PENN STATE
LAW REVIEW

A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench

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I. INTRODUCTION

"Could we not have a provision in the law for some mechanism that retired Supreme Court [J]ustices could be asked to sit on the Court when there is a recusal," wondered former Supreme Court Justice John Paul Stevens.[1] This question spurred Vermont Senator Patrick Leahy to draft legislation that would create such a mechanism.[2] If enacted, Leahy's proposed legislation would enable the active Justices on the Court to select, by a majority vote, retired Justices to return to the Bench to fill recusal-based vacancies.[3]

Judicial recusal describes a judge's *sua sponte* withdrawal from a case,[4] whereas disqualification refers to judicial removal that is required by statute or prompted by a party's motion.[5] These technical distinctions notwithstanding, recusal and disqualification are governed by the same federal standard and are often used interchangeably.[6]

Historically, Supreme Court Justices have been disinclined to recuse themselves, even when a litigant has moved for a Justice's

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1. David Ingram, *Should Retired Justices Be Called Back to the Supreme Court?*, THE BLT: THE BLOG OF LEGAL TIMES (June 16, 2010, 4:14 PM), http://legaltimes.typepad.com/blt/2010/06/should-retired-justices-be-called-back-to-supreme-court.html [hereinafter *Should Retired Justices Be Called Back to the Supreme Court?*].

2. *Id*.

3. *See* S. 3781, 111th Cong. § 1 (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).

4. *See* BLACK'S LAW DICTIONARY 1390 (9th ed. 2009) (defining recusal as the "[r]emoval of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest").

5. *See* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 532 n.5 (2005).

6. *Id*.

disqualification.[7] Common law doctrines such as the "duty to sit"[8] and the "rule of necessity"[9] effectively create recusal loopholes, allowing judges to refrain from recusal in situations that would otherwise warrant such action.[10] Prior to 1974, Supreme Court Justices frequently invoked these common law doctrines in support of their refusal to recuse.[11]

In 1974, Congress amended 28 U.S.C. § 455 to curb widespread judicial reliance on these common law doctrines.[12] Despite Congress's attempt to create a standard wherein judges would "err on the side of recusal,"[13] certain Justices have failed to comply.[14] The Supreme Court, in particular, has indicated that its "unique nature justifies a less demanding recusal standard" than that which governs all other federal judges.[15]

One famous instance reflecting this tendency for Supreme Court Justices to "refuse to recuse" occurred in 2004, when the Sierra Club filed a motion for the recusal of Supreme Court Justice Antonin Scalia

7. *See, e.g.*, Cheney v. U.S. Dist. Court, 541 U.S. 913 (2004) (Scalia, J., mem.) (denying motion to recuse); Microsoft Corp. v. United States, 530 U.S. 1301 (2002) (statement of Rehnquist, C.J.) (explaining that his son's partner status at a law firm representing Microsoft in matters pending before the Court did not warrant Chief Justice Rehnquist's recusal in those matters); Laird v. Tatum, 409 U.S. 824 (1972) (Rehnquist, J., mem.) (relying on duty to sit doctrine in denial of respondents' motion to disqualify); *see also* Jewell Ridge Coal Corp. v. United Mine Workers, 325 U.S. 897 (1954) (Jackson, J., concurring in denial of rehearing) (criticizing Justice Black's refusal to recuse from a case argued by his former law partner); Tinsley E. Yarbrough, MR. JUSTICE BLACK AND HIS CRITICS 4 (1988) (noting that litigants often "objected to [Black's] participation in cases reviewing the validity and meaning of statutes he had sponsored" as a Senator).

8. *See infra* note 46 and accompanying text.

9. *See infra* note 47 and accompanying text.

10. *See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 604-05 (1987) [hereinafter *Rehnquist, Recusal, and Reform*].

11. *See Rehnquist, Recusal, and Reform*, *supra* note 10, at 606 n.63 (listing various cases cited by Chief Justice Rehnquist illustrating widespread adherence to the duty to sit doctrine).

12. *See* H.R. REP. NO. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351; Stempel, *supra* note 8, at 607 (noting that "the revised section 455 expressly eliminated the duty to sit doctrine").

13. Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 815 (2009) [hereinafter *Chief William's Ghost*] ("In close cases, judges should err on the side of recusal in order to enhance public confidence in the judiciary and to ensure that subtle, subconscious, or hard-to-prove bias, prejudice, or partiality does not influence decision-making.").

14. *See id.* at 907 (noting that Chief Justice Rehqnuist in Microsoft Corp. v. United States, 530 U.S. 1301 (2002), Justice Scalia in Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004), and the seven Justices who signed the Court's 1993 Statement of Recusal Policy, *see infra* note 94, "deploy[ed] a doctrine that was supposed to have been abolished to resist recusal and buttress a nonrecusal decision that is at least questionable if not clearly erroneous.").

15. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 681 (2005).

from the matter *Cheney v. United States District Court*.[16] Justice Scalia had recently accompanied former-Vice President Dick Cheney, a named party in the action, on a duck hunting excursion.[17] In denying Sierra Club's recusal motion, Justice Scalia reasoned that, although Sierra Club questioned his impartiality, it did not do so "reasonably" in light of all the relevant facts and circumstances.[18] Thus, Justice Scalia concluded that his recusal was unwarranted under the terms of 28 U.S.C. § 455.[19]

Recently, the recusal practices of Supreme Court Justices have garnered increasing media attention.[20] In October 2010, reporters questioned whether Virginia Thomas's active role in partisan politics, which has been characterized as "the most partisan role ever for a spouse of a [Supreme Court] [J]ustice,"[21] would raise recusal issues for her husband, Justice Clarence Thomas.[22]

In the controversial case of *Citizens United v. Federal Election Commission*,[23] Justice Thomas joined the 5-4 majority in issuing a decision that reduced former campaign spending restrictions, thereby allowing corporate entities to make unlimited expenditures.[24] Common Cause, a liberal nonprofit advocacy organization, has suggested that Justice Thomas may have had "an undisclosed financial conflict of interest due to his wife's role as CEO of Liberty Central, a 501(c)(4)

16. Cheney, 542 U.S. 367 (2004).

17. Cheney v. U.S. Dist. Court, 541 U.S. at 914-16, (Scalia, J., mem.) (explaining circumstances surrounding duck-hunting excursion).

18. *Id.* at 926.

19. *Id.* (concluding that his recusal would not be "proper").

20. *See, e.g.*, Linda Greenhouse, *Recuse Me*, N.Y. TIMES, May 4, 2011, http://opinionator.blogs.nytimes.com/2011/05/04/recuse-me/ (discussing the merits of a motion filed by supporters of Proposition 8 who claim that Judge Vaughn R. Walker should have recused himself before ruling on the constitutionality of California's marriage ban because he "secretly intends to marry his partner of 10 years and has thus improperly placed himself in a position to reap personal benefit from his own ruling"); Lawrence Hurley, *Justice Sotomayor Recusal Likely as Supreme Court Weighs Greenhouse Gas "Nuisance" Case*, N.Y. TIMES, Dec. 3, 2010, http://www.nytimes.com/gwire/2010/12/03/03greenwire-justice-sotomayor-recusal-likely-as-supreme-cou-2319.html (suggesting that Sotomayor's possible recusal in *American Electric Power v. Connecticut* could result in a 4-4 deadlock among the remaining Justices); Jackie Calmes, *Activism of Thomas's Wife Could Raise Judicial Issues*, N.Y. TIMES, Oct. 9, 2010, at A1, *available at* http://www.nytimes.com/2010/10/09/us/politics/09thomas.html; Tony Mauro, *Behind Justice Stevens' Recusal in Florida Case*, THE BLT: THE BLOG OF LEGAL TIMES (Dec. 4, 2009, 1:41 PM), http://legaltimes.typepad.com/blt/2009/12/behind-justice-stevens-recusal-in-florida-case.html (indicating that Justice Stevens may have recused himself in *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection* because Stevens owns property "within a renourishment zone similar to the property at issue in the case").

21. Calmes, *supra* note 20, at A1.

22. *Id.*

23. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

24. *See id.*

organization that stood to benefit from the decision."[25] This potential conflict notwithstanding, Justice Thomas may have had another reason to recuse himself from that case.[26]

On January 19, 2011, Common Cause filed a petition with the Department of Justice requesting an investigation into whether Justices Thomas and Scalia should have recused themselves from the *Citizens United* case under 28 U.S.C. § 455.[27] In support of its request, Common Cause contends that "both [J]ustices have participated in political strategy sessions, perhaps while the [*Citizens United*] case was pending, with corporate leaders whose political aims were advanced by the decision."[28] According to Common Cause, Justices Scalia and Thomas have each attended at least one secret political retreat sponsored by Koch Industries, a conservative organization that has benefited significantly from the *Citizens United* decision.[29] Yet, because of the Justices' failure to list these attendances on their judicial disclosure forms and because of the secrecy surrounding Koch Industries' gatherings, information about these Justices' attendance at Koch retreats is not publically available.[30] The deliberate lack of transparency surrounding Justices Thomas and Scalia's affiliation with the Koch brothers coupled with the Justices' refusal to recuse in *Citizens United* has undermined the Court's image as an impartial judiciary.[31]

Impartiality is a bedrock principle of justice, and judicial recusal is critical to the Court's ability to remain impartial—or, at the very least, to maintain the appearance of impartiality. Constitutional safeguards such as life tenure and compensation illustrate the Framers' intention to protect the federal judiciary from improper political and financial influences.[32] Despite legislative attempts to create an objective and

25. Letter from Bob Edgar, President and CFO, Common Cause and Arn H. Pearson, Vice President for Programs, Common Cause to Eric Holder, Attorney General, United States Dep't of Justice (Jan. 19, 2011) (on file with author).

26. *See* Eric Lichtblau, *Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases*, N.Y. TIMES (Jan. 19, 2011); *Common Cause Seeking Ethics Probe of Scalia and Thomas*, THE BLT: THE BLOG OF LEGAL TIMES (Jan. 20, 2011, 1:50 PM), http://legaltimes.typepad.com/blt/2011/01/common-cause-seeking-ethics-probe-of-scalia-and-thomas.html.

27. Letter from Bob Edgar, *supra* note 25, at 1.

28. *Id.*

29. *Id.* at 2-3 ("The Koch Industries PAC spent $2.6 million in the 2010 election cycle, and individuals associated with Koch Industries spent another $1.8 million. . . . In addition, Americans for Prosperity—founded and funded by the Kochs—stated its intention last summer to spend $45 million to influence the 2010 elections.").

30. *Id.* at 4.

31. *Id.*

32. *See* U.S. CONST., art. I, § 1 (providing that Supreme Court Justices "shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office").

workable recusal policy, Supreme Court Justices remain reluctant to recuse themselves, often citing the negative consequences of recusal on the Court such as 4-4 deadlocks and procedural affirmances.[33] The system of substitute Justices proposed by Leahy's legislation could alleviate some of these practical problems,[34] thereby assuaging the Justices' reluctance to recuse themselves when their impartiality has been questioned.

Section II will provide a historical summary of judicial recusal and disqualification beginning with the common law origins of recusal. This Section will also describe the circumstances surrounding the codification of 28 U.S.C. § 455, the federal recusal statute, and its subsequent amendments. Additionally, Section II will explore the evolution of federal judicial recusal policy in the United States with an emphasis on the Court's adherence to that policy—or lack thereof.

Section III will introduce the functional problems that arise from the practice of judicial recusal, such as 4-4 deadlocks and procedural affirmances, before presenting Leahy's proposal in Section IV. Section IV will analyze the constitutionality of the legislation by addressing the following three concerns: (1) whether Congress possesses the authority to enact this legislation; (2) whether this legislation violates the Appointments Clause of Article II; and (3) whether this legislation runs counter to the doctrine of separation of powers. Following the constitutional analysis, this Comment will then assess the desirability of Leahy's legislation.

Finally, Section V will examine other possible alternatives to Leahy's proposed legislation. Ultimately, this Comment will conclude by urging support for Leahy's proposal.

II. HISTORY OF JUDICIAL RECUSAL & DISQUALIFICATION[35]

The practice of judicial recusal is neither novel nor unique to the United States' system of jurisprudence. The longstanding and widespread tradition of recusal, which dates back to medieval times, evolved out of a desire for impartiality among judicial decision-makers.[36] In the United States, however, the federal law governing judicial recusal policy strives not only to maintain actual impartiality but also to achieve

33. *See infra* Section III.

34. *Id*.

35. Frost, *supra* note 5, at 533 n.5 ("'Recusal' refers to a judge's voluntary decision to remove himself from a case, while 'disqualification' refers to a statutory mandated removal of a judge. However, the same standard governs recusal and disqualification under federal law.").

36. *Id.* at 537 n.20 (citing Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 1 (1923)).

the appearance of impartiality.[37] To attain these dual objectives, the legislature has attempted to codify federal judicial recusal policy.[38] Despite Congress's repeated efforts to clearly define the circumstances that warrant judicial recusal,[39] vestiges of common law doctrines disfavoring recusal continue to persist even at the highest level of the contemporary American judicial system.[40] Traditionally, Supreme Court Justices have construed legislative recusal standards narrowly.[41] This tendency for Justices to sit rather than to recuse may be attributed to the lack of a workable system for filling recusal-based vacancies on the Supreme Court.[42]

A. Common Law Origins of Judicial Recusal Policy

The current statutory recusal policies in the United States reflect a strong common law influence. According to English common law, judicial impartiality was measured solely in terms of direct pecuniary interest.[43] Consequently, recusal was justified only in circumstances where adjudication implicated a judge's financial interest; neither bias nor prejudice arising out of interpersonal relationships was recognized as a legitimate reason for judicial recusal.[44] Although non-financial bases for recusal have since been recognized and incorporated into contemporary recusal standards, financial interest in a pending matter remains the most likely reason for recusal among American judges.[45]

Two related doctrines regarding judicial recusal policy have emerged from common law: the duty to sit[46] and the rule of necessity.[47]

37. *See* 28 U.S.C. § 455(a) (2006) (requiring recusal when a judge's "impartiality might reasonably be questioned").

38. *See generally* 28 U.S.C. § 455 (defining federal judicial recusal policy).

39. *See* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 246 (1987) ("Congress has supplemented its original disqualification statute of 1792 five times, in each instance expanding the scope of disqualification.").

40. *See* Bassett, *supra* note 15, at 682 ("[T]he Supreme Court's rationalization for its insistence upon participating in cases involving potential recusal issues has been based on a variant of the so-called 'rule of necessity' and the 'duty to sit.'").

41. *See* Frost, *supra* note 5, at 536 ("[H]istory shows that each time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves.").

42. I am asserting this tendency based not on the internal predilections of individual Justices, but rather, on what I view as a systemic shortcoming.

43. Frost, *supra* note 5, at 539.

44. *Id*.

45. Bassett, *supra* note 15, at 655 ("Studies have shown that judges are most likely to recuse themselves from cases involving an actual or suggested financial interest . . . and are far less likely to recuse themselves from matters involving a possible non-financial bias.").

46. *See* Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965) (recognizing that judges have a "duty to sit"); *Chief*

The duty to sit creates a presumption against recusal by requiring an assigned judge "to hear a case unless and until an unambiguous demonstration of extrajudicial bias or prejudice [is] made."[48] Theoretically, judicial adherence to the duty to sit benefits the judicial system by reducing intrusions on other judges and enhancing judicial efficiency.[49] Practically, however, this doctrine has resulted in repeated instances of judges refusing to recuse themselves from cases when their impartiality has been justifiably questioned.[50] Consequently, judicial over-reliance on the duty to sit doctrine has reduced public confidence in the United States' adjudicatory system.[51]

Like the duty to sit, the rule of necessity requires judges to refrain from recusal in situations that would otherwise warrant such action.[52] Unlike the duty to sit, however, the rule of necessity was intended to be used only when no other judge was available.[53] Although this doctrine emerged over five hundred years ago,[54] the Supreme Court has noted that the rule of necessity should continue to serve the valuable purpose of

William's Ghost, *supra* note 13, at 814.

47. *See, e.g.*, United States v. Will, 449 U.S. 200, 217 (1980) (concluding that 28 U.S.C. § 455 does not eliminate the rule of necessity); *see also* Bassett, *supra* note 15, at 682-83.

48. *In re* BellSouth Corp., 334 F.3d 941, 968 (11th Cir. 2003) (Tjoflat, J., dissenting); *see also Chief William's Ghost*, *supra* note 13, at 824-25 (distinguishing between what he terms the "benign" duty to sit from the "pernicious" duty to sit). According to Stempel, "the benign notion of the duty to sit [is understood] as cautioning against recusal simply to avoid a difficult, time-consuming, or politically charged case," whereas the "pernicious" connotation of the duty to sit is understood as "resisting recusal unless the facts of the case force the judge to step aside." *Id.* at 825.

49. Bassett, *supra* note 15, at 682-83 (2005) (quoting Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 604 (1987)).

50. *See, e.g.*, Cheney v. U.S. District Court, 541 U.S. 913 (2004) (Scalia, J., mem.); Microsoft Corp. v. United States, 530 U.S. 1301 (2002) (statement of Rehnquist, C.J.).

51. *See* Bill Mears, *Scalia Won't Recuse Himself from Cheney Case*, CNN JUSTICE, (Mar. 18, 2004) http://articles.cnn.com/2004-03-18/justice/scalia.recusal_1_cheney-case-recuse-scalia-and-cheney?_s=PM:LAW (quoting Senator Leahy as saying, "Instead of strengthening public confidence in our court system, Justice Scalia's decision risks undermining it").

52. *See* United States v. Will, 449 U.S. at 213 ("[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.") (emphasis added).

53. *See id.* at 213-214 (1980); Bassett, *supra* note 15, at 676 (defining the "rule of necessity" as "a common law doctrine permitting a judge with an otherwise disqualifying conflict of interest to hear the case if all other judges are similarly disqualified"); Jeffrey T. Fiut, Comment, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 BUFF. L. REV. 1597, 1637 (2009) (explaining that under the "rule of necessity" doctrine, "[a] judge can sit in a case in which she is interested if there is no other judge available").

54. Bassett, *supra* note 15, at 682-83.

providing litigants with a forum for litigation.[55]

Although there are technical differences between the duty to sit and the rule of necessity, both of these doctrines tend to prevent judicial recusal in situations that would otherwise warrant such action.[56] Consequently, many contemporary judges have continued to invoke these common law principles when justifying nonrecusal.[57] In 1974, Congress attempted to limit judicial reliance on the duty to sit by amending 28 U.S.C. § 455.[58] Although the First Circuit recognized these amendments as abolishing the duty to sit doctrine,[59] many of its fellow circuit courts did not.[60] Moreover, the 1974 amendments failed to eliminate the rule of necessity,[61] which, according to the Model Rules of Judicial Conduct, may "override the rule of disqualification."[62] Thus, despite legislative attempts to limit use of these common law doctrines, the influence of these principles has continued to prevail.

B. Evolution of Judicial Recusal Policy in the United States

Although the first federal judicial recusal policy in the United States

55. *See Will*, 449 U.S. at 217 ("[W]ithout the Rule [of necessity], some litigants would be denied their right to a forum.").

56. *See, e.g.*, Laird v. Tatum, 409 U.S. 824, 837-39 (1972) (Rehnquist, J., mem.) (relying on duty to sit doctrine in denial of respondents' motion to disqualify); *Will*, 449 U.S. at 214 (citing cases in support of the proposition that "the Rule of Necessity has been consistently applied in this country in both state and federal courts").

57. *See, e.g.*, Cheney v. U.S. Dist. Court, 541 U.S. 913 (2004) (Scalia, J., mem.); *Laird*, 409 U.S. 824 (1972) (Rehnquist, J., mem.) (relying on duty to sit doctrine in denial of respondents' motion to disqualify).

58. H.R. REP. NO. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (explaining that the language of the amendment "has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute"); *see* Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980).

59. *See* Waller v. U.S., 504 U.S. 962, 964 (1992) (White, J., dissenting) (advocating grant of certiorari to resolve conflict among the circuits in interpreting statutory recusal provisions where First circuit has concluded that "the language of [28 U.S.C.] § 455(a) . . . did away with the 'duty to sit' doctrine" while other Circuit courts adhere to a contrary approach).

60. *Id.* (indicating that the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits continued to apply the duty to sit in cases not involving an extrajudicial source of bias).

61. *Will*, 449 U.S. at 217 (concluding that 28 U.S.C. § 455 does not eliminate the rule of necessity).

62. MODEL RULES OF JUDICIAL CONDUCT R. 2.11, cmt. 3 (2007). The Rules provide:

> The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

Id.

was codified in 1792, this initial standard applied only to district court judges.[63] Over 150 years later, Congress enacted 28 U.S.C. § 455, a recusal standard applicable to all federal judges—district judges, circuit judges, and United States Supreme Court Justices.[64] Although § 455 has been modified multiple times since its enactment in 1948,[65] this statute nonetheless remains the governing legal standard for federal judicial recusal in the United States.[66]

Initially, § 455 created an expectation for *sua sponte* recusals when a judge's interest in a matter or connection to any party would "render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."[67] Critical of § 455's subjective recusal standard,[68] which established the judge as the arbiter of personal bias or prejudice, the American Bar Association ("ABA") introduced a new standard for recusal in its 1972 Model Code of Judicial Conduct ("Model Code").[69] The ABA's 1972 Model Code provided that "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."[70] Unlike the standard set forth in the original version of § 455, whereby judicial impartiality was to be determined based on a judge's self-assessment, the standard advanced by the 1972 Model Code called for an objective assessment of impartiality from the perspective of a reasonable, disinterested person.[71]

In 1974, Congress amended § 455 by replacing the statute's

63. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792). That statute provided:

> And be it further enacted, that in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.

Id.

64. 28 U.S.C. § 455 (2006).

65. *See* Leubsdorf, *supra* note 39, at 682.

66. 28 U.S.C. § 455.

67. Fiut, *supra* note 53, at 1603.

68. *Id.* (defining subjective recusal standard as "[a] standard that allows a judge to use her discretion and look to her own conscience to determine whether she is biased").

69. H.R. REP. NO. 93-1453, *reprinted in* 1974 U.S.C.C.A.N. 6351 (1974) (detailing the creation of the Model Code, which was unanimously approved by the ABA's House of Delegates to replace the Canons of Judicial Ethics).

70. CODE OF JUDICIAL CONDUCT, Canon 3(C)(1) (1972); *see also* Fiut, *supra* note 53, at 1604.

71. CODE OF JUDICIAL CONDUCT, Canon 3(C)(1) (1972); *see also* Fiut, *supra* note 53, at 1604-05.

subjective recusal standard with the Model Code's objective approach.[72] Additionally, Congress adopted the Model Code's "appearance-of-bias" standard, thereby requiring recusal for both actual and perceived impartiality.[73] Furthermore, the amended statute mandated recusal in specifically-enumerated circumstances, regardless of a judge's impartiality.[74]

The 1974 amendments were triggered in part by then-Associate Justice William Rehnquist's controversial refusal to recuse in *Laird v. Tatum*,[75] after which § 455 became the subject of increased public scrutiny.[76] In *Laird*, respondents moved for Justice Rehnquist to disqualify himself from the proceeding pursuant to 28 U.S.C. § 455.[77] Prior to joining the Court, Justice Rehnquist had testified as an expert witness before the Senate on behalf of the Department of Justice.[78] Both in his testimony before the Senate and on other occasions prior to joining the Court, Justice Rehnquist had expressed views contrary to the position advanced by the respondents in *Laird* regarding executive authority relating to government surveillance.[79] The respondents cited these instances in support of their contention that Justice Rehnquist's impartiality in this matter was "clearly questionable."[80]

In addition to denying respondents' motion, Justice Rehnquist issued a memorandum explaining his refusal to recuse.[81] Applying § 455's subjective recusal standard to himself, Justice Rehnquist simply concluded that he was not biased and, subsequently, that § 455 did not warrant his disqualification in the matter.[82] He then invoked the

72. 28 U.S.C. § 455(a) (2006) (providing that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned"); *see also* Fiut, *supra* note 50, at 1606.

73. 28 U.S.C. § 455(a)-(b) (requiring recusal where a judge's "impartiality might be reasonably questioned" and where a judge actually "has personal bias or prejudice").

74. *See* 28 U.S.C. § 455(b) (requiring disqualification in specifically-enumerated circumstances such as where, for example, a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," § 455(b)(1), or where a judge, in private practice, "served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it," § 455(b)(2)).

75. Laird v. Tatum, 408 U.S. 1 (1972); *see also* Laird v. Tatum, 409 U.S. 824 (1972) (Rehnquist, J., mem.) (explaining his refusal to recuse).

76. Fiut, *supra* note 53, at 1603 ("Rehnquist's failure to recuse himself in *Laird* and the fact that he cast the deciding vote in that controversial case helped persuade Congress to broaden § 455 and codify parts of the ABA Code of Judicial Conduct.").

77. *See Laird*, 409 U.S. at 825 (Rehnquist, J., mem.).

78. *Id.* at 824-25.

79. *Id.* at 826.

80. *Id.* at 825.

81. *Id.* at 824.

82. Laird v. Tatum, 409 U.S. 824, 836 (Rehnquist, J., mem.).

common law doctrines of the duty to sit and the rule of necessity[83] in further support of his decision not to recuse.[84]

Justice Rehnquist described the duty to sit as "even stronger" for members of the Supreme Court than for judges on other courts because of the unique consequences that may arise when a Supreme Court Justice is disqualified.[85] As Justice Rehnquist aptly noted, the absence of even one of the nine Justices increases the possibility of an equally divided Court.[86] Rather than definitively resolving the legal issue in question and announcing a clear legal rule,[87] an equally divided Supreme Court merely affirms the lower court's decision, thus leaving the state of law unsettled.[88]

After refusing to recuse himself in *Laird*, Justice Rehnquist then sided with the five-Justice majority, effectively casting the deciding vote in that case.[89] Although Justice Rehnquist's participation did not violate the then-existing legal standard for recusal under § 455, his actions have been criticized as "lack[ing] the appearance of impartiality necessary to maintain public confidence in the Supreme Court."[90] As such, his conduct contravened the principles set forth in the Model Code.[91]

The controversy surrounding Justice Rehnquist's participation in *Laird* illustrates the conflict that existed between the narrow statutory requirements of § 455 prior to the 1974 amendments and the broad

83. *Rehnquist, Recusal, and Reform*, *supra* note 10, at 605 ("Although Rehnquist's *Tatum* memorandum spoke only of the duty to sit, it invoked portions of the rule of necessity by characterizing the ground for his disqualification as mere aversion to his judicial philosophy, thus implying that his recusal in *Tatum* would subject all judges with views on legal issues to disqualification.").

84. *Laird*, 409 U.S. at 837 (Rehnquist, J., mem.).

85. *Id.* at 837-38.

86. *Id.*

87. Although 5-4 decisions may avoid procedural affirmance of a lower court's decision, a majority decision does not guarantee that the decision provides clear legal guidance. *See* Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1, *available at* http://www.nytimes.com/2010/11/18/us/18rulings.html (commenting on the declining level of clarity in Roberts Court decisions). Recent studies have shown that the Roberts Court's decisions lack clarity, a characteristic often attributed to the Court's desire to achieve unanimity. *Id*. Even Justice Scalia has commented that his brethren's opinions tend to be "opaque," and one federal appellate judge described a recent opinion as "almost aggressively unhelpful." *Id*.

88. *Laird*, 409 U.S. at 837-38 (Rehnquist, J., mem.); *see infra* Section III (discussing functional problems arising from Supreme Court Justices' refusal to recuse).

89. Laird v. Tatum, 408 U.S. 1 (1972) (holding that plaintiff-respondents failed to raise a justiciable controversy); *see* Fiut, *supra* note 50, at 1604.

90. Note, *Justice Rehnquist's Decision to Participate in* Laird v. Tatum, 73 COLUM. L. REV. 106, 124 (1973).

91. *Id.* at 111 (noting that although the Model Code, 28 U.S.C. § 144, and § 7 of the Administrative Procedure Act are not binding on Supreme Court Justices, these provisions nonetheless offer guidance in determining the propriety of a Justice's participation in a case).

ethical principles promulgated by the ABA.[92] In an effort to resolve this tension between the statutory and ethical standards for recusal, Congress amended § 455 in 1974 to make these dual standards "virtually identical."[93]

Despite Congress's efforts in amending § 455, the Supreme Court has attempted to evade the federal recusal standard. In 1993, the Court issued its Statement of Recusal Policy (Statement) in an effort to articulate the Justices' recusal obligations in cases involving their relatives.[94] Specifically, the Statement addressed circumstances in which matters appearing before the Court involved individuals within the specified degrees of relation to a Justice such that recusal would be warranted under § 455(b)(5)(ii).[95] However, as the Statement pointed out, the statutory language of § 455(b)(5)(ii) specifies that recusal is warranted only when the relative "[i]s acting as a lawyer in the proceeding."[96] The statute's use of a present tense verb implies that a relative's involvement at a previous stage of litigation is not sufficient to warrant recusal under the statute.[97]

The Statement also noted that § 455(a)'s standard for recusal is "less specific" than that of § 455(b)(5)(ii).[98] Accordingly, a relative's connection to either a firm or a case does not automatically give rise to a scenario in which the Justice's "impartiality might reasonably be questioned" such that recusal would be required pursuant to § 455(a).[99] Thus, despite the legislature's intent to abolish the duty to sit, the Statement reflected the Court's continued reliance on this concept. Explaining its reluctance to recuse absent "some special factor,"[100] the Court emphasized its unique nature[101] as justifying a less demanding

92. H.R. REP. NO. 93-1453 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352 ("The existence of dual standards, statutory and ethical, . . . has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril.").

93. *Justice Rehnquist's Decision to Participate in* Laird v. Tatum, *supra* note 90, at 111.

94. Statement of Recusal Policy, Supreme Court Release, (Nov. 1, 1993) (on file with author) [hereinafter *Statement of Recusal Policy*].

95. *Id.*

96. 28 U.S.C. § 455(b)(5)(ii) (2006).

97. *Statement of Recusal Policy*, *supra* note 94.

98. *Id.*

99. 28 U.S.C. § 455(a).

100. *Statement of Recusal Policy*, *supra* note 94.

101. *Id.* (describing how the Court's unique nature is affected by recusal). The Statement provides:

> In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of

recusal standard for itself compared to the federal standard codified in § 455.[102]

More recently, however, in 2004, Chief Justice William Rehnquist commented that "each of [the Justices on the Court] strives to abide by the provisions of 28 U.S.C. § 455."[103] Chief Justice Rehnquist's assurance of compliance notwithstanding, the recusal practices of certain Justices in recent years illustrate a continued refusal to recuse.[104] Perhaps the Justices would be less hesitant to recuse if a viable system of substitution were to exist such as that proposed by Senator Leahy.

III. FUNCTIONAL PROBLEMS THAT ARISE FROM JUDICIAL RECUSAL

In *Laird*, Justice Rehnquist pointed out that no system of substitution exists to fill recusal-based vacancies on the Court.[105] Consequently, he explained, "the disqualification of one Justice . . . raises the possibility of an affirmance of the judgment below by an equally divided Court."[106] In instances of 4-4 deadlocks, automatic procedural affirmance of the lower court's decision leaves the state of the law unsettled, which may be especially problematic when the Court has granted certiorari to resolve jurisdictional conflicts.[107]

Significantly, the difficulties surrounding Supreme Court recusal practices, as articulated nearly four decades ago by Justice Rehnquist in *Laird*, continue to persist. There is still no system for "substituting Justices" on the Supreme Court in the same way that lower federal judges may serve as proxies for one another in instances of disqualification.[108] Because of the lack of such a system of substitution, Supreme Court recusals continue to pose the risk of procedural affirmances by an equally divided Court.[109] Furthermore, as Justice

nine.

Id.

102. Bassett, *supra* note 15, at 681 (explaining that "the Supreme Court has made it clear that it has no intention of following the strict proscriptions of section 455, and instead believes that the Court's unique nature justifies a less demanding standard").

103. Letter from William Rehnquist, Chief Justice, United States Supreme Court to Patrick Leahy, United States Senator (Jan. 26, 2004) (on file with author).

104. *See, e.g.*, Cheney v. U.S. Dist. Court, 541 U.S. 913, 926-27 (2004) (Scalia, J., mem.) (denying motion to recuse and noting that, in his opinion, his recusal would "harm the Court"); Microsoft Corp. v. United States, 530 U.S. 1301, 1301-03 (2002) (statement of Rehnquist, C.J.) (declining to recuse himself and explaining, in support of his decision, "the negative impact that the unnecessary disqualification of even one Justice may have upon our Court").

105. Laird v. Tatum, 409 U.S. at 837 (Rehnquist, J., mem.).

106. *Id.* at 837-38.

107. *See Laird*, 409 U.S. at 837.

108. *Id.*

109. *See, e.g.*, Costco Wholesale Corp. v. Omega, 131 S. Ct. 565 (2010) (per curium); Warner-Lambert Co., LLC v. Kent, 552 U.S. 440 (2008) (per curium); Dow Chem. Co. v.

Rehnquist noted, no higher appellate court exists to review an equally divided Court's decision, thus leaving the legal issue in question unresolved.[110] Moreover, when a case is heard by less than the full Court, the absence of one Justice may enhance the effect of the biases among the sitting Justices.[111]

Another problem implicated by Supreme Court recusals involves losing a potential grant of certiorari.[112] According to Supreme Court tradition, the grant of certiorari requires four affirmative votes.[113] Recusal-based abstentions may deprive the petitioner of a potentially affirmative vote, which may thereby prevent the grant of certiorari.[114] As Justice Scalia explained in one of his self-issued[115] denials of a recusal motion: "The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all."[116] Thus, a recusal-based abstention is, in effect, "indistinguishable" from a vote against the grant of certiorari.[117]

Professor Steven Lubet has explored the paradox of what he calls the "certiorari conundrum," which occurs when a Justice's recusal-based abstention "harms the very party it was intended to protect."[118] According to Lubet's statistical analysis, the absence of even one Justice "always reduces the already-slight likelihood of obtaining certiorari."[119] Thus, in some circumstances, as Lubet illustrates, judicial recusal for the

Stephenson, 539 U.S. 111 (2003) (per curium).

110. *Id.* at 837-38.

111. F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 674 n.143 (2009) ("[S]hared biases may actually enhance the strength of a bias through group polarization, especially if no other Justice holds a strongly opposing view.").

112. Bassett, *supra* note 15, at 686.

113. Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 662 n.26 (1996) (explaining that the four vote requirement is rooted solely in tradition and is not imposed by statute).

114. *Id.* at 663.

115. Fiut, *supra* note 53, at 1637 (commenting that the practice of "a judge rul[ing] on her own recusal has become 'one of the most heavily criticized features of United States disqualification law'").

116. Cheney v. U.S. District Court, 541 U.S. 913 (2004) (Scalia, J.) (denying motion to recuse).

117. Lubet, *supra* note 113, at 662.

118. *Id.* at 661.

119. *Id.* at 658, 663. Lubet provides the following illustration:

> [A]ssume a 0.1 probability that any Justice will vote to grant certiorari in any case, and that three already have decided to grant a certain petition. If six Justices are yet to vote, the probability of granting certiorari is .47. With only five remaining Justices, however, the probability of review drops to .41, a difference of .06. This relationship remains constant, although ratios change, for all probabilities less than 1.0.

Id.

purpose of avoiding the appearance of prejudice against the petitioner may result in actual harm to the petitioner (i.e., the denial of certiorari), the party for whom the recusal was intended to protect.[120]

IV. SENATOR LEAHY'S PROPOSAL

In an attempt to remedy some of the problems stemming from the current judicial recusal policy, Vermont Senator Patrick Leahy has proposed a bill that would allow retired Supreme Court Justices to sit in place of recused Justices. Specifically, this legislation would "authorize the designation and assignment of retired justices . . . to particular cases in which an active justice is recused."[121] The bill, which was introduced on September 29, 2010, would amend chapter 13 of title 28,[122] the statute governing the designation and assignment of retired Supreme Court Justices to active duty.[123]

Currently, any retired Supreme Court Justice is permitted to "perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake."[124] The text of 28 U.S.C. § 294(d) explicitly precludes designation or assignment to the Supreme Court.[125] Leahy has publically expressed dissatisfaction with the existing statute, which he believes creates an "ironic"[126] situation whereby "[r]etired Justices may be designated to sit on any court in the land except the one to which they were confirmed."[127]

Leahy's proposed amendment seeks to resolve this purported irony by extending statutory permission to any willing retired Justice "to serve as a justice on the Supreme Court of the United States."[128] For a retired Justice to be designated or assigned to the Supreme Court, Leahy's proposal requires: (1) that "an active justice is recused from that case"[129]

120. *Id.* at 661-62.
121. S. 3781, 111th Cong. (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).
122. *Id.*
123. 28 U.S.C. § 294(a).
124. 28 U.S.C. § 294(a) states in full: "Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake."
125. *Id.* § 294(d) ("No such designation or assignment shall be made to the Supreme Court.").
126. David Ingram, *Leahy Introduces Bill to Allow Retired Justices to Serve*, THE BLT: THE BLOG OF LEGAL TIMES (Sept. 29, 2010, 3:25 PM), http://legaltimes.typepad.com/blt/2010/09/leahy-introduces-bill-to-allow-retired-justices-to-serve.html.
127. *Id.*
128. S. 3781, 111th Cong. § 1 (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).
129. *Id.*

and (2) that "a majority of active justices vote to designate and assign that retired Chief or Associate Justice."[130] Except as provided by the proposed amendments to this section, 28 U.S.C. § 294(d) would continue to prohibit designation or assignment to the Supreme Court.[131]

A. Constitutionality of Senator Leahy's Proposal

Leahy's proposal raises three major constitutional concerns: (1) whether Congress possesses the authority to enact this legislation; (2) whether this legislation violates the Appointments Clause of Article II; and (3) whether this legislation runs counter to the doctrine of separation of powers. Although Duke University Law Professor Paul Carrington has suggested that Leahy's proposal will likely pass constitutional muster,[132] careful analysis of the proposed legislation is necessary to ensure its constitutionality.

1. Congressional Authority

Congress derives its authority from Article I of the Constitution, which permits Congressional action only if such action is expressly or impliedly authorized in the Constitution.[133] In *McCulloch v. Maryland*,[134] the Supreme Court broadly construed Congress's power, thereby authorizing Congress to carry out its lawful authority through any means not prohibited by the Constitution.[135] Accordingly, Leahy's legislative proposal likely falls within the scope of Congress's constitutional authority under the Necessary and Proper Clause.[136] Yet, even if Congress possesses the power to pass Leahy's proposal, the law itself must not violate any constitutional precepts or principles.[137]

130. *Id.*

131. *Id.* (proposing the following language: "Except as provided under subsection (a)(2), no designation or assignment under this section shall be made to the Supreme Court.").

132. *Should Retired Justices Be Called Back to the Supreme Court?*, *supra* note 1.

133. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

134. McCulloch v. Maryland, 17 U.S. 316 (1819).

135. Interestingly, as Stempel points out, "Chief Justice John Marshall arguably violated even the most narrow disqualification norms of his time by acting as a judge in his own case, albeit one in which his involvement was personal and ideological rather than financial." *Chief William's Ghost*, *supra* note 13, 837-38.

136. *See* U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution"); U.S. CONST. art. II, § 2.

137. McCulloch v. Maryland, 17 U.S. at 423 (asserting the Court's "painful duty" to strike down unconstitutional legislation).

2. Appointments Clause

On its face, the text of this legislation necessarily implicates the Appointments Clause of Article II.[138] The mechanism for selecting a substitute Justice under Leahy's proposal, which allows the active Justices to select the recused Justice's replacement,[139] may infringe upon the President and the Senate's constitutionally-defined roles in the judicial appointment process.[140] Yet, because all potential substitutes are retired Justices, they have already been nominated and confirmed pursuant to the appointment process of Article II.[141] Furthermore, if the substitute Justices are considered inferior officers rather than principal officers,[142] then Congress may lawfully vest the appointment power of such officers to the Supreme Court.[143] Thus, the first inquiry is whether a retired Supreme Court Justice who is filling a recusal-based vacancy is a principal officer or an inferior officer.[144]

Although the Supreme Court has failed to explicitly define either principal officer or inferior officer,[145] the Court's limited Appointments Clause jurisprudence provides some guidance for distinguishing these two types of officers. Historically, the Court has examined the officer's

138. U.S. CONST. art. II, § 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id. at cl. 1-2. Section 2 further provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id*. at cl. 3.

139. *See* S. 3781, 111th Cong. § 1 (as referred to S. Comm. on the Judiciary, Sept. 29, 2010) (requiring that "a majority of active justices vote to designate and assign that retired Chief or Associate Justice").

140. U.S. CONST. art. II, § 2.

141. *Id*.

142. Morrison v. Olson, 487 U.S. 654, 670 (1988) (explaining that "the Constitution for purposes of appointment . . . divides all its officers into two classes" (internal citations omitted)).

143. *Id.* (comparing the appointment process of principal officers, who are "selected by the president with the advice and consent of the Senate," with that of inferior officers, who "Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary") (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976)).

144. *Id*. at 670-71 (1988) (noting that "[t]he initial question is, accordingly, whether appellant is an 'inferior' or a 'principal' officer").

145. United States v. Edmond, 520 U.S. 651, 661-62 (1997) (noting that "Morrison did not purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause. To the contrary, it explicitly stated: 'We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view [the independent counsel] clearly falls on the 'inferior officer' side of that line.'") (citing Morrison v. Olson, 487 U.S. at 671).

status or rank vis-à-vis a superior,[146] the extent of the officer's duties, the duration of the officer's service, and the circumstances under which the officer has been appointed.[147] If an officer is subordinate to or subject to removal by a superior, has limited duties or jurisdiction, has limited tenure, and is appointed under special or unique circumstances, the Court will likely conclude that such an officer is inferior.[148] Accordingly, Congress may lawfully vest the authority for appointing such an officer within the purview of the Court.[149]

After weighing these factors in *United States v. Eaton*,[150] the Court determined that a "vice consul" appointed by the executive during the consul's temporary absence was properly categorized as an inferior officer because he was "charged with the performance of the duty of [a] superior for a limited time[,] and under special and temporary conditions."[151] Similarly, in *Morrison v. Olson*,[152] the Court concluded that a specially-appointed independent counsel[153] was an inferior officer because she was subject to removal by a higher-ranking executive branch official (in this case the Attorney General),[154] she was empowered to

146. *Id.* at 662-63. In Edmond, the Court further explains:

> Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Id.

147. *Morrison*, 487 U.S. at 672 (asserting that "factors relating to the 'ideas of tenure, duration . . . and duties' . . . are sufficient to establish that appellant is an 'inferior' officer in the constitutional sense").

148. *See id*.

149. U.S. CONST. art. II, § 2.

150. United States v. Eaton, 169 U.S. 331 (1898).

151. *Id.* at 343.

152. *Morrison*, 487 U.S. 654 (1988).

153. The statute at issue in *Morrison*, Title VI of the Ethics in Government Act of 1987, provided for the appointment of an independent counsel by the Special Division, a court consisting of three circuit court judges, one of whom must be a judge of the United States Court of Appeals for the District of Columbia Circuit and no two of whom were to be from the same court. *Id.* at 661 n.3. Pursuant to this statute, the role of independent counsel was to "investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws." *Id.* at 660.

154. *Id.* at 671 (noting that although "appellant may not be 'subordinate' to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree 'inferior' in rank

perform only limited duties,[155] her office was limited in jurisdiction,[156] and her tenure was limited.[157]

The language of Article II explicitly references "Judges of the [S]upreme Court," thus seemingly conferring principal status upon the Justices.[158] However, the substitute Justices created by Leahy's legislation may be appropriately categorized as inferior officers because of the brevity and infrequency of their role in the overall functioning of the Court and because of their limited involvement in specific, discrete matters.[159]

According to Leahy's proposal, a substitute Justice would be called upon only when an active Justice is disqualified,[160] thus limiting the substitute's jurisdiction and tenure to the scope and duration of the particular matter for which substitution is requested. Similar to the vice consul in *Eaton*, a substitute Justice under Leahy's proposal would be "charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions. . . ."[161] Thus, as in *Eaton*, the mere performance of a principal officer's duties in a limited and temporary capacity would not thereby "transform" the substitute Justice into "the superior and permanent official."[162] Yet, a recused Justice would still maintain the status of a superior officer within the meaning of the Constitution (i.e., principal officer) in the same way that the consul in *Eaton* remained a superior officer during his temporary absence, despite the appointment of a vice-consul.[163]

A substitute Justice's decision-making authority, however, should not be considered subordinate to that of an active Justice. Although the *Edmond* Court suggested that a relationship of this nature is a requisite component of the superior-inferior officer dynamic,[164] such a relationship

and authority").

155. *Id.* ("An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes.").

156. *Id.* at 672 ("[A]n independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General.").

157. *Morison*, 487 U.S. at 672. ("[T]he office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division.").

158. U.S. CONST. art. II, § 2.

159. S. 3781, 111th Cong. (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).

160. *Id.*

161. United States v. Eaton, 169 U.S. U.S. 331 (1898).

162. *Id.*

163. The language of Article II explicitly references "Consuls" and "Judges of the supreme Court," thus conferring principle status upon them. *See* U.S. CONST. art. II, § 2.

164. Edmond v. United States, 520 U.S. at 663 (defining inferior officers as "officers whose work is directed and supervised at some level by others who were appointed by

in the context of the composition of the Supreme Court would frustrate the purpose of Leahy's legislation by denying the substitute Justices the very decision-making authority with which these proxies have been vested.

Furthermore, the substitute Justices should not be considered "subordinate" to the active members of the Court because, like the independent counsel in *Morrison*, the substitutes have independent discretion with which to carry out their responsibilities.[165] While serving as proxies, the substitute Justices should be considered equal to the active Justices with regard to their decision-making authority and the respect that these Justices warrant. Yet, the substitute Justices will remain inferior to the current members of the Court in terms of "rank and authority,"[166] and, like the independent counsel in *Morrison*, are thus properly categorized as inferior officers.

In contrast to the independent counsel in *Morrison* who was considered inferior in "rank and authority" because she was subject to removal by the Attorney General,[167] the substitute Justices are not subject to removal by any individual active Justice.[168] In fact, Leahy's proposal is silent as to any removal process for the substitutes.[169] However, the substitute Justices may be viewed as inferior in "rank and authority" to the active Justices collectively because a majority of active Justices controls which proxy is selected.[170]

Moreover, the substitute Justices are inferior to the active Justices in "rank and authority" because, ultimately, the substitutes are still retired, even if they occasionally sit as proxies; thus, they have less overall influence in the aggregate of the current Court's decisions. In light of the *Morrison* Court's reasoning, perhaps a more nuanced assessment of this relationship is that the substitute Justices are inferior only when considering the Court as a whole but not to any individual active Justice. Thus, the active Justices, both sitting and recused, collectively possess a higher degree of "rank and authority" compared to the retired Justices, even when a retired Justice serves as a proxy.

Based on the foregoing analysis, the policy of allowing the active

Presidential nomination with the advice and consent of the Senate").

165. Morrison v. Olson, 487 U.S. 654, 671 (1988).

166. *Id.*

167. *Id.* (explaining that "the fact that she can be removed by the Attorney General indicates that she is to some degree 'inferior' in rank and authority").

168. *See* S. 3781, 111th Cong. (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).

169. *Id*.

170. *Id.* (providing that "a majority of active justices vote to designate or assign" the substitute Justice).

Justices to vote[171] on which retired Justice will act as a proxy in a given case would not violate the Appointments Clause because the Judiciary has the power, pursuant to the Constitution, to appoint inferior officers.[172] Due to the increasing frequency of recusals,[173] however, these substitute Justices may arguably assume more than a sporadic role on the Court.

The regularity with which retired Justices may have the opportunity to reappear as voting members of the Court may worry some opponents of Leahy's plan.[174] Yet, even regular substitution of a retired Justice would not transform the substitute into a principal officer[175] because a substitute is not charged with assuming the full range of duties of an active Justice. Thus, Leahy's legislation does not violate the Appointments Clause by depriving the President and the Senate of their constitutionally-required roles because the substitute Justices that are selected by the Court are not principal officers.

Moreover, Leahy's proposal merely enables the Justices to "designate and assign" the substitute Justices, not to "appoint" them.[176] In fact, Leahy's proposal is void of any variant of the word "appoint."[177] Leahy seems to be skirting the Appointments Clause issue simply by avoiding any language of appointment in his carefully crafted statutory proposal, a tactic that the Court has accepted in the past.[178] Similar to the Uniform Code of Military Justice at issue in *Edmond*, from which the word "appointment" was also "conspicuously absent,"[179] Leahy's

171. *Id.*

172. *See* U.S. CONST. art. II, § 2.

173. Justice Elena Kagan has already recused herself from nearly half of the cases that the Supreme Court is scheduled to hear this term. *See* Editorial, *Recusals and the Court*, N.Y. TIMES, Oct. 7, 2010, *available at* http://www.nytimes.com/2010/10/08/opinion/08fri1.html (calculating Kagan's expected recusal rate as 25 out of 51 cases); *see also* Bill Mears, *New Supreme Court Term Begins: Kagan to Recuse from Dozens of Cases*, (Oct. 4, 2010), http://articles.cnn.com/2010-10-04/politics/scotus.new.term_1_military-funerals-westboro-baptist-church-fred-phelps?_s=PM:POLITICS (estimating that Kagan will recuse herself from at least 24 of the of the 52 cases on the Court's docket).

174. Robert Barnes, *A Deep Bench of Substitute Justices Goes Unused*, WASH. POST, Aug. 9, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/08/AR2010080802629.html (postulating that because the current pool of retirees, including Justices Stevens, O'Connor, and Souter, are all "to the left of the [C]ourt's dominant conservatives," many conservatives may oppose Leahy's proposal. As Hofsta Professor of Law James Sample stated, "It's so difficult to divorce discussion of the proposal from the individual [J]ustices who might end up replacing the recused [J]ustices.").

175. United States v. Eaton, 169 U.S. 331, 343 (1898).

176. S. 3781.

177. *Id.*

178. *See* Edmond v. United States, 520 U.S. 651, 657 (1997).

179. *Id.*

proposal uses the language of "assignment" rather than "appointment." As noted by the *Edmond* Court, "[t]he difference between the power to 'assign' officers to a particular task and the power to 'appoint' those officers is not merely stylistic."[180]

Statutory language of appointment invokes the Appointments Clause. Accordingly, a statute including language of appointment must be in conformity with the constitutional requirements set forth in Article II. Language of assignment, however, does not require the same degree of constitutional analysis as that of appointment.[181] A statutory scheme through which previously-appointed officers are assigned rather than appointed does not necessitate an Appointments Clause analysis.

In *Weiss v. United States*,[182] for instance, the Court upheld a statute that enabled previously-appointed military officers to be assigned as military judges.[183] Like the officers in *Weiss*, retired Supreme Court Justices have been properly appointed pursuant to the Appointments Clause of Article II. In upholding the constitutionality of the statute at issue in *Weiss*, the Court relied heavily on the military officers' prior appointment, noting that "allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question."[184] Similarly, because Leahy's proposal merely enables the assignment of previously-appointed officers, this legislation does not violate the Appointments Clause.

3. Separation of Powers

The final inquiry with regard to the constitutionality of Leahy's legislation is whether this proposal violates the separation of powers principles that undergird the Constitution.[185] These principles reflect the Framer's desire to avoid the concentration of power in a single governmental authority[186] and thereby prevent the threat of tyranny.[187]

180. *Id.*

181. *Id.* at 657-58 (citing Weiss v. United States, 510 U.S. 163, 172 (1994) ("Congress repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior officer.")).

182. Weiss v. United States, 510 U.S. 163 (1994).

183. *Weiss*, 510 U.S. at 176.

184. *Id.* 510 U.S. at 170 n.4. The *Weiss* Court also cited the military officers' active duty status in addition to the officers' prior appointment as an additional justification for upholding the statute. *Id.* at 170.

185. Morrison v. Olson, 487 U.S. at 697-98 (Scalia, J., dissenting) ("The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles.").

186. *Id.* 699 (Scalia, J., dissenting) ("The allocation of power among Congress, the

Thus, the Framers established a tripartite system of government consisting of three distinct branches of government—the legislative, the executive, and the judicial—each of which is simultaneously subordinate and superior to the others.[188]

Using the separation of powers doctrine as their framework, the Framers effectuated an enduring system of checks and balances by vesting limited and overlapping authority in three separate governmental subdivisions.[189] Pursuant to the parameters defined in the Constitution,[190] each branch serves a unique governmental function, and no branch may encroach upon the province of another.[191] This constant tension between the legislative, executive, and the judicial branches of government has helped to preserve the structure of United States government.

Because separation of powers principles continue to remain the bedrock of contemporary United States government,[192] Leahy's legislation raises critical separation of powers concerns. Assessing whether Leahy's proposed system disrupts the balance of governmental power involves a dual inquiry: (1) whether the process of assigning and

President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish-so that 'a gradual concentration of the several powers in the same department,' Federalist No. 51, p. 321 (J. Madison), can effectively be resisted.").

187. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." (quoting Myers v. United States, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting))).

188. Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.").

189. United State v. Mistretta, 488 U.S. 361, 381 (1989) ("Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence. . . ."); United States v. Nixon, 418 U.S. 683 (1974) (quoting 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.") (internal quotation marks omitted)).

190. *Humphrey's Executor*, 295 U.S. at 629-630, ("So much is implied in the very fact of the separation of the powers of these departments by the Constitution . . . .").

191. *Id.* at 630 ("James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.'").

192. Morrison v. Olson, 487 U.S. at 698 (Scalia, J., dissenting) ("Without a secure structure of separated powers, our Bill of Rights would be worthless. . . .").

designating substitute Justices is an exercise of purely executive or legislative power and (2) whether the proposed legislation deprives the either the executive or legislative branch of exclusive control over the exercise of a constitutionally-vested power.[193] Because neither inquiry yields an affirmative response,[194] Leahy's legislation does not violate the principles of separation of powers.

Justice Scalia applied this dual inquiry in his dissenting opinion in *Morrison*.[195] He concluded that the Ethics in Government Act violated separation of powers principles because (1) the statute authorized the special prosecutor to engage in the exercise of purely executive power and (2) the special prosecutor's authority encroached upon the President's exclusive control over the exercise of his constitutionally-vested power.[196] In contrast to Scalia's assessment of the power to prosecute at issue in *Morrison*,[197] the power to assign and designate is not a power exclusively vested in another branch.[198] Although the power to assign and designate is not constitutionally vested in any of the three branches,[199] statutory authority has long permitted chief judges and justices to assign and designate other judges to fill judicial vacancies.[200] Because Leahy's proposed system of judicial substitution neither allows the Judiciary to impermissibly appropriate the power of another branch nor permits another branch to confer its constitutionally designated authority to the judiciary, the proposal does not violate the principles of separation of powers.

Moreover, Leahy's proposal may actually further the functional

193. *Id.* at 705.

194. *Id.* (explaining that a violation of separation of powers principles requires both questions to be answered affirmatively).

195. *Id.*

196. *Id.*

197. Although the Morrison majority agreed that "the functions performed by the independent counsel [we]re 'executive,'" the Court failed to regard the special prosecutor's exercise of authority as interfering with the President's exercise of executive power. *Morrison*, 487 U.S. at 691.

198. *See* U.S. CONST. arts. I-III (failing to vest the power to assign and designate exclusively within any of the three branches).

199. *See id.*

200. 28 U.S.C. § 291(a)-(b) (2006). Sections (a) and (b) respectively provide as follows:

> The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit.
>
> The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

Id.

goals of separation of powers. In *Mistretta v. United States*,[201] the Court applied a pragmatic approach[202] to separation of powers when it upheld the constitutionality of the Sentencing Reform Act of 1984, a statute that established the United States Sentencing Commission "as an independent commission in the judicial branch of the United States" tasked with promulgating federal sentencing guidelines.[203] The *Mistretta* Court concluded that the statute did not impermissibly delegate legislative power to the judicial branch because the non-delegation doctrine did not prohibit Congress from enlisting assistance from the other two branches.[204]

In considering the permissibility of Congress's delegation of power to the Judiciary, the *Mistretta* Court applied the intelligible principles test established by Chief Justice Taft:

> So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[205]

The Court also analogized the statute at issue to the various other enabling acts through which Congress has delegated rulemaking authority to the Judiciary.[206]

Additionally, in further support of its decision, the *Mistretta* Court cited *Chandler v. Judicial Council*,[207] a case in which the Court upheld a statute permitting the Judiciary to "make 'all necessary orders for the effective and expeditious administration of the business of the courts.'"[208] By recognizing Congress's need to delegate "nonadjudactory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary,"[209] the *Mistretta* Court adopted a practical approach to separation of powers.[210]

201. Mistretta v. United States, 488 U.S. 361 (1989).

202. Eric R. Glitzenstein & Alan B. Morrison, *The Supreme Court's Decision in* Morrison v. Olson*: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359, 373 n.83 ("In *Mistretta*, the Court again reaffirmed its pragmatic approach to the separation of powers doctrine.").

203. *Mistretta*, 488 U.S. at 368 (citing the language of the statute at issue, 28 U.S.C. § 991(a)).

204. *Id.* at 372.

205. *Id.* (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

206. *Id.* at 388.

207. Chandler v. Judicial Council, 398 U.S. 74 (1970).

208. *Id.* at 86 n.7.

209. *Mistretta*, 488 U.S. at 388.

210. *Id.* at 372 (noting that Supreme Court "jurisprudence has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives").

Accordingly, Leahy's proposal furthers the functional goals of separation of powers in that it merely provides the mechanism for the Supreme Court to select the substitute Justices.[211] The selection of a substitute Justice from a pool of Supreme Court retirees is akin to an administrative task necessary for the proper operation of the Court. Requiring Congress to choose a substitute would likely overburden the Legislature with a task that is well within the purview of the Court. Additionally, the proposed legislation contains sufficient intelligible principles as to the operation of the selection process so as to pass muster under Justice Taft's intelligible principles test.[212]

The goal of separation of powers is to prevent the concentration of power in one branch.[213] Leahy's proposal allows a majority of the active Justices to reshape the composition of the Court for a given case if there is a recusal-based vacancy.[214] Yet, although this proposal vests a considerable amount of power in the Court, this power is limited because all of the substitutes among whom the active Justices are choosing have already gone through the process of nomination and confirmation.[215] As retirees, each of the possible substitutes has been previously approved by the two other branches of government to serve on the Court. Consequently, because retired Justices have already been appointed in accordance with the constitutional requirements, the balance of powers between the branches remains intact.

B. Desirability of Senator Leahy's Proposal[216]

Senator Leahy believes that his proposed legislation will remedy many of the problems that stem from the Court's current judicial recusal practices.[217] Creating a policy for judicial replacement in the event of recusal would ideally encourage Justices to recuse themselves when they should, thus eliminating the perception of judicial impropriety resulting from the refusal to recuse.[218] By codifying a practical and straightforward procedure for judicial substitution, Leahy hopes that Justices will "feel free to recuse themselves when they have a conflict in

211. S. 3781, 111th Cong. (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).
212. *Mistretta*, 488 U.S. at 372.
213. *Id.* at 381-82.
214. S. 3781.
215. *Id.*
216. Leahy's proposal may prove to be more financially sound than other proposals because retired Justices remain on the government's payroll. *See* 28 U.S.C. § 371 (2006). However, this Section of the Comment is limited solely to the functional and procedural advantages of Leahy's legislation. Any potential financial benefits of Leahy's proposed system of substitution may require further analysis.
217. *Should Retired Justices Be Called Back to the Supreme Court?*, *supra* note 1.
218. Barnes, *supra* note 174.

a specific case."[219]

This legislation would effectively render obsolete the frequently-invoked common law justifications for refusing to recuse. The duty to sit and the rule of necessity would no longer remain valid grounds for denial of recusal motions because Leahy's substitution system provides litigants with available alternative judges[220] and thus a forum for litigation. Furthermore, not only may Justices feel more inclined to recuse themselves when their impartiality has been reasonably questioned, but litigants may also feel more comfortable questioning judicial impartiality knowing that this judicial proxy system will prevent the possibility of an equally divided Court.

Moreover, this system of substitution will help avoid the practical problems that arise from judicial recusal such as procedural affirmances, which prevent the clear resolution of legal issues. Under Leahy's proposal, a substitute Justice's vote would necessarily preclude procedural affirmances by an equally divided Court.

Because use of this policy is limited to circumstances involving recusal of an active justice,[221] it will not be employed as a means of filling permanent vacancies on the Court.[222] According to Professor Howard J. Bashman, such use could pose separation of powers concerns by "diminish[ing] the pressure on the Senate to promptly confirm a replacement."[223] Consequently, such a policy would undermine the important process of judicial confirmation. Similarly, Bashman's argument likely applies to diminished pressure on the executive to promptly nominate a replacement.

Although carefully crafted, Leahy's proposal is not without flaws. Because the substitute Justices are chosen only from retired Supreme Court Justices,[224] Leahy's proxy system would be impracticable if there were no living or competent retired Justices. Additionally, although Leahy's proposal details the mechanism for assigning substitute Justices,[225] he fails to provide any procedure for the removal of substitutes. Removal may be necessary in circumstances where, after a

219. *Id.*

220. *See* S. 3781, § 1(2).

221. S. 3781, § 1(2) (requiring the recusal of "any active justice" as the threshold condition before invoking this system of judicial substitution).

222. Howard J. Bashman, *Avoiding Recusal-Based Tie Votes at the U.S. Supreme Court*, LAW.COM (March 4, 2008), http://www.law.com/jsp/article.jsp?id=1204544938947.

223. *Id.*

224. S. 3781, § 1 (limiting designation and assignment to "retired Chief Justice[s] or Associate Justice[s]").

225. *Id.* ("[A] majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice.").

competent retired Justice is assigned, the proxy becomes physically or mentally incapacitated during the course of that substitute's temporary tenure.[226]

In spite of its shortcomings, Leahy's proposed system for substituting Justices is desirable because it furthers the Court's role of providing clear legal rules and resolving jurisdictional conflicts.[227] Not only will this system of substitution likely increase judicial integrity, but it will also increase the perception of judicial integrity and enhance public confidence in the judicial system. Even in circumstances when a judicial proxy cannot be successfully employed, the mere codification of such a system would serve as a testament to the People's demand for an impartial Court.[228]

V. OTHER SOLUTIONS

Although Leahy's proposal has been the subject of much recent attention, systems of judicial substitution are not uncommon.[229] Section 294 of the Judicial Code provides the rules governing the assignment and designation of retired district court judges, circuit court judges, and Supreme Court Justices to active duty.[230] Specifically, as Leahy has pointed out in defense of his legislation, "retired [J]ustices . . . can sit on any federal court, except the [C]ourt to which they were confirmed."[231] Additionally, many state constitutional or state statutory provisions authorize the assignment of state court judges to other state courts.[232]

226. Although removal power implications may be of interest, such implications are not explored in this Comment and may require further study.

227. F. Andrew Hessick, *supra* note 111, at 695-700 (explaining how one's understanding of the Court's proper role in society directly affects one's view as to the ideal size of the Court). This concept could similarly be applied to one's attitude toward recusal policy. Those who believe the more significant function of the Court is to provide clear legal rules may be more inclined to favor Leahy's legislation than those who believe that the Court's primary function should be to reach the "correct" answer. Ideally, the Court's decisions should be both clear and correct. Although assessing clarity tends to be objective, determining the "correctness" of a Court-issued decision is subjective because such a determination depends on one's approach to constitutional interpretation. *Id.*

228. According to one commentator, public opinion of the Court has recently declined because the Justices are viewed as partisan and not impartial. *See* Editorial, *Ethics, Politics and the Law*, N.Y. TIMES, July 1, 2011, at A22.

229. Lubet, *supra* note 113, at 662 n.78.

230. *See* 28 U.S.C. § 294 (2006).

231. Barnes, *supra* note 174.

232. Lubet, *supra* note 113, at 674 (citing examples of states that provide for "the temporary replacement of a disqualified Justice"). According to Lubet, California, Delaware, Georgia, Idaho, Kentucky, New Jersey, New Mexico, Texas, and Utah have constitutional provisions allowing for such a temporary replacement include, whereas Indiana, Nevada, South Carolina, and South Dakota have enacted similar statutory provisions. *Id.*

Similar systems of judicial substitution also exist in several jurisdictions outside of the United States.[233]

In addition to the federal, state, and foreign models of judicial substitution, scholars and academics have proposed other possible solutions to the problems created by recusal-based vacancies on the United States Supreme Court. One option is to include all lower federal judges in the pool of possible substitutes. By expanding the pool of potential proxies, Leahy's proposal would no longer be rendered impracticable in the absence of competent and willing retired Justices. However, a significant objection to this option would be that district court judges often have little, if any, federal appellate experience. Yet, this objection is routinely overlooked when district court judges sit by designation at the circuit court level as provided by Section 294.

Accordingly, Professor Bashman has suggested a mechanism through which the replacement Justice would "be randomly selected from among all non-recused [federal] circuit judges in regular active duty."[234] Yet, any proposal that expands the pool of substitute Justices to anyone other than retired Supreme Court Justice may face constitutional challenges under the Appointments Clause, which Leahy's proposal manages to avoid. Supreme Court Justices are nominated and confirmed by the executive and legislative branches, respectively.[235] They derive their authority through these processes. Any proxy Justice on the High Court who has not gone through the appointment process would lack the requisite authority and credibility of an active or retired Supreme Court Justice.

Assuming that retired Justices are the proper pool of individuals from whom to choose, the question remains as to who or what is the proper individual or entity to select the substitute. Under Leahy's proposal, the nine active Justices of the current court choose the substitute through a majority vote.[236] Another option is to allow the recused Justice to pick the substitute, although such a model would undermine the purpose and effect of the recusal itself. The recused Justice would likely hand-pick the retiree most likely to vote in alignment with how the recused Justice would have voted. Thus, the recused Justice would be essentially voting by proxy. Another similar option would be to allow the Chief Justice to choose the substitute, but

233. Abimbola A. Olowofoyeku, *Regulating the Supreme Court*, 2006 SING. J. LEGAL STUD. 60, 82 (2006) (noting the existence of judicial substation provisions in Canada, New Zealand, and South Africa).

234. Bashman, *supra* note 222.

235. U.S. CONST. art. II, § 2.

236. S. 3781, 111th Cong. § 1 (as referred to S. Comm. on the Judiciary, Sept. 29, 2010).

that approach would effectively give the Chief Justice two votes.[237] Perhaps a better option would be for the parties to agree on the substitute akin to the process of selecting a mediator in alternative dispute resolution.

Another alternative is simply to do nothing and maintain the status quo. A strict formalist would likely argue that a 4-4 deadlock resulting in a procedural affirmance is preferable to a 5-4 decision wherein the deciding vote has been cast by a substitute Justice.[238]

Under Leahy's plan, the composition of the Court would be subject to change within any given term. According to Professor Sample, conservatives remain skeptical of Leahy's proposal because the three living retired Justices are left-leaning.[239] Thus, the substitution of any one of them may result in more "liberal" decisions. Sample has proposed creating a plan for judicial substitution now but postponing implementation of that plan for several years so that "the replacement pool would likely be different."[240] The legislation may have more success in Congress if the Republican legislators do not feel threatened by the return of left-leaning Justices who tend to vote against Republican Party interests.[241]

VI. CONCLUSION

Recusal-based vacancies on the Supreme Court are problematic, but judicial refusal to recuse is even more troubling. Rather than serving as an exemplar of proper judicial recusal practices, the Supreme Court has carved out its own exceptions to the federal recusal standard. In its 1993 Statement of Recusal Policy, the Court indicated that its unique nature justifies a less demanding standard than that which governs all other federal judges. The governing federal recusal standard aims to prevent both actual and perceived impartiality. Consequently, judicial refusal to recuse, especially when endorsed by the highest Court, undermines the integrity of the American adjudicatory system by decreasing public confidence in the Judiciary.

In denying recusal motions, Supreme Court Justices have often cited the functional problems that result from Supreme Court recusals such as the possibility of 4-4 deadlocks and procedural affirmances. Senator

237. Barnes, *supra* note 174.

238. Orrin Hatch, a Republican Senator from Utah and former Chair of the Senate Judiciary Committee, fails to recognize the practical problems created by the Court's current judicial recusal practices. *Leahy Introduces Bill to Allow Retired Justices to Serve*, *supra* note 123. According to Hatch, "A tie vote is still a result." *Id.*

239. Barnes, *supra* note 174.

240. *Id.*

241. *Id.*

Leahy's proposed legislation provides a viable solution to these problems by creating a mechanism for judicial substitution. Allowing retired Supreme Court Justices to sit in place of recused Justices eliminates the possibility of procedural affirmances by an equally divided Court. Thus, if Leahy's proposal is adopted Justices may be more inclined to recuse themselves when they should. At the very least, however, Leahy's proposal would invalidate the frequently-invoked justifications for non-recusal.

Although not flawless, Senator Leahy's proposed bill will likely pass constitutional muster. First, Congress possesses the authority to enact such legislation pursuant to the Necessary and Proper Clause. Second, Leahy's proposed legislation will not violate the Appointments Clause. The substitute Justices created by Leahy's legislation are appropriately categorized as inferior officers because of the brevity and infrequency of their role in the overall functioning of the Court and because of their limited involvement in specific, discrete matters. Not only may Congress lawfully delegate the authority for appointing inferior officers, but the Judiciary also has the power, pursuant to the Constitution, to appoint them. Additionally, because Leahy's legislation merely enables the assignment of previously-appointed officers, it does not violate the Appointments Clause.

Finally, Leahy's proposal does not contravene the principles of separation of powers. His proposed system of judicial substitution does not allow the Judiciary to impermissibly appropriate the power of another branch nor does the legislation permit another branch to confer its constitutionally-designated authority to the judiciary.

Leahy's proposed legislation provides a realistic solution to the problems created by recusal-based vacancies. Although this system of substitution does not work in every conceivable scenario, it is preferable to other possible alternatives and should be fully endorsed. Ideally, Leahy's proposal will be the next step in the long-evolving policy of judicial recusal.