

creases police effectiveness by earning the community's trust.<sup>83</sup> By contrast, the racial composition of a fire department is largely irrelevant to its ability to protect the public from fire. Instead, a compelling interest would seemingly need to be found in something more abstract, such as developing role models for aspiring firefighters. A Court supportive of the colorblind Constitution is unlikely to expand its recognition of compelling interests to that degree.<sup>84</sup>

*Ricci* thus leaves the Court in a difficult position. To find Title VII's disparate impact provisions unconstitutional would be a bold step indeed — both the Supreme Court and Congress “have approved of disparate-impact liability, cementing its legitimacy over almost forty years.”<sup>85</sup> Indeed, critics could easily declare an opinion that struck down Title VII's disparate impact provisions to be a modern incarnation of *Lochner v. New York*,<sup>86</sup> “in which the Court overrode democratic judgments in favor of a dubious understanding of the Constitution.”<sup>87</sup> And yet to rule otherwise would seriously compromise the Court's colorblind equal protection jurisprudence. The Court cannot be eager to confront either alternative. In the end, only one thing seems clear: the day on which “the war between disparate impact and equal protection [is] waged”<sup>88</sup> will be bloody.

### B. Foreign Sovereign Immunities Act

*Iraqi Sovereign Immunity.* — As amended in 1996, the Foreign Sovereign Immunities Act of 1976<sup>1</sup> (FSIA) limited the sovereign immunity from suit in United States courts of nations designated as state sponsors of terrorism. In April 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act<sup>2</sup> (EWSAA), which in part authorized the President to “make inapplicable with respect to Iraq [any] provision of law that applies to countries that have supported terrorism.”<sup>3</sup> President Bush exercised that authority to its fullest extent in May 2003.<sup>4</sup> In 2004, then-Judge Roberts disagreed with a hold-

<sup>83</sup> See *Petit*, 352 F.3d at 1115 (recognizing diversity among police sergeants as compelling “in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city”).

<sup>84</sup> Indeed, the Court has already rejected such a “role model” theory as too indefinite. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion).

<sup>85</sup> Brief for Respondents, *supra* note 67, at 50.

<sup>86</sup> 198 U.S. 45 (1905) (holding that “liberty of contract” was implicit in the Due Process Clause of the Fourteenth Amendment).

<sup>87</sup> Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 247 (2008).

<sup>88</sup> *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

<sup>1</sup> Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602–1611 (2006)).

<sup>2</sup> Pub. L. No. 108-011, 117 Stat. 559 (2003).

<sup>3</sup> *Id.* § 1503, 117 Stat. at 579.

<sup>4</sup> Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003).

ing of the D.C. Circuit in *Acree v. Republic of Iraq*<sup>5</sup> that the President did not have authority under EWSAA to waive the FSIA's terrorism exception to sovereign immunity with respect to Iraq.<sup>6</sup>

Last Term, in the consolidated cases of *Republic of Iraq v. Beatty* and *Simon v. Republic of Iraq*,<sup>7</sup> the Supreme Court reversed the U.S. District Court for the District of Columbia's decision to follow *Acree*, holding that the EWSAA did authorize the President to restore Iraq's sovereign immunity and that his exercise of that authority withdrew federal court jurisdiction over pending cases against Iraq. Given the procedural posture of *Beatty*, now-Chief Justice Roberts's participation in hearing the case may at first appear easy to defend. However, the Court's review of *Beatty* was little more than a belated review of *Acree*, and the Chief Justice approached the boundary of appropriate recusal practice by participating in a de facto review of his own prior decision. Although the Chief Justice's involvement in *Beatty* was probably proper, it does raise questions about the Court's recusal practices.

In general, the FSIA denies United States courts jurisdiction to entertain actions against foreign sovereigns.<sup>8</sup> The history of the FSIA's application to Iraq is tangled. In 1990, the administration of President George H.W. Bush designated Iraq as a state sponsor of international terrorism.<sup>9</sup> In 1996, Congress amended the FSIA to recognize a limited exception to the sovereign immunity of nations so designated.<sup>10</sup> As part of the United States's change in diplomatic stance toward Iraq following Saddam Hussein's fall from power in 2003, Congress enacted section 1503 of the EWSAA, which authorized the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990: . . . Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."<sup>11</sup> In May 2003, President Bush exercised that authority to its utmost extent.<sup>12</sup>

In 2004, a panel of the Court of Appeals for the D.C. Circuit ruled in *Acree* that the proviso of EWSAA section 1503 did not authorize the

<sup>5</sup> 370 F.3d 41 (D.C. Cir. 2004).

<sup>6</sup> See *id.* at 60 (Roberts, J., concurring in part and concurring in the judgment).

<sup>7</sup> 129 S. Ct. 2183 (2009).

<sup>8</sup> See 28 U.S.C. § 1604 (2006).

<sup>9</sup> Public Notice 1264, 55 Fed. Reg. 37,793 (Sept. 13, 1990).

<sup>10</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7) (2006)), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44.

<sup>11</sup> Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003) (emphasis omitted).

<sup>12</sup> Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003) (making "inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism").

President to waive the exception to sovereign immunity contained in 28 U.S.C. § 1605(a)(7).<sup>13</sup> In *Acree*, plaintiffs brought suit against Iraq for injuries arising from their ill treatment as prisoners of war in the first Gulf War.<sup>14</sup> The panel majority reasoned that the reference to the Iraq Sanctions Act of 1990<sup>15</sup> (ISA) in section 1503's principal clause limited the subsequent proviso's reference to "any other provision of law" to only certain laws.<sup>16</sup> In turn, the ISA referred only to those "provisions of law that *impose sanctions* against" sponsors of terrorism, and the panel determined that this category did not include the jurisdictional provisions of the FSIA.<sup>17</sup> Then-Judge Roberts dissented from this view but agreed with the majority's dismissal of the case for want of a cause of action.<sup>18</sup>

Like *Acree*, *Beaty* and *Simon* involved actions against Iraq brought in early 2003 by victims of alleged abuse inflicted by the Saddam Hussein regime in the 1990s.<sup>19</sup> The district court refused to dismiss either *Simon* or *Beaty* on jurisdictional grounds<sup>20</sup> but dismissed the *Simon* respondents' claims on the grounds that they were time-barred.<sup>21</sup>

In *Beaty*, Iraq invoked the collateral order doctrine<sup>22</sup> to support an interlocutory appeal of the district court's denial of Iraq's motion to dismiss.<sup>23</sup> On appeal, the full D.C. Circuit denied Iraq's request to re-

<sup>13</sup> *Acree v. Republic of Iraq*, 370 F.3d 41, 43 (D.C. Cir. 2004).

<sup>14</sup> *Id.* at 43–44.

<sup>15</sup> Pub. L. No. 101-513, § 586–586J, 104 Stat. 1979, 2047–54.

<sup>16</sup> *Acree*, 370 F.3d at 54 (quoting EWSAA § 1503, 117 Stat. at 579).

<sup>17</sup> *Id.* (emphasis added) (quoting EWSAA § 586F(c), 104 Stat. at 2051).

<sup>18</sup> *Id.* at 60 (Roberts, J., concurring in part and concurring in the judgment). Iraq's success in having these claims dismissed precluded it from seeking Supreme Court review of the majority's holding regarding the scope of the President's EWSAA waiver authority. *See Beaty*, 129 S. Ct. at 2187.

<sup>19</sup> The *Simon* respondents were captured and held hostage by Iraqi officials in 1990–91. *See Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 14–15 (D.D.C. 2006), *rev'd sub nom. Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008). The *Beaty* respondents' fathers, Kevin Beaty and William Barloon, were captured and held hostage by Iraqi officials in 1993 and 1995, respectively. *See Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 62–63 (D.D.C. 2007).

<sup>20</sup> *Beaty*, 480 F. Supp. 2d at 70 (citing *Acree*, 370 F.3d at 51); *Vine*, 459 F. Supp. 2d at 19.

<sup>21</sup> *See Vine*, 459 F. Supp. 2d at 25.

<sup>22</sup> The collateral order doctrine allows appellate review of interlocutory orders that "(i) 'conclusively determine the disputed question'; (ii) 'resolve an important issue completely separate from the merits of the action'; and (iii) [would] 'be effectively unreviewable on appeal from a final judgment.'" *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

<sup>23</sup> *See Beaty*, 129 S. Ct. at 2188. The United States also supported the request as *amicus curiae*. *See id.*

consider the holding of *Acree* en banc.<sup>24</sup> A panel then summarily affirmed the denial of Iraq's motion to dismiss.<sup>25</sup>

The *Simon* respondents appealed the trial court's decision that their claims were time-barred. After the *Simon* appeal had been briefed and argued, but while the appeal was still pending, Congress enacted the National Defense Authorization Act for Fiscal Year 2008<sup>26</sup> (NDAA).<sup>27</sup> Section 1083 of the NDAA (i) repealed the § 1605(a)(7) terrorism exception;<sup>28</sup> (ii) replaced it with a new one to be codified at 28 U.S.C. § 1605A;<sup>29</sup> (iii) asserted that “[n]othing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of [FSIA], or the removal of the jurisdiction of any court of the United States”;<sup>30</sup> and (iv) authorized the President to waive any provision of section 1083 with respect to Iraq.<sup>31</sup> After receiving supplemental briefing on the NDAA's impact on the case, the D.C. Circuit reversed the district court's determination that the *Simon* respondents' claims were time-barred,<sup>32</sup> and held that “the NDAA leaves intact [federal court] jurisdiction over cases . . . that were pending against Iraq when the Congress enacted the NDAA.”<sup>33</sup>

The Supreme Court reversed the D.C. Circuit's decisions in both *Beaty* and *Simon*. Writing for a unanimous Court, Justice Scalia reasoned by way of syllogism: The EWSAA section 1503 proviso authorized the President to “make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism.”<sup>34</sup> One provision of law applying to such countries is 28 U.S.C. § 1605(a)(7). Thus, the President's May 2003 exercise of the full authority granted him under section 1503 restored Iraq's sovereign immunity from suit.<sup>35</sup>

Then-Judge Roberts had articulated this “straightforward” construction of section 1503 in his *Acree* concurrence,<sup>36</sup> and after adopting

<sup>24</sup> *Beaty v. Republic of Iraq*, No. 07-7057 (D.C. Cir. filed Nov. 21, 2007) (order denying motion for initial hearing en banc). Judges Brown and Kavanaugh would have granted the petition for initial hearing en banc. *Id.*

<sup>25</sup> *Beaty v. Republic of Iraq*, No. 07-7057 (D.C. Cir. filed Nov. 21, 2007) (order granting motion for summary affirmance).

<sup>26</sup> Pub. L. No. 110-181, 122 Stat. 3.

<sup>27</sup> *Simon v. Republic of Iraq*, 529 F.3d 1187, 1189 (D.C. Cir. 2008).

<sup>28</sup> NDAA § 1083(b)(1)(A)(iii), 122 Stat. at 341.

<sup>29</sup> *Id.* § 1083(a), 122 Stat. at 338-41.

<sup>30</sup> *Id.* § 1083(c)(4), 122 Stat. at 343.

<sup>31</sup> *Id.* § 1083(d), 122 Stat. at 343-44.

<sup>32</sup> *Simon*, 529 F.3d at 1194-96.

<sup>33</sup> *Id.* at 1194.

<sup>34</sup> Pub. L. 108-011, § 1503, 117 Stat. 559, 579 (2003).

<sup>35</sup> *Beaty*, 129 S. Ct. at 2189.

<sup>36</sup> See *Acree v. Republic of Iraq*, 370 F.3d 41, 60 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

his reasoning, the Court's opinion focused primarily on the defects in the *Acree* majority's construction. Justice Scalia described the *Acree* majority's "highly sophisticated effort to construe the proviso as a limitation upon the principal clause" as "neither necessary nor successful."<sup>37</sup> Acknowledging that the "general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality,"<sup>38</sup> the Court stated that "[this] office is not, alas, [a proviso's] exclusive use,"<sup>39</sup> and the proviso to section 1503 "was not, on any fair reading, an exception to, qualification of, or restraint on the principal [clause]."<sup>40</sup> Rather, it "purported to grant [the President] an *additional* power."<sup>41</sup> The Court took further issue with *Acree*'s reliance on the absence of any reference to the FSIA in the EWSAA's legislative history: "[T]he whole value of a generally phrased residual clause . . . is that it serves as a catchall for matters not specifically contemplated . . ."<sup>42</sup> Though conceding that it could not "say with any certainty . . . whether the Congress that passed the EWSAA *would have wanted* the President to be permitted to waive § 1605(a)(7)," the Court declared itself "wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law's true purpose."<sup>43</sup>

The Court made short work of respondents' alternative argument that the scope of the waiver authority granted by the proviso should be limited to "section 620A of the Foreign Assistance Act or any other provision of law cited therein," calling it "an absurd reading, not only textually but in the result it produces."<sup>44</sup> Justice Scalia also quickly disposed of the effect of NDAA section 1083, writing that because "the President was given authority to 'waive any provision of [section 1083]

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<sup>37</sup> *Beatty*, 129 S. Ct. at 2190.

<sup>38</sup> *Id.* (quoting *United States v. Morrow*, 266 U.S. 531, 534 (1925)) (internal quotation marks omitted).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; *see also id.* (describing Congress's occasional use of a proviso "to state a general, independent rule" (quoting *Alaska v. United States*, 545 U.S. 75, 106 (2005)) (internal quotation marks omitted)). Then-Judge Roberts also noted this distinction in his *Acree* concurrence. *See Acree*, 370 F.3d at 63 (Roberts, J., concurring in part and concurring in the judgment) ("I can respond with a case of similar vintage for the opposite proposition that 'a frequent use of the proviso in Federal legislation [is] to introduce . . . new matter extending rather than limiting or explaining that which has gone before.'" (alteration and omission in original) (quoting *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25, 37 (1904))).

<sup>42</sup> *Beatty*, 129 S. Ct. at 2191.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2192. The Court also noted that respondents' invocation of the canon against implied repeals was mistaken, because "Iraq's construction of the statute neither rest[ed] on implication nor effect[ed] a repeal." *Id.*

with respect to Iraq,”<sup>45</sup> and he “proceeded to waive ‘all’ provisions of that section as to Iraq,” the NDAA could “add nothing to [the Court’s] analysis.”<sup>46</sup>

After deciding that the President’s 2003 EWSAA waiver included § 1605, the Court adopted then-Judge Roberts’s reasoning in *Acree* to support its holding that the waiver was effective with respect to cases pending at that time.<sup>47</sup> Rather than merely removing Iraq’s status as a state sponsor of terrorism, which would have left intact jurisdiction in cases — such as *Beaty* and *Simon* — arising out of acts occurring while Iraq was so designated,<sup>48</sup> the President’s waiver made the exception inapplicable to Iraq.<sup>49</sup> Quoting then-Judge Roberts’s *Acree* concurrence, the Court noted that this result was not perplexing: “Congress in 2003 ‘for the first time’ confronted the prospect that a friendly successor government would, in its infancy, be vulnerable . . . to crushing liability for the actions of its renounced predecessor.”<sup>50</sup>

While the cases involved different underlying facts and different sets of plaintiffs, the Supreme Court’s decision in *Beaty* was in nearly all respects a belated review of the D.C. Circuit’s decision in *Acree*. The Court’s opinion specifically refers to the *Acree* decision no fewer than ten times during its substantive discussion; in the same discussion, the decisions of the lower courts in *Beaty* and *Simon* are not referenced once. Moreover, the procedural posture of the consolidated cases in *Beaty* made it clear *ex ante* that the validity of *Acree* would be the major issue to be resolved by the Court. Thus, although Chief Justice Roberts’s participation in *Beaty* did not run afoul of the well-settled norm that a Justice should refrain from hearing appeals in cases he decided as a member of a lower court,<sup>51</sup> it nonetheless offers

<sup>45</sup> *Id.* (quoting National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. 3, 343).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2193–94.

<sup>48</sup> See 28 U.S.C. § 1605(a)(7) (2006).

<sup>49</sup> See *Beaty*, 129 S. Ct. at 2193–94.

<sup>50</sup> *Id.* at 2193 (quoting *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment)). Like then-Judge Roberts in *Acree*, the Court also reasoned that (i) “[l]aws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases,” *id.* at 2194, and (ii) the events at issue in the case occurred before the enactment of the FSIA terrorism exception — the President’s 2003 waiver of the exception “could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts,” *id.* See *Acree*, 370 F.3d at 64–65 (Roberts, J., concurring in part and concurring in the judgment).

<sup>51</sup> See *Laird v. Tatum*, 409 U.S. 824, 830 (1972) (Rehnquist, J.) (order denying motion to recuse) (“And it has always seemed to the Court that when a . . . judge could not sit in a case because of his previous association with it, . . . it was our manifest duty to take the same position.” (quoting *To Change the Quorum of the Supreme Court of the United States: Hearing on H.R. 2808 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 78th Cong. 24 (1943) (statement of

an opportunity to consider the wisdom of drawing a bright line for Supreme Court recusal to include only such cases.

As the Court's opinion made abundantly clear, the principal issue in *Beatty* was whether the D.C. Circuit in *Acree* correctly construed EWSAA section 1503. In fact, *Acree*'s prominent role was apparent even before the consolidated cases were briefed and argued; *Beatty* came to the Court on summary affirmation only after the full D.C. Circuit denied Iraq's motion to reconsider the holding of *Acree* en banc,<sup>52</sup> and the panel in *Simon* relied explicitly on Congress's ratification of the *Acree* holding to support its decision that the NDAA left intact jurisdiction over pending cases.<sup>53</sup> In its petitions for certiorari, Iraq relied heavily on then-Judge Roberts's opinion in *Acree*.<sup>54</sup> Moreover, after the Court granted certiorari in the consolidated cases, Iraq and both respondents devoted pages in their merit briefs to attacking or supporting, respectively, the *Acree* majority's EWSAA holding.<sup>55</sup> Thus, the Chief Justice had ample notice that *Beatty* would turn primarily on whether the Court agreed with *Acree*.

Supreme Court Justices are subject to fewer constraints concerning recusal decisions than federal judges sitting on lower courts. For example, both the Code of Conduct for United States Judges and Canon 3 of the ABA Model Code of Judicial Conduct are applicable by their terms only to "judges."<sup>56</sup> Indeed, 28 U.S.C. § 47, which dictates that "[n]o judge shall hear or determine an appeal from the decision of a

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Chief Justice Stone)) (internal quotation marks omitted). For example, Chief Justice Burger and Justices Stewart, Harlan, and Scalia have all recused themselves from proceedings concerning cases they had previously considered as circuit court judges. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 609 n.73 (1987).

<sup>52</sup> Indeed, in its brief to the district court in *Beatty*, Iraq recognized that *Acree* was controlling and "ask[ed] only that the Court 'render a ruling . . . so that defendant may . . . seek further review . . . before the *en banc* D.C. Circuit or the Supreme Court.'" *Beatty v. Republic of Iraq*, 480 F. Supp. 2d 60, 70 (D.D.C. 2007) (quoting Defendant's Combined Opposition to Plaintiff's Motion for Partial Summary Judgment and Reply in Support of Motion to Dismiss at 10, *Beatty*, 480 F. Supp. 2d 60 (No. 1:03-CV-00215(JDB)), 2006 WL 5691585).

<sup>53</sup> See *Simon v. Republic of Iraq*, 529 F.3d 1187, 1193 (D.C. Cir. 2008).

<sup>54</sup> See Petition for Writ of Certiorari at 29–34, *Beatty*, 129 S. Ct. 2183 (2009) (No. 08-539), 2008 WL 4678679; Petition for Writ of Certiorari at 2, 17–21, *Beatty*, 129 S. Ct. 2183 (2009) (No. 07-1090), 2008 WL 488002.

<sup>55</sup> See Brief for Respondents Jordan Beatty et al., *Beatty*, 129 S. Ct. 2183 (2009) (Nos. 07-1090 & 08-539), 2009 WL 740762; Brief for Respondents Robert Simon et al., *Beatty*, 129 S. Ct. 2183 (2009) (Nos. 07-1090 & 08-539), 2009 WL 1615356; Brief for Petitioners, *Beatty*, 129 S. Ct. 2183 (2009) (Nos. 07-1090 & 08-539), 2009 WL 434719.

<sup>56</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES 1 (2009), available at [http://www.uscourts.gov/library/codeOfConduct/Code\\_Effective\\_July-01-09.pdf](http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf); MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2004), available at [http://www.abanet.org/cpr/mcjc/canon\\_3.html](http://www.abanet.org/cpr/mcjc/canon_3.html); see also Stempel, *supra* note 52, at 603–04 & n.56 (noting that "Justice Rehnquist was only legally obliged to follow the statute prevailing at the time," *id.* at 603, but finding "no logical reason for Justices not to conform their conduct to the Code [of Judicial Conduct,] . . . so long as the Code provisions fall within the zone of rationality," *id.* at 604 n.56).

case or issue tried by him,” applies only to circuit court judges.<sup>57</sup> However, 28 U.S.C. § 455 does apply to judges and Justices alike: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned.”<sup>58</sup> The statutory standard for recusal — if the Justice’s “impartiality might reasonably be questioned” — certainly supports drawing the line for Supreme Court recusal to include cases in which the Justice has already participated; if the impartiality of an appellate judge is deemed by statute to be reasonably questionable in cases the judge decided as a district judge,<sup>59</sup> it would seem to follow that the same is true for that of a Supreme Court Justice in cases the Justice decided as a circuit judge. And modern Court recusal practices indicate that the Justices would agree. The question remains: should *Beatty* fall inside the line?

Recusal policies are typically motivated by a desire to prevent a judge’s potential biases from influencing the outcome of a case and to prevent the public perception that such partiality might be at work.<sup>60</sup> Although *Republican Party of Minnesota v. White*<sup>61</sup> did not directly concern recusal, the Court in that case discussed at length the concept of judicial impartiality.<sup>62</sup> In *White*, the Court considered three possi-

<sup>57</sup> 28 U.S.C. § 47 (2006). Justice Holmes took advantage of a similar loophole in an earlier iteration of the statute when he voted in at least four Supreme Court decisions reviewing cases he decided as a justice on the Massachusetts Supreme Judicial Court. See Stempel, *supra* note 52, at 608 (noting that “[b]y today’s law and mores, Justice Holmes’ conduct is improper, although perhaps not illegal”).

<sup>58</sup> 28 U.S.C. § 455(a) (emphasis added). Nonetheless, as illustrated by controversial recusal decisions in recent decades, the established practice of allowing each Justice to decide his own recusal motions can prevent § 455 from having much bite at the Supreme Court level. See, e.g., *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004) (Scalia, J.) (order denying motion to recuse) (defending Justice Scalia’s decision to participate despite his having vacationed with Vice President Cheney while the case was before the Court); *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J.) (order denying motion to recuse) (defending Justice Rehnquist’s decision to participate despite his having commented negatively on the merits of the case while testifying before a Senate subcommittee in his previous role as a Justice Department official); see also Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 194–95 (2005). Indeed, commentators have argued that some Justices “have attempted to rewrite the statutory language to change ‘might’ to ‘would.’” Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 675 (2005) (citing MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 9.06, at 242–43 (3d ed. 2004)).

<sup>59</sup> See 28 U.S.C. § 47.

<sup>60</sup> See Bassett, *supra* note 59, at 657; see also *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262–64 (2009) (discussing cases and explaining the distinction between actual bias and circumstances that lead to an appearance of bias). Recusal standards do not require actual bias to merit recusal, and this comment does not argue that Chief Justice Roberts suffered from any actual bias in deciding *Beatty*.

<sup>61</sup> 536 U.S. 765 (2002).

<sup>62</sup> See *id.* at 775–81. The Court in *White* considered whether promoting judicial impartiality — as a means of protecting litigants’ due process rights and preserving public confidence in the



ble meanings of impartiality: (i) “the lack of bias for or against either party to the proceeding”;<sup>63</sup> (ii) the “lack of preconception in favor of or against a particular legal view”;<sup>64</sup> and (iii) a “willing[ness] to consider views that oppose [one’s legal] preconceptions, and remain open to persuasion, when the issues arise in a pending case.”<sup>65</sup>

Taking a cue from the Court’s opinion in *White*, one can separate the judicial biases that might arise in a case like *Beatty* into those pertaining to the parties and those pertaining to the legal issues. The first category focuses on real or perceived biases arising out of prior relations with the parties or knowledge of related facts from extrajudicial sources.<sup>66</sup> Because Iraq did not appear before the D.C. Circuit in *Acree*, Chief Justice Roberts had no prior relations, indeed no direct interaction, with the parties in *Beatty*.<sup>67</sup> However, the Chief Justice’s role in *Acree* is slightly more problematic in the context of extrajudicial knowledge of the facts relevant to the Court’s decision in *Beatty*. A Justice reviewing a case like *Beatty* might be privy to information that he heard in the prior case but that is not relevant to the pending case. This information may play a role — possibly a subconscious one — in the Justice’s decision to vote a certain way and yet be absent from the resulting opinion.<sup>68</sup>

The second category concerns real or perceived biases with respect to the legal issues involved in the case, and it applies with more force in *Beatty*. As noted in *White*, some degree of predisposition regarding legal outcomes is unremarkable and even desirable; after all, it is the job of Justices and judges alike to have legal opinions.<sup>69</sup> However,

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courts — was a compelling state interest, justifying the abridgement of a judicial candidate’s First Amendment freedom of speech. *See id.* at 774–81.

<sup>63</sup> *Id.* at 775. The Court called this type of impartiality “essential to due process.” *Id.* at 776 (citing, *inter alia*, *Tumey v. Ohio*, 273 U.S. 510, 523, 531–34 (1927)).

<sup>64</sup> *Id.* at 777. The Court called this type of impartiality “neither possible nor desirable.” *Id.* at 778.

<sup>65</sup> *Id.* at 778. The Court did not say whether ensuring this type of impartiality was a compelling state interest, but did allow that “[i]t may well be that impartiality in this sense . . . [is] desirable.” *Id.*

<sup>66</sup> *See, e.g.*, *Liteky v. United States*, 510 U.S. 540, 554–55 (1994) (discussing permissible and impermissible types of knowledge from extrajudicial sources); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (holding that a judge could not preside over a contempt proceeding because of the severity of prior clashes between the judge and the defendant).

<sup>67</sup> In *Beatty*, Iraq did not appear to appeal the default judgment entered against it. Rather, the United States intervened on Iraq’s behalf. *See* Petition for Writ of Certiorari at 7, *Beatty*, 129 S. Ct. 2183 (2009) (No. 07-1090), 2008 WL 488002.

<sup>68</sup> *Cf.* RICHARD A. POSNER, *HOW JUDGES THINK* 69–76 (2008) (discussing subconscious biases, including judicial omission of relevant facts to shape a decision’s precedential effect). This concern will arise not only when the cases involve a common party and similar facts, but also when the cases involve merely similarity of parties and facts. *Cf. id.* at 69 (discussing the subconscious effect of prior interactions with similar parties when a judge makes a witness credibility determination). However, commonality of parties could result in a greater risk of perceived bias.

<sup>69</sup> *See White*, 536 U.S. at 778; Stempel, *supra* note 52, at 612–13.

threats to the third type of impartiality discussed in *White* — what the Court termed “openmindedness”<sup>70</sup> — are more troublesome. For instance, a Justice may be moved by a desire to seek vindication of his previous performance.<sup>71</sup> Moreover, even if a Justice has no conscious desire to see his prior decision upheld, the very fact of having previously decided the question leaves the Justice vulnerable to confirmation bias — “the well-documented tendency, once one has made up one’s mind, to search harder for evidence that confirms rather than contradicts one’s initial judgment.”<sup>72</sup> Even a Justice fully and consciously committed to giving a case like *Beatty* a fresh look may not be capable of doing so.<sup>73</sup> Thus, this type of subconscious bias suggests that the Justices should be wary of participating in cases, like *Beatty*, where such unfelt biases are likely to play a role. Finally, the Justice’s participation in the present case could influence the deliberation of the other Justices, particularly if the Justice’s reversal aversion, conscious or otherwise, moves him to voice his opinions more emphatically.

Broadening the rule for Supreme Court recusal to include cases like *Beatty* would come at a cost, however. To a much greater extent than lower court judges, Supreme Court Justices are selected precisely because of the views they held and opinions they expressed prior to their appointment.<sup>74</sup> Recusal of a Justice necessarily requires the loss of a distinctive voice in the resolution of important issues. Moreover, unlike circuit court judges, Supreme Court Justices cannot be replaced once disqualified.<sup>75</sup> Thus, recusal has significant ramifications for certiorari decisions<sup>76</sup> and the Court’s ability to settle divisive issues. An eight-member Court raises the specter of a 4–4 decision, which has the effect of affirming the appellate court without setting binding precedent.<sup>77</sup> Though *Beatty* was decided unanimously, if the Chief Justice had recused himself and the other Justices had split — an easily imaginable occurrence given the current Court’s proclivity for 5–4 decisions<sup>78</sup> — then the issue of Iraq’s immunity from suit would have

<sup>70</sup> *White*, 536 U.S. at 778.

<sup>71</sup> Cf. POSNER, *supra* note 69, at 70–71 (discussing “reversal aversion” among lower court judges).

<sup>72</sup> *Id.* at 111 & n.42 (citing studies).

<sup>73</sup> See Bassett, *supra* note 59, at 668 (“[P]eople who claim, and honestly believe, they are not prejudiced may nevertheless harbor unconscious stereotypes and beliefs.”).

<sup>74</sup> See *id.* at 690–91; see also POSNER, *supra* note 69, at 277–78 (discussing the confirmation process in the context of the Court’s role as a “political court,” *id.* at 269).

<sup>75</sup> See Bassett, *supra* note 59, at 686.

<sup>76</sup> See generally Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657 (1996) (describing the probabilistic effect of recusal on the Court’s certiorari decisions).

<sup>77</sup> See *Laird v. Tatum*, 409 U.S. 824, 837–38 (1972) (Rehnquist, J.) (order denying motion to recuse).

<sup>78</sup> See *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 388 (2009).

likely remained unsettled indefinitely. In addition, Chief Justice Roberts's dissent in this Term's *Caperton v. A.T. Massey Coal Co.*<sup>79</sup> decision raised the counterintuitive concern that expanding the standards for recusal could decrease the public's confidence in judicial impartiality by increasing the permissible opportunities for alleging judicial bias.<sup>80</sup> At the least, this concern supports construing any *Beatty*-inspired expansion of Supreme Court recusal standards narrowly — every member of the current Court is a former court of appeals judge<sup>81</sup> and, in that role, is likely to have decided issues of colorable similarity to many, if not all, of those they must consider as Justices.

Supreme Court recusal standards must strike a delicate balance between efficient administration of justice and the preservation of the Court's legitimacy among the public. By declining to participate in cases they decided as judges on lower courts, the Justices foster the appearance of openmindedness on the part of the Court as a whole and avoid the appearance of bias toward the parties. However, when, as in *Beatty*, the danger of partiality with respect to the parties is less severe, recusal may not be justified by reference to openmindedness alone. Otherwise, recusal would arguably follow any time a Justice considered an issue he or she had previously decided, and the administration of justice would be unacceptably hampered. Thus, despite the potential for impropriety, Chief Justice Roberts's participation in *Beatty* was likely proper. Nonetheless, the principles behind the Court's recusal practices require that the Justices be particularly cognizant of threats to openmindedness in future cases like *Beatty*.

### C. *Hawaii Apology Resolution*

*Alienation of Hawaiian Land.* — In recent years, the United States has apologized for some of the unfortunate aspects of its history. Since 1988, Congress has passed resolutions apologizing for the internment of Japanese-Americans,<sup>1</sup> for the U.S. role in overthrowing the Kingdom of Hawaii,<sup>2</sup> and for slavery and racial segregation.<sup>3</sup> A proposed congressional apology to Native Americans has yet to gather sufficient

<sup>79</sup> 129 S. Ct. 2252 (2009).

<sup>80</sup> See *id.* at 2267 (Roberts, C.J., dissenting); see also Stempel, *supra* note 52, at 595–96 (discussing the notion of a “judicial ‘duty to sit’ in close cases to prevent the disqualification law from being abused,” *id.* at 595). But see Bassett, *supra* note 59, at 672–73 (arguing that “Congress eliminated . . . the ‘duty to sit’ doctrine in 1974” by amending 28 U.S.C. § 455, *id.* at 673).

<sup>81</sup> POSNER, *supra* note 69, at 134.

<sup>1</sup> Act of Aug. 10, 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903–04 (codified at 50 U.S.C. app. § 1989a(a) (2006)). The apology also included a payment of \$20,000 to internees who were still alive. *Id.* § 105(a)(1), 102 Stat. at 905–06 (codified at 50 U.S.C. app. § 1989b-4(a)(1)).

<sup>2</sup> Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1513.

<sup>3</sup> S. Con. Res. 26, 111th Cong. (2009) (enacted); H.R. Res. 194, 110th Cong. (2008) (enacted).