision to remove executive officers at will.[163] The statute was invalidated, and although not uncontroversial,[164] the decision brought relative clarity to both Branches. Less than a decade later, the Court again addressed the removal issue, and held that Congress could limit the Executive's removal authority in the context of independent agencies.[165] Again, the Court's conclusion was adopted as the authoritative solution to the interbranch conflict. Since then, the Court has addressed additional removal issues without any challenges to its institutional authority or capacity to do so.[166] These examples show that the Court can be well-suited to resolve disputes between Congress and the Executive, and in fact may be an important bulwark against undue conflict between those Branches in its role as a neutral constitutional arbiter.

The circumstances change dramatically, however, when the Court becomes involved in constitutional review of statutes that are targeted at the Court itself or the Justices. The most direct example of this phenomenon is in cases that have come before the Court under the Exceptions Clause of Article III.[167] The

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163. *See Myers*, 272 U.S. at 51 (discussing the President's power to remove executive officers).

164. *See* FISHER, *supra* note 154, at 60–64 (discussing Chief Justice Taft's decision in *Myers* and the subsequent reactions thereto).

165. *See* Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935):

> The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

166. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3164 (2010) (holding that the particular arrangement of "good cause" requirements for removal of members of the Public Company Accounting Oversight Board violated separation of powers principles, as the President did not have the authority to oversee the officials within the Executive Branch).

167. The Exceptions Clause is the best example here because it is the only

Exceptions Clause expressly empowers Congress to provide "Exceptions" or "Regulations" regarding the Supreme Court's appellate jurisdiction.[168] The Clause is the only constitutional provision that is aimed expressly and exclusively at the relationship between Congress and the Supreme Court; it does not empower any other government actor to influence the Court's appellate jurisdiction, and does not permit Congress to do anything with respect to any other constituency of the Judicial Branch. The Exceptions Clause is thus the purest analog for the impasse between Congress and the Court over recusal, and as such provides useful insights into how the Court views its role as constitutional interpreter differently when the Court's own institutional interests are at stake.

The Court's Exceptions Clause jurisprudence is the subject of longstanding debate, but one feature of that jurisprudence—and the most important feature for present purposes—is clear: The Court has never invalidated a statute solely on the basis that it overstepped Congress's authority under the Exceptions Clause. The Court has upheld congressional authority in all but one case interpreting the Clause, albeit often narrowly and without conceding that the Court's jurisdiction is entirely precluded.[169] In

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constitutional provision that gives Congress authority over *just* the Supreme Court and not the other parts of the Judicial Branch. There are of course other—in fact significantly more common—instances in which the Court engages in judicial review of statutes that raise conflicts between the Legislative and Judicial Branches. *See, e.g.*, CFTC v. Schor, 478 U.S. 833, 835–36 (1986) (resolving whether the statutory authorization of the Commodity Futures Trading Commission to adjudicate certain claims unconstitutionally interfered with the authority of Article III judges). In terms of drawing analogies to the impasse over Supreme Court recusal, it is important to focus on the relationship not between Congress and the federal courts in general, but Congress and the Supreme Court. While there may be reasons of comity and legitimacy that prevent the Court from resolving disputes between the Legislature and the Judiciary as a whole, those problems are magnified significantly when the Court's decision deals solely with its own authority vis-à-vis Congress. Because the instant analysis focuses solely on recusal practices at the Supreme Court, it is more instructive to draw analogies from equally narrow conflicts. The only constitutional conflict that is as narrow as—and is thus properly analogized to—Supreme Court recusal is the conflict between Congress and the Court under the Exceptions Clause.

168. U.S. CONST. art. III, § 2, cl. 2.

169. *See* Felker v. Turpin, 518 U.S. 651, 652 (1996) (upholding a federal

the lone case in which the Court did strike a statute under the Exceptions Clause, *United States v. Klein*,[170] the Court went to great lengths to offer alternative explanations for its holding. *Klein* struck down a statute that required the Court to dismiss for lack of jurisdiction any suit to recover proceeds from property seized during the Civil War in which the claimant's entitlement to the property was based on a presidential pardon. The Court importantly acknowledged Congress's power to limit the Court's appellate jurisdiction.[171] It then declared the statute unconstitutional on the grounds that it impermissibly attempted to direct the outcome of specific cases in violation of the judicial power vested in the Court by Article III,[172] and interfered with the President's pardoning power under Article II.[173] Taken

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statute against an Exceptions Clause challenge); *Ex parte* Yeager, 75 U.S. 85, 106 (1869) (same); *Ex parte* McCardle, 74 U.S. 506, 514–15 (1869) (same).

170. United States v. Klein, 80 U.S. 128 (1871).

171. *See id.* at 145 ("If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.").

172. The *Klein* Court explained that:

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. . . . It is evident from this statement that the denial of jurisdiction to this court . . . is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? . . . We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 145–47.

173. *See* U.S. CONST. art. II, § 2, cl. 1 ("[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States."). The *Klein* Court went on to explain that:

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. . . . To the executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the

together, the Court's Exceptions Clause jurisprudence demonstrates the Court's reluctance to assert its own interests over those of Congress. It has generally affirmed Congress's authority to limit the Court's appellate jurisdiction,[174] and even when it found it necessary to invalidate a statute it relied heavily on the countervailing interests of the Executive in doing so.[175]

The purpose of the Exceptions Clause example is not to take a position as to the quality of the Court's reasoning or conclusions in those cases. It is offered rather as support for the narrow proposition that the Court exercises its power of judicial review more cautiously when addressing conflicts between itself and another branch of government, as in the Supreme Court recusal context. While the Exceptions Clause analogy is a strong one, it is limited both by its relatively small number of cases and the fact that there are no corroborating examples, primarily because no other constitutional provisions single out the Court as the sole subject of regulation. Nevertheless, a normative analysis of the Court's approach to resolving conflicts between itself and the other Branches confirms the impression left by the Court's Exceptions Clause cases, and counsels strongly against the Court using its power of review to overturn the recusal statute.

As an initial matter, cooperation and comity among the coordinate Branches of government are necessary to the effective functioning of our tripartite constitutional arrangement.[176] The Branches are coequal and necessarily interactive,[177] and

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> legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. . . . This certainly impairs the executive authority and directs the court to be instrumental to that end.

Klein, 80 U.S. at 147–48.

174. *See Felker*, 518 U.S. at 654 (stating that the Act at issue did not violate the Exceptions Clause); *Ex parte McCardle*, 74 U.S. at 513 (stating that the Constitution gives Congress the power to "'mak[e] exceptions to the appellate jurisdiction of the Supreme Court'" (citation omitted)).

175. *See Klein*, 80 U.S. at 147–48 (discussing the potential infringement on the power granted by the Constitution to the Executive).

176. *See* Paulsen, *supra* note 93, at 228–29 (describing the need for coordinacy among the three Branches of the federal government); Entin, *supra* note 145, at 226 (explaining that "[t]he separation of powers assumes a minimum level of interbranch comity").

177. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 702 (1997) ("[O]ur . . . system

collaborate on nearly every issue of national importance such as the national budget, military readiness and deployment, social policy questions, and law enforcement initiatives. Although each branch is equipped with powerful constitutional checks designed to maintain a sense of equilibrium and balance within the federal structure, the use of those checks in a confrontational or unwelcome way may exchange short-term gains for long-term damage to governmental efficiency and productivity. For this reason alone, the Court should be cautious in exercising its powers of judicial review, especially in the context of resolving disputes in favor of one branch of government over another. As Professor Bruce Peabody and John Nugent explained:

> [W]e do not suggest that the judiciary should never intervene in separation of powers conflicts. But we do think this intervention should be infrequent [and] restrained . . . . The judiciary should, to the best of its ability, resist efforts to become embroiled in interbranch disputes while they are still unfolding. . . . [W]hen the judiciary does intervene in disagreements over the authority or powers of the different divisions of government, it should . . . address how its ruling will affect the various levels at which the separation of powers operate.[178]

The remaining normative arguments against the Court striking the recusal statute are perfectly in line with the concerns expressed by proponents of recusal reform—protection of the Court's public reputation and, in turn, its legitimacy as the final expositor of constitutional law. As Justice O'Connor explained, "The Court's power lies, rather, in its legitimacy, a product of

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imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" (citation omitted)); *id.* at 703 ("As Madison explained, separation of powers does not mean that the Branches 'ought to have no *partial agency* in, or no *control* over the acts of each other.'" (quoting THE FEDERALIST NO. 47, at 266 (James Madison) (Colonial Press ed., 1901))); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

178. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 40 (2003).

substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[179] She went on to explain that "[t]he underlying substance of this legitimacy . . . is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all."[180] Striking the portion of the recusal statute that governs the Justices invites criticism that the Court is aggrandizing power at the expense of at least one of the political Branches. This criticism, especially when combined with parallel critiques that the Court is becoming overly politicized,[181] could undermine public confidence in the institution and its fitness not only to adjudicate, but also to fulfill its role under the separation of powers as a check on the other Branches. The Court's legitimacy could be similarly imperiled by a decision striking regulations on Supreme Court recusal if such a decision appeared unprincipled. Particularly in an area such as Supreme Court recusal and the separation of powers, in which the constitutional text, history, and judicial precedent are at best sparse, a decision in which the Court favors its own authority over that of another branch—even in the face of a written opinion explaining the decision—could be seen as pretextual and thus democratically illegitimate. Finally, the Court's Exceptions Clause jurisprudence provides yet another reason why the Court should refrain from using its power of review in the debate over recusal. Whereas application of the recusal statute could harm litigants by precluding them from receiving an otherwise constitutionally-provided level of judicial review in a single case,[182] the application of a jurisdiction-stripping statute is almost certainly more likely to bar review in a wider array of

179. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992).

180. *Id*.

181. *See supra* note 8 and accompanying text (noting recent critiques of the Justices' political associations and interactions).

182. *See supra* Part III.B (outlining the constitutional difficulties with congressional influence over Supreme Court recusal based at least in part on the fact that a recusal statute threatens to preclude the Court from exercising its inherent authority to decide individual cases).

cases. Nevertheless, despite their potential for harm, the Court has been extremely reluctant to strike jurisdiction-stripping statutes under the Exceptions Clause. To the extent that the harmful impact on litigants of a jurisdiction stripping statute is greater than that of a recusal statute, there is even less reason for the Court to overturn the latter.

Because the Court cannot remedy its impasse with Congress without doing precisely the damage to its institutional reputation and legitimacy that proponents of recusal reform seek to avoid, the task lies with Congress to employ the non-legislative tools at its disposal to alleviate the interbranch tension over recusal.

IV. Congress as an Effective Constitutional Actor

The fact that regulatory approaches to Supreme Court recusal raise constitutional concerns about the bounds of congressional authority does not mean that Congress is without potentially effective methods to remedy its impasse with the Court. By viewing the question of Supreme Court recusal as a matter of constitutional structure, we can more clearly identify ways that Congress may legitimately exercise its non-regulatory authority to address concerns over the Justices' recusal practices without the countervailing harm to judicial and congressional legitimacy that results from regulatory intervention.

A. Congress's Indirect Constitutional Tools

This analysis reveals five indirect constitutional approaches for Congress to use in influencing Supreme Court recusal practice within the confines of a legitimate tripartite governmental structure—impeachment, procedural reform, judicial confirmation, appropriations, and investigation.

1. Impeachment

Congress's impeachment power is perhaps its strongest means of curtailing perceived recusal abuses by the Justices. The benefits of impeachment in the Supreme Court recusal context

are its clear constitutional legitimacy as a legislative check on the Judiciary and its effectiveness, both as a response to past recusal misconduct and as a deterrent against future misconduct by the Justices. First, impeachment is a valuable tool for Congress in the recusal context because it is clear as a constitutional matter. In fact, questions of impeachment are best understood as political questions, dedicated exclusively to the Legislature by Article I.[183] Unlike direct regulatory limits on Supreme Court recusal, impeachment is not a separation of powers problem, but rather an anticipated and explicitly prescribed potential solution. Impeachment is also attractive because of the nature of the remedy; by removing a Justice from office, any future problems with that Justice's recusal practices will be alleviated. It likewise stands to reason that the specter of impeachment will work as a deterrent, encouraging Justices to conform their recusal practices to those norms not considered impeachable by Congress.

Impeachment's primary shortcoming in the recusal context is its lack of constitutionally mandated criteria. The converse of impeachment's strong claim to legitimacy as a legislative check on the Judiciary as an institution is the potential legitimacy problem arising from a specific exercise of the impeachment power over an individual Justice. Article III guarantees the Justices their "Offices during good Behavior,"[184] but that term is otherwise undefined in the constitutional text, and Article I provides little or no guidance as to how or when impeachment proceedings should be instituted.[185] Impeachment proceedings against a Justice for any reason, including recusal issues, would require significant explanation by Congress to avoid the public perception of overreaching and to avoid the risk of lowering the bar for the impeachment of federal judges, especially Supreme Court Justices, to the detriment of the Judiciary's ability to function as a coequal branch of government. These dangers, however, while significant, are neither unique to Congress's

183. Nixon v. United States, 506 U.S. 224 (1993) (holding that challenges to the impeachment process are non-justiciable political questions).

184. U.S. CONST. art III, § 1.

185. One feature of impeachment proceedings that is clear from the constitutional text is that they must initiate in the House. *See id.*

exercise of the impeachment power nor fatal to impeachment's potential usefulness for recusal. Arbitrariness and overuse are no more present in impeachment than in any other largely discretionary exercise of authority under the Constitution. The power to declare war, for example, does not come with any easily cognizable objective legal standards limiting its application; it is a political decision by a political branch that is checked only by electoral and political processes.[186] The President's veto power is a similarly discretionary act that is checked not by constitutional restraints on the exercise of that power, but by political and electoral checks on the President.[187] Impeachment enjoys similar political limitations, as well as the additional constraint of requiring two separate and coordinated efforts by both Houses of Congress.[188] By dividing the power of removal through impeachment between the two Houses, impeachment is better protected from abuse and overuse than other discretionary constitutional acts. Finally, the lack of demonstrable standards does not make impeachment impossible to employ as a productive and valuable, even if rarely used, tool for influencing Supreme Court recusal. Federal judicial impeachment has rarely been used by past Legislatures.[189] There is no reason to believe that future Congresses will have difficulty deciding how impeachment may be used to affect the Justices' recusal decisions without unduly damaging itself, the Court, or the separation of powers more generally. In fact, the severity of the impeachment remedy may cause it to be used even more sparingly. In short, because impeachment is constitutionally dedicated to Congress and holds substantial promise as an effective (if rarely used) remedy, it remains a viable tool for congressional involvement in the debate over Supreme Court recusal.

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186. *See id.* art I, § 8, cl. 11 (giving Congress the power "[t]o declare [w]ar").

187. *See id.* art I, § 7. The possibility of a congressional override is of course a check on the effectiveness of the President's veto power, but not on his constitutional authority to choose to issue the veto in the first instance.

188. *See* U.S. CONST. art I, § 2, cl.5; *id.* art. I, § 3, cl. 6.

189. *See* REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 29–30 (1993) (noting that since the Founding, only eleven judges have been tried in impeachment proceedings, and only seven have been convicted).

2. Procedural Reform

A second example of congressional authority over the Justices' recusal practices lies in Congress's authority to promulgate procedural requirements for the federal courts. The operative word in this category is *procedural* in light of the working assumption that the separation of powers precludes direct congressional regulation of the Justices' substantive recusal decisions. With that caveat in mind, there are several ways in which Congress could seek to regulate Supreme Court procedure. The first is through the Exceptions Clause of Article III. The Exceptions Clause could be used by Congress to regulate or "strip" appellate jurisdiction from the Court in cases in which, for instance, a certain number of recusals occurred, or conversely in which a certain number of recusal motions were denied. The Exceptions Clause could thereby serve as an incentive to encourage or discourage recusals, as Justices would presumptively be less likely to recuse when doing so would imperil the Court's jurisdiction over a case, and more likely to do so when it would not.[190] Nevertheless, although theoretically straightforward under Article III, use of the Exceptions Clause is not uncontroversial, especially when, as in the above recusal examples, it could effectively eviscerate the Court's otherwise valid appellate jurisdiction. The Court's Exceptions Clause jurisprudence has never upheld a statute that has the effect of closing off Supreme Court review altogether, and there are potential separation of powers problems associated with Congress taking that step.[191] Moreover, stripping jurisdiction in reaction to the denial of motions to recuse could incentivize meritless recusal motions by litigants who were successful below. An additional requirement aimed to remedy this problem, for instance counting

190. The precise opposite motivations could also be true, namely when a Justice who is not enamored of a case could base their recusal decision at least in part on how that decision would affect the case's viability, but I think this is a far less likely scenario, especially when the alternative is to vote on the merits of the case.

191. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2, at 182 (5th ed. 2007) (explaining that congressional attempts to limit the Court's appellate jurisdiction have "never . . . been interpreted as precluding all Supreme Court review").

only nonfrivolous motions to recuse in the jurisdictional analysis, highlights another problem with the use of the Exceptions Clause to influence recusal at the Court—the ultimate unenforceability of the standards. As long as the Court remains the final word on the Exceptions Clause, and there is no constitutional basis to conclude that it would not, Congress's authority to limit the Court's appellate jurisdiction remains dependent on the Court's own reading of the Clause. While the Court would not lightly strike such a statute,[192] it may attempt to protect some measure of its own authority (and litigants' access to it) through the same statutory interpretation and constitutional line-drawing techniques it has employed in prior Exceptions Clause cases.[193] Finally, the Exceptions Clause is under-inclusive in the recusal context because it cannot reach cases involving the Court's original jurisdiction.

One possible counter to the Exceptions Clause's under-inclusiveness is Congress's power over the Court's quorum requirements. Quorum standards are not limited to cases arising under the Court's appellate jurisdiction. They also do not necessarily pose a separation of powers problem.[194] Quorum values could be used to either encourage or discourage recusals. A high quorum requirement would likely encourage participation

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192. *See* discussion *supra* Part III.C (discussing the importance of inter-branch comity and cooperation to the constitutional separation of powers).

193. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (interpreting a jurisdiction-stripping statute to still permit appellate review on alternative statutory grounds); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868) (employing the alternate basis for appellate jurisdiction suggested in *McCardle*).

194. Quorum standards are less likely to create separation of powers problems when they do not set minimum participation requirements for the Justices that are unattainable, either due to the number of Justices currently sitting on the Court, or the total number of Justices authorized to serve. For example, quorum requirements almost certainly would create a separation of powers problem if they set the minimum number of Justices required to decide a case as higher than the total number of Justices authorized to sit on the Court (envision a quorum requirement of 10 on the present Court). A similar problem would arise if the quorum number was greater than the number of Justices available to serve at any one time, due to an unfilled vacancy or a prolonged absence. In those instances, I would argue that Congress has a constitutional duty to either lower the quorum requirements or to fill the existing vacancies by confirming additional Justices in order to honor the Article III requirement that there be "one supreme Court." U.S. CONST. art. III, § 1.

and a lower number could decrease the perceived cost of a Justice's decision to recuse. While they are limited by the fact that the substantive decision to recuse is ultimately left to the Justices themselves, and as such permits easy circumvention of any quorum requirements,[195] the absence of regulatory recusal standards at minimum makes the Justices accountable for a decision to circumvent quorum in a way they were not under a regulatory recusal regime.

Finally, Congress could require that the Justices follow specific procedural steps in making and issuing their recusal decisions under its traditional, inherent power to regulate the procedures of the federal courts.[196] Procedural reforms, like a requirement that the Justices publish explanations of their recusal decisions, or that those decisions be subject to review by the entire Court, are popular among reformers concerned about the public perception and legitimacy of the Court,[197] and admittedly are less susceptible to constitutional arguments invoking the separation of powers than substantive recusal requirements.[198] This does not, however, mean that procedural requirements are without limitations. The suggested procedural reforms are not only ultimately unenforceable against the Justices, but their anticipated benefits may also be diminished by the absence of parallel substantive reforms.[199] If the Court is

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195. This is precisely what happened in *North American Co. v. SEC*, 327 U.S. 686 (1946). Chief Justice Stone originally recused himself from the case, only to reverse his decision and participate when he realized his recusal could defeat a quorum.

196. This authority could also be grounded in the Necessary and Proper Clause of Article I, Section 8, but, for these purposes, the precise constitutional basis is unimportant. It is adequate for the present discussion to acknowledge that Congress retains constitutional authority to influence—at least to some degree—the procedures of the federal courts, including the Supreme Court.

197. *See* discussion *supra* notes 49–56 and accompanying text (discussing the criticism of current Supreme Court recusal practices and the suggestions for various types of reform).

198. *See* Virelli, *supra* note 11, at 1223–25 (discussing potential methods of procedural recusal reform).

199. To the extent supporters of statutory procedural recusal reform value the potential symbolic or persuasive effects of those reforms on the Supreme Court, any such benefit is arguably outweighed by the costs of creating a seemingly irresolvable conflict between two Branches of government.

constitutionally protected from congressional interference in deciding whether a Justice will ultimately be recused from a case, the procedural framework in which that decision is made is not likely to shed significantly more light on that decision. For example, requirements that Justices publish their reasons for failing to recuse themselves could, in the absence of defined, binding criteria for recusal decisions, do little to promote the integrity or public perception of the Court because there will be no baseline against which to measure the quality of the Justice's explanations. It is also difficult to imagine how, in cases where a Justice would not voluntarily choose to publicly explain their decision, an unenforceable reporting requirement would result in anything more than a cursory statement by the Justice. A similar problem arises if the procedural requirement consists of the full Court reviewing an individual decision of one of its members. As evidenced by the fact that only once in its history has the Court experienced a public dispute between its members over recusal,[200] it is unlikely that internal Court review of its members' recusal decisions would lead to any useful insight into either the decision under review or the Court's feelings about recusal more broadly. Nevertheless, even if procedural reforms do not drastically change the outcome of individual recusal decisions, they can serve to increase the transparency of the process by either increasing the amount of substantive information provided by the Justices in their recusal decisions, or, at minimum, shifting responsibility for providing that information (and thus blame for not providing it) from Congress to the Justices.

Procedural reform is an example of an indirect constitutional tool that is far greater than the sum of its parts. Despite the limitations of each of the proposed reforms, the impact of procedural reform in general offers potentially significant benefits in terms of transparency and accountability, both of which could enhance the Court's public perception and legitimacy

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200. *See* Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 897, 897 (1945) (Jackson, J., concurring) ("There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case.").

without the expense of the constitutional impasse created by direct congressional regulation of recusal standards.

3. Judicial Confirmation

The Senate's power over judicial confirmations is another means by which Congress can influence Supreme Court recusal. Unlike its legislative authority, which is limited by Article I as well as competing constitutional provisions, the Senate's power to confirm is seemingly unconstrained as a constitutional matter.[201] Moreover, Supreme Court confirmation hearings have become increasingly detailed and substantive. As Professors Lori Ringhand and Paul Collins demonstrated in their exhaustive empirical study of the last seven decades of Supreme Court confirmation hearings, "it is evident there was a steady increase in the amount of dialogue that transpires at the hearings" since 1939, and "substantive issues . . . have long dominated the hearings."[202] There is also no reason to believe that Senators' questions regarding a nominee's views on recusal would not be answered. Although many of the Senators' inquiries about specific and controversial areas of the law are met with generic and noncommittal responses by the nominee in order to avoid appearing as if they have prejudged issues that could come before the Court, questions about a potential Justice's views on judicial recusal would be largely immune from such an objection. Recusal questions are technically not the subject of cases before the Court, as they are committed entirely to an individual Justice's judgment. They are more akin to questions about judicial philosophy, which is a popular topic at confirmation hearings[203]

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201. *See* U.S. CONST. art. II, § 2, cl. 2 (stating only that the President "shall nominate, with the Advice and Consent of the Senate . . . Judges of the Supreme Court").

202. Lori A. Ringhand & Paul M. Collins, Jr., *May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009*, 60 AM. U. L. REV. 589, 632–33 (2011).

203. *See id.* at 617–18 ("Judicial philosophy is the third most frequently occurring issue following chatter and civil rights. Comments about judicial philosophy, which include such things as discussions of constitutional interpretation, stare decisis and judicial activism, constitute 12.4% of the

and has not been treated as objectionable by the nominees; in fact, Chief Justice Roberts's most memorable statement from his own confirmation hearing explained his jurisprudential philosophy by analogizing judges to baseball umpires.[204] In light of the Chief Justice's Year-End Report, it is clear that the Court is equivocal about which, if any, specific standards govern their recusal decisions. Without attempting to impose binding legal requirements on those decisions—something I have argued here and elsewhere would violate the separation of powers[205]—the Senate could exercise its unbounded discretion over confirmation to screen Supreme Court candidates based on their views of Supreme Court ethics and recusal. This approach is admittedly limited, as a candidate's views on recusal may not be sufficient to deny their confirmation, and questioning a nominee about recusal would not have any legal effect on a Justice post-confirmation. Nevertheless, by focusing at least in part on recusal at a nominee's confirmation hearing, the Senate could encourage both the nominees and the public to more closely examine the recusal issue in a way that could create pressure on the new Justice to comport with the views expressed at their confirmation hearing.

4. Appropriations

Congress's power of the purse is yet another potentially useful means of legislative influence over the Court's recusal practices. Like many of the other indirect methods mentioned, Congress's appropriations power has the benefit of a clear constitutional pedigree; there is no question that the ultimate authority to provide funding for the coordinate Branches lies squarely and solely with Congress.[206] Appropriations are also a

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comments in the dataset.").

204. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of the umpire and a judge is critical. They make sure everyone plays by the rules, but it is a limited role.").

205. *See generally* Virelli, *supra* note 11 (stating that separation of powers principles prevent Congress from directly regulating Supreme Court recusal).

206. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the

powerful source of leverage over the other Branches. Finally, because appropriations are inherently focused on the Court as an institution, rather than the individual Justices, Congress's power of the purse could be an effective way to encourage the Court to adopt its own recusal reforms.[207]

There are, however, limitations on any congressional attempt to influence Supreme Court recusal through appropriations. Although the institutional focus of appropriations may serve as a benefit in attempting to change the recusal practices of the Court as a whole, appropriations are not a good way for Congress to try and address an individual Justice's recusal practices. Appropriations are also limited by the fact that they do not address the Court's recusal practices directly; they are a source of pressure designed to incentivize the Justices to change their behavior in exchange for funding that likely has little or nothing to do with that behavior. While this is not a weakness in terms of the relevance or availability of appropriations as a source of legislative influence, it does render the power of the purse inferior to other approaches such as procedural reforms and even investigations that are able to target and potentially change specific recusal practices directly. Moreover, in the event Congress chose to rely heavily on its appropriations power to influence the Justices' recusal practices, additional problems could arise. A decision to withhold funding in order to affect recusal could have serious consequences for the Court's ability to perform its constitutionally-assigned judicial function. At the extreme, a deprivation of funding could impair the Court so severely as to threaten the Article III requirement that there be "one supreme Court."[208] Notwithstanding these limits, Congress's power of the purse is another constitutionally-recognized tool by which Congress may influence the Justices' conduct, and as such is a potentially useful feature in the process of reformulating the balance of power between Congress and the Court over recusal.

Treasury, but in Consequence of Appropriations made by Law . . . .").

207. This would be perhaps the best of all possible outcomes, as a decision by the Justices to voluntarily adopt clearer and more transparent recusal practices could promote the legitimacy of the Court without disrupting the balance of powers between the Court and Congress. *See infra* Part IV.B.2.

208. U.S. CONST. art. III, § 1.

5. Investigation

Finally, Congress can use its general investigatory power[209] to investigate and, more specifically, conduct public hearings on issues of national importance. In light of the constitutional and practical realities of Supreme Court recusal, any lasting, effective institution-wide reform will ultimately be up to the Justices themselves. One way for Congress to instigate such reform is to bring additional public awareness and pressure to bear on the Justices such that they reevaluate their own recusal practices.[210] Congress's investigatory authority is broad, and includes the ability to question members of the Court regarding recusal.[211] Congress began to explore this approach in 2011, as Justices were asked to testify before Congress on two separate occasions about

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209. This reference to "general investigatory power" is meant to contrast the exercise of congressional power being discussed here with the power to investigate incident to impeachment proceedings. Investigations relating to an impeachment are part of the broader discussion of impeachment and recusal included *supra* at notes 127–32 and accompanying text.

210. This is not to suggest that Congress should employ the full weight of its investigatory authority—such as its subpoena power—on the Justices, as this would implement questions of interbranch coordination and comity that may themselves run afoul of the separation of powers. The investigative authority contemplated in this section is akin to an ongoing confirmation hearing, whereby Congress may enhance the public's awareness and knowledge of the Supreme Court's recusal practices as a way of encouraging the Justices to remain vigilant in thinking about and evaluating their recusal practices.

211. *See, e.g.*, William P. Marshall, *The Limits On Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 785 ("Although there is no explicit textual grant of investigative power to Congress in the Constitution, the proposition that a legislative body generally possesses investigative powers is not controversial as a historical matter."); Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 11 (2004)

> As with the testimony concerning court administration, testimony by federal judges on policy matters directly affecting the court (as long as it does not morph into an investigation of the judge) seems not only to be non-problematic, but also to be essential to the preservation of good relations between the legislative and judicial branches, and important for the protection of the interests of the federal courts.

See also Fisher, supra note 154, at 160 ("Congress uses its investigative power to satisfy four main purposes: to enact legislation, to oversee the administration of programs, to inform the public, and to protect its integrity, dignity, reputation and privileges.").

ethical and recusal practices at the Court.[212] Following those public appearances, and in conjunction with public pressure from academics and the media to consider reform,[213] Chief Justice Roberts chose to dedicate nearly all of his Year-End Report to ethical issues, including recusal. Although it is impossible to draw a definite causal link between the increased attention to the Justices' recusal practices and the Chief Justice's decision to publicly address those practices in his annual report, at least some connection between the two is easy to imagine. It is rational to assume that the Court would take seriously the feelings of a coordinate branch, especially when those feelings are corroborated by public opinion and advocacy organizations.[214] This assumption is supported by the fact that the first public statement by the Court regarding recusal since 1993 occurred in the wake of just this type of congressional and public pressure.

Prohibiting Congress from directly regulating the Justices' recusal decisions does not render it constitutionally helpless in influencing those decisions. Congress may exercise its largely unfettered constitutional discretion to impeach, fashion procedural standards, confirm judicial nominees, appropriate funds, and investigate in order to protect against recusal decisions that imperil the public's perception of the Court and its institutional legitimacy. Although each of these indirect constitutional approaches is limited in its scope and potential effectiveness with regard to individual recusal decisions, collectively these approaches have the opportunity to create some

212. Justices Breyer and Kennedy were asked about Supreme Court ethics and recusal standards as part of their testimony before a House subcommittee on April 14, 2011. *See* Malloy, *supra* note 5, at 2389. Additionally, on October 5, 2011, Justices Breyer and Scalia testified about the same topic before the Senate Judiciary Committee. *See Considering the Role of Judges under the Constitution of the United States: Hearing Before the S. Judiciary Comm.*, 112th Cong. (2011).

213. *See supra* notes 2–10 and accompanying text (outlining the public media and academic scrutiny brought to bear on the recusal question in 2011).

214. The Alliance for Justice recently circulated a request for signatures for a letter requesting the Court to take up ethical reforms on its own. *See* Alliance for Justice, *Supreme Court Ethics Reform*, http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/judicial-ethics-prof-letter-scotus.html (last visited Sept. 18, 2012) (on file with the Washington and Lee Law Review).

normative benefits that are potentially lost in the current impasse between Congress and the Court over recusal.

B. Political and Institutional Benefits

There are two broad categories of benefits that accrue from shifting the conversation about Supreme Court recusal to a constitutional framework. The first are systemic benefits, benefits that adhere to the effectiveness of our entire tripartite system by promoting the constitutional legitimacy and reputation of the Court. The second are institutional benefits, which include the substantive benefits to both litigants and the Court that arise from the Justices retaining (at least direct) control over their own recusal decisions.[215] Rather than encouraging Congress to engage in unenforceable and unconstitutional direct regulation of the Justices' recusal practices that has little if any transformative effect on those practices, a constitutional lens highlights the other options available to release the interbranch tension over recusal and to create a new dynamic between the Court and Congress (and ultimately the public) that is both constitutionally sound and effective. The result is more and better opportunities for lasting solutions to the impasse over recusal at the Court.

1. Systemic Benefits

The impasse over Supreme Court recusal reflects badly on the Justices and draws into question the constitutional legitimacy of all of their decisions, including recusal decisions. The ongoing tension facilitated by the Court's failure to comply with an unenforceable congressional mandate creates a sense of arbitrariness and overreaching on behalf of the Justices, regardless of whether their decisions are in fact legitimate or

215. As discussed in this section as well as in *supra* Part IV.A, Congress has a series of constitutional mechanisms at its disposal to influence the Court's recusal decisions. Nothing in this discussion of the benefits associated with the Justices' control over those decisions is meant to diminish or otherwise overlook Congress's authority in that regard. The benefits argued for here are understood to exist alongside congressional use of its own constitutional influence.

constitutional.[216] Part of this problem stems from the fact that the Court, as the regulated entity, is also the final word in applying the recusal statute. Short of reading the recusal statute to create a strong presumption in favor of recusal, a position that would raise other constitutional problems,[217] the Court invites criticism that it is acting in a self-serving or aggrandizing manner simply by virtue of its fulfilling its role as the governmental entity ultimately responsible for deciding "what the law is."[218] Assigning constitutional responsibility for alleviating the impasse over recusal to Congress helps avoid the problems of legitimacy for the Court that come both from an irresolvable dispute with Congress over recusal as well as an attempt by the Court to resolve such a dispute in its own favor.

In addition to enhancing the Supreme Court's reputation and legitimacy, relief from the interbranch tension over recusal could refocus Congress on more constitutionally defensible and appropriate activities regarding recusal. Congress's pursuit of indirect constitutional mechanisms represents a more effective and cooperative use of our constitutional structure to resolve difficult problems, and as such offers the public an example of its federal government at work that makes sense within the constitutional framework. The broader range of constitutional tools at Congress's disposal are well-suited to raise public awareness about recusal and put the Justices on notice that their recusal decisions—and as a result the institutional legitimacy of

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216. One could argue that a reciprocal perception problem adheres for Congress; that the ineffectiveness of the recusal statute makes Congress appear ineffectual. While this is true in theory, I would suggest that the appearance of arbitrariness or overreaching is far more damaging to the public perception of a democratic institution than the perception that it is unable to enforce its own positions, especially when the failure to enforce is due to the apparent obstinacy of a coequal branch. As a result, the public perception problem created by the impasse over recusal is depicted here as solely a judicial problem not because there is no countervailing negative repercussions for Congress, but because those repercussions are less severe and in some ways derivative of the problems created for the Court.

217. *See* discussion *supra* Part III.B (discussing the constitutional limits on congressional regulation of Supreme Court recusal). *See generally* Virelli, *supra* note 11 (stating that separation of powers principles prevent Congress from directly regulating Supreme Court recusal).

218. Marbury v. Madison, 1 U.S. (Cranch) 137, 177 (1803).

the Court in general—will be subject to greater public scrutiny. Confirmation hearings can work to create cultural change about recusal at the Court as well as put individual Justices on specific notice about what Congress and the public expect in terms of fairness and consistency from the Justices. Congressional investigations and hearings can also raise public awareness and communicate clear messages to the Court as a whole about recusal, which in turn may serve as incentives for internal recusal reform. Appropriations offer further incentives for internal recusal reform at the Court and provide a potentially valuable opportunity for Congress and the Court to cooperate in the best spirit of the separation of powers. The specter of impeachment is an unlikely but powerful deterrent against the Justices overreaching to hear cases that Congress and the public consider them unfit to decide, and jurisdictional limitations and procedural reforms are potentially useful ways to maintain some additional checks on the Justices' conduct. Even if these mechanisms are rarely utilized, a shift by Congress to focus on these measures creates a public image of an orderly and effective system of checks and balances, rather than the unrestrained exercise of personal judgment by unelected Justices.

Recognition of the proper division of constitutional responsibility over recusal also promotes legitimacy by signaling public trust in the integrity and professionalism of the Court. This signal is valuable for at least two reasons. First, it is factually accurate, at least in the majority of cases. Although ethics and recusal at the Court have become a hotly discussed issue, even the strongest critics of the Court's practices concede that in the overwhelming majority of instances in which recusal decisions are required, the Justices either get it right or make responsible decisions.[219]

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219. *See* Stempel, *supra* note 32, at 642

> To be fair, the low use and success rate of recusal motions probably stems in large part from the Justices' ability to stop a lurking conflict of interest and voluntarily remove themselves from questionable cases. . . . Indeed, because of this strong informal tradition of stepping aside where appropriate without being asked, the custom of counsel has been to refrain from seeking recusal by motion . . . .

See also McElroy & Dorf, *supra* note 60, at 99 (explaining that "Justices would

Second, it facilitates a sense of interbranch comity and respect that is essential to the integrity of a tripartite government.[220] Under the current arrangement, Congress appears to be calling into question the legitimacy of the Court without either the imprimatur of a binding legal standard to initiate change or a means of addressing the unique institutional concerns associated with Supreme Court recusal. Expressly acknowledging the constitutional reality that the Court may, at minimum, exercise significant discretion in its recusal decisions promotes public understanding of, and confidence in, the separation of powers. This argument is made even more powerful by the fact that the benefit is available virtually free of cost. As it currently stands, Supreme Court recusal decisions are entirely dependent on the Justices' individual judgment and integrity.[221] Acknowledgment that the Court is the sole arbiter of its own recusal questions (subject only to those constitutional checks clearly assigned to Congress) could serve as a powerful endorsement of the Court's competence and integrity without requiring that Congress relinquish any actual authority.

Finally, judicial procedure generally, and recusal decisions in particular, are squarely within the expertise of the Judiciary. Congressional acknowledgement of the Court's greater expertise further inspires public confidence in the Court and properly draws focus on the Legislature's constitutionally assigned prerogatives for curtailing judicial power.

2. Institutional Benefits

Just as alleviating the impasse over recusal at the Court will have systemic benefits for the overall efficacy and legitimacy of our constitutional democracy, it may also present potential advantages for both individual litigants and the Court. Perhaps

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almost certainly recuse themselves in clear-cut conflict situations").

220. *See* Paulsen, *supra* note 93, at 228–29 (describing the importance of "coordinacy" among the Branches).

221. *See* Stempel, *supra* note 32, at 642 ("Supreme Court recusal practice provides an almost unique illustration in American government of substantive law without force when applied to a certain institution.").

the most obvious of these advantages is that a congressional decision to focus on indirect constitutional influences and formally commit substantive recusal decisions exclusively to the Justices most accurately describes current and historic constitutional practice. This is significant because it eliminates any distortive effects from the current statutory regime. Under the existing statutory standards, Congress provides the Court with unenforceable statutory "cover" for its recusal decisions. This discourages transparency and accountability among the Justices, as they are free to explain their recusal decisions in the context of the statutory standard when there is little reason to believe they feel bound by or accountable to that standard; although they generally cite to the governing statute when discussing recusal, in practice the Justices seem content to rely on extrastatutory sources and arguments to support their conclusions.[222] The statute thus provides a veil of legality over what is, in actuality, a constitutionally assigned judicial policy decision about whether to recuse. By lifting the statutory veil from the Court's recusal practices, each Justice's recusal decisions can be properly understood and attributed to them as their own analysis of what is in the best interests of justice in that case. While this may not necessarily lead to more satisfying results in specific cases, it will more accurately focus public attention on the correct target in evaluating the Court's recusal jurisprudence. This increased transparency and accountability among the individual Justices could in turn promote internal reform by encouraging the Justices to reexamine their views on the proper role of recusal for themselves and the Court as an institution.

In addition to promoting transparency in the Court's recusal jurisprudence, there are reasons to believe that Congress could promote better substantive recusal practices by accepting its proper constitutional role and foregoing attempts to directly regulate recusal at the Court. First, stepping aside could open up space for the Court to take greater responsibility for the recusal

222. *See* discussion *supra* notes 111–20 and accompanying text (describing the recusal analyses proffered by then-Justice Rehnquist in *Laird* and Justice Scalia in *Cheney*).

issue and be more creative in seeking its own responses to public and governmental criticism.[223] Although it is unlikely, especially in light of recent events,[224] that the Court would adopt sweeping formal reforms of its recusal practices, heightened public awareness of the issue, coupled with the absence of a statutory standard, may push the Justices toward more frequent explanation of their recusal decisions or more serious consideration of recusal questions in certain circumstances. An incentive to engage in voluntary recusal reform may be the best possible solution to the public discontent over Supreme Court recusal, as it incorporates recusal reform without threatening the balance of power between Congress and the Court.

Another outcome that seeks to achieve this balance and is made more likely by Congress refraining from direct regulation of recusal at the Court is the reintroduction of the Due Process Clause into the discussion of Supreme Court recusal. Although the separation of powers may reserve authority over recusal to the Court alone, it does nothing to limit the scope of the Court's authority over its own recusal practices or to insulate the Justices from the constitutional requirements of fairness, dignity, and personal liberty embodied in the concept of due process.[225] Moreover, because due process is a constitutionally mandated individual right, it is uncontroversial as a separation of powers matter because it is precisely the sort of standard that the Court is qualified to apply and constitutionally bound to uphold.

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223. A recent campaign from Alliance for Justice, a prominent public interest group concerned with judicial ethics, took precisely this approach in an open letter to the Court urging that the Justices voluntarily adopt recusal reform without congressional involvement. *See* Letter from Twelve Reform Organizations to the Supreme Court (Jan. 9, 2012), *available at* http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/coalition-letter-to-chief-justice-roberts.pdf.

224. *See* 2011 YEAR-END REPORT, *supra* note 3 (explaining why Supreme Court Justices must exercise their own independent judgment in making recusal decisions); Chief Justice Letter, *supra* note 13 ("[F]or the reasons explained in my year-end report, the Court does not plan to adopt the Code of Conduct for United States Judges.").

225. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (describing the concept of due process as "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society").

Finally, the elimination of direct congressional influence over the recusal process leaves that process with the Court. By virtue of their experience and training alone, the Justices possess greater institutional competence than Congress in fashioning effective recusal standards.

In sum, treating Supreme Court recusal as a constitutional question governed by the principle of separation of powers offers significant systemic and institutional benefits. It promotes public confidence in the Court as well as transparency and accountability among the Justices by shaping the legal framework to better reflect constitutional practice. It also has potential to improve the Justices' decision making in the area by incentivizing them to consider their own recusal practices and to incorporate standards that are squarely within the Court's institutional expertise and responsibility.

V. Conclusion

Recusal has come to dominate current conversations about the Court because it implicates the most foundational features of Supreme Court jurisprudence—fairness, legitimacy, transparency, and the proper scope and exercise of governmental power. Nevertheless, the debate over recusal has so far been framed almost exclusively as a matter of judicial ethics. This Article is the second part of an effort to reexamine the recusal issue through a constitutional lens in order to better illustrate how structural principles like the separation of powers are necessary to help us more fully understand the consequences of the Justices' recusal decisions and the dynamics of tripartite government more broadly. In an earlier treatment of recusal at the Court, I argued that statutory recusal standards are inconsistent with the principle of separation of powers because they unduly infringe on the Court's inherent judicial power under Article III of the Constitution. The present analysis takes this constitutionalization of the recusal debate a step further, asking how the separation of powers can help us reach a constitutionally acceptable and effective resolution of the ongoing impasse between Congress and the Court over recusal.

The answer can be found at the intersection of Congress's status as a constitutional interpreter and all three Branches' responsibility to promote interbranch coordination and comity in a tripartite constitutional regime. When the Supreme Court is at odds with a coequal branch of government, as in the recusal context, the separation of powers suggests that the Court should not take it upon itself to resolve the dispute, especially if the better constitutional argument favors the Justices. It is precisely in this scenario when Congress must be called on to take up the interpretive mantle and correct the constitutional impasse in a way that best promotes effective government. In the context of recusal, this calls for Congress to cease regulating the Justices' recusal practices directly, and instead to employ its indirect constitutional tools such as impeachment, procedural reform, judicial confirmation, appropriations, and investigation to influence the Court's recusal decisions.

Perhaps more importantly, this application of the separation of powers to the interbranch impasse over recusal offers broader insights into the best way to think about constitutional conflicts between the Court and its coordinate Branches going forward. By considering the role of the Court in its conflict with Congress over recusal, we are better able to understand which structural principles can be used to alleviate interbranch tension and diffuse potential crises of institutional legitimacy. The instant analysis also highlights a series of critical questions regarding constitutional structure and dynamics for future research, such as: Should democratic legitimacy always be the guiding principle in resolving interbranch disputes? What is each branch's institutional responsibility in resolving those disputes? Do those responsibilities change when a branch is a party to the dispute, or are they a function of institutional competency and constitutional authority? Under what circumstances should a coordinate branch feel comfortable asserting its own interests against another branch? Does it matter if those interests are legal or political? What constitutional mechanisms are best suited to provide resolutions? The constitutional lessons learned from Supreme Court recusal serve as a template for addressing these bigger questions about the boundaries of constitutional power and the role of each of the coordinate Branches in facilitating our constitutional democracy.