ARTICLE

RECUSAL LEGISLATING: CONGRESS'S ANSWER TO INSTITUTIONAL STALEMATE

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Americans have grown accustomed to, but no less tired of, congressional gridlock. Although the Framers intentionally designed a system that would make lawmaking difficult, they did so with an eye toward ensuring broad consensus before policy enactment. There are times, however, when organizational structures and norms combine with electoral constraints and ambitions to create legislative stalemate despite widespread agreement on not only the need to act, but also on the substance of the necessary policy. These occasions rightfully spark frustration from both inside and outside Congress. Yet it has gone largely unnoticed that, recognizing this problem, Congress has devised a mechanism for overcoming deadlock by "recusing" itself from particular areas of policy development. In these cases, Congress combines delegation of substantial policymaking authority to a non-administrative agency with expedited congressional consideration of the delegatee's self-effectuating proposal. Drawing on three contrasting examples, this Article creates a framework for understanding the concept of recusal legislating. It identifies the key motivations and benefits of recusal legislating and considers the device's role in resolving future legislative impasses.

I. INTRODUCTION

"If pro is the opposite of con, what's the opposite of progress? Congress." This old joke taking aim at America's legislative branch holds some truthful bite. One need only compare the laundry list of campaign promises made during an election season to the actual laws enacted during a congressional session to understand why the joke endures. Too often, on too many issues, the federal lawmaking process grinds to a halt, as legislative action succumbs to congressional inaction. Progress is lost to Congress.

Voters are not the only ones who are frustrated by congressional stalemate;[1] lawmakers also want legislative success.[2] Although what prevents action is often substantive disagreement about the necessity or substance of a proposed law, stalemate sometimes occurs despite widespread agreement on the need for, and substance of, a given policy. In these instances, it is con-

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[1] *See, e.g.*, Jeffrey M. Jones, *Perceived Inaction Largely Behind Low Ratings of Congress*, GALLUP NEWS SERVICE, Feb. 5, 2007, http://www.gallup.com/poll/28600/perceived-inaction-largely-behind-low-ratings-congress.aspx.

[2] *See, e.g.*, William Anderson et al., *The Keys to Legislative Success in the U.S. House of Representatives*, 28 LEGIS. STUD. Q. 357, 359–60 (2003).

gressional structures, institutional norms, and electoral constraints that prevent action.

To a large extent, the blame for these barriers rests with our Constitution. The Constitution promises citizens a strong representative voice in government and identifies Congress as the "grand depository of the democratic principle of the government."[3] Delegates at the Constitutional Convention reached this result despite the serious doubts many of them harbored about the role American citizens needed to play in the new nation's governance.[4] Partly to assuage these concerns, the Framers intentionally created a system that made national legislating difficult—to avoid, in the words of James Madison, the "facility and excess of law-making" that "seem to be the diseases to which our governments are most liable."[5]

However, when drafting the Constitution, the Framers were also responding to the inefficiencies and ineffectiveness of Congress under the Articles of Confederation.[6] One of the primary purposes of the Framers was to create an active and effective legislature that would act when broad support for a measure existed.[7] When the system prevents legislation *despite* broad consensus and extensive debate, the disease requiring a remedy is no longer the excess of lawmaking, but its absence.[8] As many scholars have noted, the system of government ordained by the Constitution sometimes discourages lawmaking in the national interest, instead creating an incentive for each legislator to vote for the benefit of her particular district, even if doing so

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[3] NEIL MACNEIL, FORGE OF DEMOCRACY 2 (1963) (quoting George Mason).

[4] *See, e.g.*, THE FEDERALIST NO. 63, at 362 (James Madison) (Kathleen M. Sullivan ed., 2009) (the Senate is "such an institution that may be sometimes necessary, as a defence to the people against their own temporary errors and delusions"); THOMAS E. PATTERSON, THE AMERICAN DEMOCRACY 439 (1990); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 48 (Max Farrand ed., 1966) [hereinafter 1 RECORDS] (Robert Sherman stating: "The people . . . want [for] information and are constantly liable to be misled"); *id.* (Eldridge Gerry referring to the people as "dupes of pretended patriots"); *id.* at 514 (Gouverneur Morris stating: "We should remember that the people never act from reason alone. The rich will take advantage of their passions and make these the instruments for oppressing them"); GARY WASSERMAN, THE BASICS OF AMERICAN POLITICS 42 (9th ed. 2000); STEPHEN J. WAYNE ET AL., THE POLITICS OF AMERICAN GOVERNMENT 466 (2d ed. 1997).

[5] THE FEDERALIST NO. 62, at 357 (James Madison) (Kathleen M. Sullivan ed., 2009).

[6] *See Proceedings of Commissioners to Remedy Defects of the Federal Government* (Sept. 14, 1786), http://avalon.law.yale.edu/18th_century/annapoli.asp. *See generally* 1 1787: DRAFTING THE U.S. CONSTITUTION 84–157 (Wilbourn E. Benton ed., 1986) (providing Convention notes discussing the weaknesses of the Articles of Confederation).

[7] *See, e.g.*, 1 RECORDS, *supra* note 4, at 449 (James Madison speaking of giving the government "sufficient energy").

[8] Scholars have devoted considerable attention to the defects of our constitutionally-prescribed legislative structure and tradition-driven congressional norms. *See, e.g.*, ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2002); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006); *see also* Symposium, *The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 B.U. L. REV. 331 (2009).

results in harm to the nation overall.[9] It is no wonder that critics say we have a government overrun with earmarks and pork barrel spending,[10] while laws that would serve the national interest but also force districts to face particularized costs go nowhere.

The purpose of this Article is not to expand on the numerous critiques one can level against our constitutional structure of government generally, or against the practices of Congress in particular. Instead, this Article draws attention to a fact gone largely unnoticed: that Congress itself has found a way to overcome frustrating stalemate. Congress accomplishes this goal when lawmakers largely remove, or recuse, themselves from the aspects of the policymaking process that encourage inaction. This Article has therefore adopted the term "recusal legislating" to refer to this type of congressional action. In cases where Congress recognizes that its own structural weaknesses prevent meaningful action on an issue on which there is policy consensus, this method of lawmaking holds promise as a means for overcoming the institutional or political hurdles that often seem to prevent the passage of important legislation.

Congress recusal legislates when it combines a delegation of authority with a hand-tying fast-track[11] procedure for congressional consideration of the delegatee's policy pronouncement. The first step of recusal legislating is a delegation of authority to another group. Unlike traditional agency delegations, these delegations are not to established administrative agencies; rather, they are to entities either specifically created by Congress for the purpose of developing a given policy or to independent bodies. This distinction is critical since, typically, when Congress delegates to an administrative agency it retains for itself a significant degree of authority over the agency through oversight, appropriations, or the threat of congressional review of an agency's rule or regulation.[12] In contrast, when Congress recusal legislates, it does not preserve for itself much, if any, control over the delegatee's policymaking. Moreover, the entities to which Congress recusal legislates are largely insulated from the political pressures and institutional norms that adversely affect legislative processes.

The second element of recusal legislating is the legislative enactment of a fast-track procedure to restrict Congress's ability to make substantive

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[9] *See, e.g.*, Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's a Democratic Legislature*, 89 B.U. L. Rev. 387, 387 (2009) (citing complaints about congressional structures preventing public-minded legislation). *See generally* Levinson, *supra* note 8.

[10] Sinclair, *supra* note 9, at 387.

[11] Most often used in the context of trade legislation, fast-track rules establish expedited procedures for congressional consideration of policy to facilitate its enactment. In the trade setting, for example, fast-track legislation grants the President authority to negotiate trade agreements that Congress then must approve or disapprove within a designated timeframe and without amendment or filibuster. *See, e.g.*, Trade Act of 2002 §§ 2103-05, 19 U.S.C. §§ 3803-05 (2006).

[12] Walter J. Oleszek, Congressional Procedures and the Policy Process 288-99, 312 (7th ed. 2007) (discussing the many ways in which Congress exercises its oversight authority).

changes to the delegatee's policy decisions. However, the fast-track procedure used in recusal legislating differs from fast-track procedures used elsewhere. In its usual form, a fast-track process ensures a proposal an up-or-down vote by both chambers. The crucial difference in the recusal context is that Congress not only establishes expedited means for considering a given policy, but also writes into the law a presumption that the delegatee's policy will become effective absent congressional action to the contrary. Thus, Congress establishes a system in which the very pressures, structures, and processes which usually serve to forestall lawmaking are employed to stop congressional interference with the law created by the delegatee. Although Congress can override the law proposed by the delegatee, the nature of the delegating legislation makes it difficult for Congress to do so. This design also distinguishes recusal legislating from the typical use of independent advisory commissions, whose recommendations are often ignored by Congress.[13]

The combination of these two features—a delegation of authority to a non-agency delegatee and a fast-tracking of the delegatee's self-effectuating proposal—represents a fundamental departure from the view that legislating should be difficult.

On its face, the option to recusal legislate seems to present potentially dangerous and wide-ranging opportunities for Congress to circumvent traditional checks on policy enactment. However, the circumstances under which recusal legislating can be a viable legislative practice are actually quite limited. As the examples in this Article show, it makes sense for Congress to recusal legislate only when: (1) Congress agrees on the need to act; (2) Congress agrees on what policy ought to be enacted (the substance of the need); and (3) organizational or electoral factors impede action, creating stalemate. Recusal legislating is uncommon because those conditions are rarely met.

Nevertheless, in certain circumstances, recusal legislating offers a means of overcoming the stalemates that frustrate Americans and legislators. This Article seeks to uncover the promise and the limits of recusal legislating. Part II begins by explaining the sources of congressional stalemate that create the need for recusal legislating. Part III describes three examples of recusal legislation that illustrate the benefits and limits of the practice: the Defense Authorization Amendments and Base Closure and Realignment Act

[13] For example, consider the work of the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission"). Congress created the 9/11 Commission to examine and report on the events of September 11, 2001, and to make recommendations for corrective measures. *See* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2408–13 (2002) (cited in 6 U.S.C. § 101 note (2006)). Even as Congress heaped praise on the work of the 9/11 Commission, most of its policy recommendations languished. *See, e.g.*, Dan Eggen, *U.S. is Given Failing Grades by 9/11 Panel*, WASH. POST, Dec. 6, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/05/AR2005120500097.html.

("BRAC") (establishing a process for military base closure decisions);[14] the Rules Enabling Act of 1934 (conferring on the Supreme Court the right to promulgate rules of procedure and evidence for federal courts);[15] and the Postal Revenue and Federal Salary Act (creating the President's Commission on Executive, Legislative, and Judicial Pay).[16] Each of these examples provides a different lesson about recusal legislating; each also shows how Congress can use recusal legislating to circumvent otherwise insurmountable stalemate. In Part IV, the Article summarizes several of the benefits of recusal legislation drawn from these examples.

Despite its many benefits, the concept of recusal legislating will attract criticism. Part V, therefore, seeks to anticipate several of the most pressing concerns and to explain why, in particular instances, the benefits of recusal legislating outweigh the potential drawbacks. Finally, the Article concludes in Part VI with a few observations about the limits of recusal legislating and the role that the device may play in resolving future legislative impasses.

II. Understanding the Need for Recusal Legislating

As Professor William Eskridge explains, various "vetogates" within the legislative process complicate the congressional enactment of policy.[17] Chief among these structures is the congressional committee system.[18] Nearly every piece of legislation introduced in either the House or the Senate is first referred to a committee.[19] The chair controls the committee's agenda, referral of legislation to subcommittees, whether to hold hearings or conduct a markup, the hiring and firing of committee staff, and the use of committee facilities.[20] It is virtually impossible for a piece of legislation to move out of a committee without the chair's support.[21] Moreover, the full chamber almost always defers to the decisions of a committee with respect

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[14] Pub. L. No. 100-526, 102 Stat. 2623 (1988) (current version at 10 U.S.C. § 2687 note (2006)). Although the correct acronym would seem to be BRCA, the Pentagon apparently preferred "BRAC." *See* U.S. Dep't of Def., *BRAC 2005 - Definitions* (2005), http://www.defenselink.mil/brac/definitions_brac2005.html.

[15] Act of June 19, 1934, ch. 651, §§ 1–2, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (2006)).

[16] Pub. L. No. 90-206, 81 Stat. 613, 642–45 (1967) (codified as amended at 2 U.S.C. §§ 351–64 (2006)).

[17] William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L. Rev. 1441, 1444–48 (2008) [hereinafter Eskridge, *Vetogates*]. Vetogates are procedural doors through which a bill must pass to become law. Each of these "gates" presents an opportunity for opponents of the measure to kill the bill rather than allowing it to move along to the next stage of the process. *See* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 66-68 (4th ed. 2007) [hereinafter Eskridge et al., Cases and Materials].

[18] Eskridge, *Vetogates*, *supra* note 17, at 1441–42.

[19] Oleszek, *supra* note 12, at 82.

[20] *Id.* at 90. A chair, demonstrating the full extent of his authority, has even gone so far as to summon the Capitol police to remove members of the other party from the committee's library. *Id.* at 164–65.

[21] *Id.* at 90–91.

to a particular bill.[22] Indeed, the rules of both chambers are designed to "protect the power and prerogatives of the . . . committees . . . by making it very difficult for a bill that does not have committee approval to come to [the] floor."[23]

Assuming legislation makes it past the relevant committees, a bill must still survive floor votes in both chambers.[24] A proposal can be kept off the floor entirely, tabled, amended, or referred back to committee.[25] In the Senate, where unanimous consent agreements are the vehicle through which the body organizes itself, a single senator can kill or significantly delay legislation.[26] And, of course, a senator can prevent consideration of a bill simply by placing a hold on it or threatening to filibuster.[27] Unless sixty senators organize to cut off debate by invoking cloture, a piece of legislation may never even be considered.[28]

Even if the House and Senate each pass a bill, a conference committee must then resolve any differences between the House and Senate versions, requiring not just agreement between the conferees but another vote on the floor of both chambers. Even after a bill goes to the President, he still might not sign it. The multiplication of potential roadblocks makes it easy to see the many ways in which a bill might not become a law.

Beyond the structural barriers that prevent legislation from advancing, institutional norms and political dynamics also play a role, both in preventing beneficial legislation from being passed and in encouraging pork-barrel legislation that ends up hurting the nation as a whole. Reelection is the central driving force of legislators.[29] This fact creates a culture in which a member's individual achievement is more important to the member than "governmental accomplishment."[30] While a given member will want to pass legislation with particular benefits for his region, he will not want to pass legislation that imposes specific costs on his district, even if the legislation is in the national interest.[31] Because many pieces of potentially beneficial legis-

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[22] *Id.* at 89.

[23] RANDALL B. RIPLEY, CONGRESS: PROCESS AND POLICY 75 (1975).

[24] Eskridge, *Vetogates*, *supra* note 17, at 1445.

[25] OLESZEK, *supra* note 12, at 153, 162–66, 182–84, 230–33 (describing the floor procedures of both chambers of Congress).

[26] *Id.* at 203–04 (discussing the use of unanimous consent agreements).

[27] *Id.* at 237–38 (summarizing the filibuster).

[28] *Id.* at 240–43.

[29] *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 116–17 (1974) (describing how electoral needs do not incentivize mobilization of "legislation bereft of particularized benefits"). This fundamental point will be discussed in greater detail in later sections of the article. *See infra* notes 257–264 and accompanying text.

[30] MAYHEW, *supra* note 29, at 52–53. Mayhew notes that as a result of their focus on reelection, the three primary activities in which legislators engage are credit-claiming, position-taking, and advertising. *Id.* at 49–61.

[31] *See* R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. OF PUB. POL'Y 371, 373–77 (1986).

lation require some sacrifice from individual communities, these incentives result in important legislation being abandoned.[32]

At the same time, a given member has little incentive to stop legislation that imposes only generalized costs on her region. Despite the fierce partisanship that appears on the surface of congressional politics,[33] lawmakers' individual electoral goals rarely require them to oppose the efforts of other members to secure district-specific benefits.[34] Thus, members share an implicit willingness to support each others' projects, since "to reward one congressman is not obviously to deprive others."[35] Moreover, challenging benefits going to other members' districts or angering powerful colleagues only erects additional hurdles to securing passage of a congressman's own legislative priorities.

Therefore, Congress is an ideal place to enact policies that bestow concentrated benefits on a particular population, the costs of which are spread generally throughout the nation. However, it is not an ideal place to enact policies with generalized benefits but specific costs. The structures and incentives discussed above conspire to produce either pork-barrel legislation that is not in the national interest or legislative gridlock. Recusal legislating seeks to overcome the incentives that lead to these results by reversing the vetogates that often serve to frustrate federal lawmaking. Instead, it helps to ensure policy enactment by placing the onus on Congress to *stop* the delegatee's proposals from taking effect.

III. Three Case Studies of Recusal Legislating

Each of the case studies that follow provides a different lesson about recusal legislating. The base closure law (BRAC) epitomizes the type of collective action problem for which recusal legislating is best suited. The Rules Enabling Act shows that recusal legislating can also be used to promote national needs by reducing the undue influence of interest group lobbying. Finally, the congressional pay legislation provides a useful illustration of the limits of recusal legislating. All three laws show how Congress can use recusal legislating to circumvent otherwise insurmountable stalemate.

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[32] *Id.* at 384 (concluding that one way members seek to avoid blame in such circumstances is to keep an issue off the agenda).

[33] Oleszek, *supra* note 12, at 324.

[34] Mayhew, *supra* note 29, at 82. Party leaders, however, have a strong incentive to highlight differences between the two parties and, therefore, often do see the legislative process as a zero-sum game. *See* Oleszek, *supra* note 12, at 324 (quoting former Majority Leader Tom Delay's (R-Tex.) 2006 farewell speech to the House).

[35] Mayhew, *supra* note 29, at 88. As one lawmaker described it during the BRAC debate, the reason for the delegation of authority to the Commission "is because we know that Congress will not on its own permit bases to be closed. Experience shows that. We all know that, because we do not have the political courage to vote against the interests of our own districts in favor of the national interest, and, of course, *there is an awful lot of backscratching that goes on*." 134 Cong. Rec. 17,065–66 (1988) (statement of Rep. Kyl (R-Ariz.)) (emphasis added).

A. Base Closure and Realignment Act

Well over half a trillion dollars—roughly twenty percent of the annual United States budget—is devoted to defense spending.[36] A significant portion of that sum goes to maintain domestic military bases.[37] Members of Congress who represent districts with military installations have long guarded those bases from elimination, often at the expense of the national interest. The need to close bases presents a classic collective action problem: everyone would be better off if more bases were closed, but no individual district—or representative of a district—wants to bear the cost of closing its bases. By the late 1980s, with the Cold War approaching an end and obsolete military bases still consuming significant financial resources, the time was ripe for congressional action in the form of recusal legislation. The resulting law offers valuable lessons that help explain why Congress may be motivated to recuse itself from policy development and how this form of legislating allows lawmakers to overcome institutional stalemate to promote the national good over district-level interests.

1. History of Base Closures in America

Congress's tortured relationship with military base closures dates to the early 1960s, when the Kennedy and Johnson administrations began focusing on eliminating military spending on unnecessary and outdated bases.[38] During this time, the question of which bases to close and consolidate fell within the nearly total discretion of the executive branch and, specifically, the Department of Defense.[39] As Secretary of Defense Robert McNamara sought to enact cost-saving measures during the military build-up in Vietnam, he began ordering the closure of bases in the United States and overseas.[40] Over the course of his tenure, McNamara oversaw the closure of more than sixty bases—all occurring without formal consultation with, or approval by, Congress.[41]

Similar efforts continued into the Nixon and Ford administrations, as the Pentagon closed and realigned military bases as part of a strategy to streamline defense spending and eliminate waste from Department of De-

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[36] *See* Cong. Budget Office, Monthly Budget Review Fiscal Year 2009, *available at* http://www.cbo.gov/ftpdocs/106xx/doc10640/10-2009-MBR.pdf.

[37] *See* U.S. Dep't of Def., Base Structure Report Fiscal Year 2009 Baseline, *available at* http://www.defense.gov/pubs/pdfs/2009Baseline.pdf.

[38] Colton C. Campbell, Discharging Congress: Government by Commission 115 (2001); Charlotte Twight, *Institutional Underpinnings of Parochialism: The Case of Military Base Closures*, 9 Cato J. 73, 75–76 (1989).

[39] Campbell, *supra* note 38 at 115.

[40] David Sorenson & Lawrence Korb, Military Base Closures 14 (2007).

[41] *Id.* at 15.

fense budgets.[42] Overall, from 1961 to 1977, the Defense Department closed ninety-four bases.[43]

These unilateral actions infuriated Congress.[44] To understand why, one must appreciate the enormous benefits that come with housing a military base in a community, as well as the real and perceived costs related to the closure of an installation. Studies have suggested that the flow of federal dollars into communities through military payrolls and procurements rivals that associated with highly coveted public works projects.[45] Indeed, bases generally represent an "economic boon" to local communities.[46] Furthermore, the hundreds of millions of dollars that come with military bases often allow local governments to meet various social goals.[47] The result is that communities rely on bases for economic sustainability.[48]

The benefits of military bases do not accrue exclusively to the local community. Elected officials with major bases in their districts also gain. They enjoy enhanced reputations as effective representatives who can bring economic benefits to their constituents and receive the attention of defense industry lobbyists.[49]

For these reasons, the implications of a base closure are significant for both the affected community and the elected officials representing it.[50] For the local beneficiaries of the bases, who have come to consider the stream of money associated with an installation as permanent, a loss of these benefits

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[42] *Id.* at 14–15.

[43] *Id.* at 14.

[44] *Id.* at 15.

[45] *See* Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 Colo. L. Rev. 331, 333 (1991).

[46] Sorenson & Korb, *supra* note 40, at 10 (bases provide direct employment, contract opportunities, school funds, and a customer base for local businesses).

[47] *See id.*

[48] Consider Lawton, Oklahoma: the city has a population of 100,000, over 21% of which is employed at nearby Fort Sill. Moreover, 43% of children in the Lawton school district come from military families, and the school system itself receives $3.4 million a year to offset costs associated with educating these children. *See id.*

[49] *See, e.g.*, Matthew Kambrod, Lobbying for Defense 39–41 (2007); Kenneth Mayer, The Base Realignment and Closure Process: Is it Possible to Make Rational Policy? 7 (2007), http://www.nyu.edu/brademas/pdf/Mayer-Defense%20FINAL.pdf ("Members believed they received substantial credit from defending 'their' bases . . . .").

[50] *See, e.g.*, Tadlock Cowan & Baird Webel, Cong. Research Serv., RS22147, Military Base Closures: Socioeconomic Impacts (2005) (studying the effect of previous BRAC base closures on communities). During the debate over the first BRAC law's passage, some lawmakers who did not represent a base community suggested that the long-term effect of base closures on local communities was not significant. For example, Representative James Kolbe (R-Ariz.) said:

> The final area I want to address, is the myth surrounding base closures. At the mere mention of a base closure or realignment, prophets of doom come out in the communities that will be most affected. But the predictions of these prophets most often do not come to pass. The world does not end with base closures. Economic Armageddon does not result. The period immediately following a closure does have tremendous impact on communities located near the base, but this blow can be softened through economic assistance and with careful planning. Many communities are actually better off once an installation has been closed.

can be devastating and angering.[51] And angry constituents are often in no mood to reelect their representative.

To protect the people they served as well as their seats in Congress, legislators began concerted efforts to respond to the Defense Department's base closures as early as 1965.[52] That year, Congress passed legislation that required the Pentagon to provide Congress with a detailed justification for any proposed base closings.[53] The legislation also imposed a 120-day delay period between the provision of the report and the closing of any given base.[54] Finally, the bill limited the timeframe during which the Pentagon could propose base closures to four months each year.[55] Unsurprisingly, President Johnson vetoed the act.[56]

That did not end the matter. Later that same year, as part of the Military Construction Authorization Act of 1966,[57] Congress enacted legislation requiring the Defense Department to fully justify to the Committees on Armed Services of the Senate and House of Representatives any closure decision affecting a base with more than 250 military and civilian personnel.[58] Congress coupled this requirement with a 30-day waiting period between provision of the justification report and any closure.[59]

Nevertheless, despite Congress's limited intervention, base closures remained within the largely unbridled discretion of the Pentagon, and they continued to occur with regularity.[60] Further inflaming Congress was the sense that administrations were using base closures as political weapons.[61] This suspicion may well have been valid. President Johnson—known for rewarding friends and punishing political foes—appeared to target bases in districts that voted for Barry Goldwater (R-Ariz.) in 1964.[62] Some members

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134 CONG. REC. 17,065 (1988). Of course, it is doubtful that Representative Kolbe's reassuring words regarding the *long-term* benefit of base closures comforted many legislators who must face reelection every two years.

[51] *See, e.g.*, Hanlon, *supra* note 45, at 334.

[52] CAMPBELL, *supra* note 38, at 115.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Military Construction Authorization Act of 1966, Pub. L. No. 89-188, 79 Stat. 793 (1966) (codified in scattered sections of 10 U.S.C., 42 U.S.C., 50 App. U.S.C.).

[58] *Id.*, 79 Stat. at 818–19 (codified in scattered sections of 10 U.S.C., 42 U.S.C., and 50 App. U.S.C.).

[59] *Id.*

[60] SORENSON & KORB, *supra* note 40 (noting that 94 bases closed during and after Robert McNamara's tenure as Secretary of Defense, extending into both the Ford and Nixon administrations).

[61] *See, e.g.*, 134 CONG. REC. 10,197 (1988) (statement of Sen. Levin (D-Mich.)) (noting that the passage of base closure laws was originally prompted by the politicization of base closures); *see also* LAWRENCE BECKER, DOING THE RIGHT THING: COLLECTIVE ACTION AND PROCEDURAL CHOICE IN THE NEW LEGISLATIVE PROCESS 19–20 (2005).

[62] SORENSON & KORB, *supra* note 40, at 15. One tale, perhaps apocryphal, describes President Johnson's trip to the city of Amarillo, Texas, ahead of the 1964 presidential election. There, the story goes, President Johnson told the city's citizens that if the city did not vote for him in the upcoming election, it would lose its air force base. When Senator Goldwater re-

of Congress perceived that President Nixon was taking a similar approach when Massachusetts, the only state to vote for George McGovern in 1972, was disproportionately hit by proposed base closures in 1973.[63] Moreover, evidence strongly suggests that the Pentagon avoided closing bases in districts with representation on the powerful military committees.[64]

In 1976, Congress passed a military construction bill[65] containing clauses that effectively put an end to the closure of America's military bases. House Speaker Tip O'Neill (D-Mass.) and Senator William Cohen (R-Me.), who both believed that bases in their districts had been unfairly targeted by the Pentagon,[66] inserted provisions into the bill that imposed strict requirements on the Defense Department to study the economic, environmental, and military impacts of proposed closures.[67] The measure also required that any base closure be in line with the standards set forth in the National Environmental Policy Act.[68]

These new requirements gave Congress a "profusion of tools" for blocking potential base closures.[69] A legislator representing a community facing a proposed closure could challenge the adequacy of the environmental impact studies and demand further reviews, hold hearings on the detailed justifications submitted by the Pentagon, deny appropriations, or propose legislation directly blocking the Defense Department's decision.[70] Legislators employed these tactics with "zeal," in part because the arsenal was incredibly effective.[71] From 1977 until the passage of the original BRAC legislation in 1988, the Pentagon did not succeed in closing a single major base, despite efforts to do so.[72] Instead, during that same period, thirteen new bases opened.[73]

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ceived a majority of the votes from the two counties in the region, President Johnson made good on his threat. *See* John Kanelis, *BRAC Way is Better than Old Way*, AMARILLO GLOBE NEWS, May 22, 2005, http://www.amarillo.com/stories/052205/opi_1942058.shtml (recounting the belief among many in Amarillo that its air force base was closed because Randall County voted for Barry Goldwater). There is also at least circumstantial evidence that base closures were used as a political tool: during his tenure, Secretary McNamara named nearly 450 bases as possible targets for closure, but only closed sixty. BECKER, *supra* note 61 at 18-19. This suggests that the original list of targets may have been drawn broadly as a bargaining chip or implicit threat, with political objectives in mind.

[63] SORENSON & KORB, *supra* note 40, at 15.

[64] BECKER, *supra* note 61, at 19.

[65] Military Construction and Guard and Reserve Forces Facilities Authorization Acts, Pub. L. No. 94-431, 90 Stat. 1349 (1977) (codified in scattered sections of 10 U.S.C.).

[66] *Revised Military Construction Bill Cleared*, 32 CONG. Q. ALMANAC 311 (1976).

[67] *Id.*

[68] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321 (2006)).

[69] BECKER, *supra* note 61, at 21 (citing Charlotte Twight, *Department of Defense Attempts to Close Military Bases: The Political Economy of Congressional Resistance*, *in* ARMS, POLITICS AND THE ECONOMY 237, 246 (Robert Higgs ed., 1990)).

[70] *Id.*

[71] *Id.*

[72] 134 CONG. REC. 17,060 (1988) (statement of Rep. Kyl) (noting that since 1977, Congress had not authorized closing any bases).

[73] BECKER, *supra* note 61, at 21.

While stopping base closures certainly meant victory for those communities that would otherwise have lost installations—and for the representatives of those communities—few could have considered this congressional obstruction a positive outcome for the nation as a whole. The need to close obsolete military bases represented a classic collective action dilemma.[74] Everyone—the administration and Congress, Democrats and Republicans, hawks and doves—agreed that military installations needed to close.[75] And yet, it was the perceived duty of every legislator to impede the ability of the Pentagon to close a base in his own district.[76] Moreover, given the particularized costs and only generalized benefits of a base closure, legislators who did not represent military base communities saw little benefit in pushing for specific closures that would thereby alienate powerful colleagues.[77]

2. *The BRAC Law and Its Features*

It was frustration over its own inaction that led Congress to create the Base Closure and Realignment ("BRAC") Commission and to delegate to it the choice of which military bases to close. Congress passed and President Reagan signed the original Defense Authorization Amendments and Base Closure and Realignment Act in 1988.[78] The law establishes new procedures to effectuate the closure and realignment of America's military installations. In essence, the law places the decision of which bases to close or consolidate squarely in the hands of an unelected commission appointed by the President.[79] The Commission is comprised of nine members, nominated directly by the President but requiring the advice and consent of the Senate.[80] The law requires the executive to consult with the Speaker of the House and the Senate Majority Leader regarding two appointments each, and the House

[74] Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, Legis. Stud. Q., Aug. 3, 1995, at 396.

[75] *See, e.g.*, 134 Cong. Rec. 10,196 (1988) (statement of Sen. Dixon (D.-Ill.)). *See generally* 134 Cong. Rec. 17,056–87 (1988).

[76] Becker, *supra* note 61, at 23.

[77] *See* Mayhew, *supra* note 29, at 122.

[78] Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988) (current version at 10 U.S.C. § 2687 note (2006)). Congress renewed and amended the law two years later in 1990. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (1990) (current version at 10 U.S.C. § 2687 note (2006)). In 2001, Congress further amended the law, authorizing new rounds of base closures by the 2005 BRAC Commission. Title XXX of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1342 (2001) (current version at 10 U.S.C. § 2687 note (2006)). While these three versions of the BRAC law shared the same core features, this Article predominantly discusses the most current official version of the law. Defense Base Closure and Realignment Commission, 10 U.S.C. § 2687 note (2006).

[79] Defense Base Closure and Realignment Commission § 2902(a).

[80] *Id.* §§ 2902(c), 2912(d)(3). The 2001 amendments increased the number of commission members from eight to nine. Title XXX of the National Defense Authorization Act for Fiscal Year 2002 § 2912(d)(3), 115 Stat. 1342.

and Senate Minority Leaders regarding one appointment each.[81] Under the statute, the Commission remains operational for a period of one year, during which time it must put together its list of proposed base closures and realignments.[82]

While the Commission maintains the ultimate authority for its closure recommendations, the process actually begins with the Department of Defense. The BRAC law requires the Pentagon to submit a forward-looking, twenty-year force structure plan, including proposed base closures and realignments, to Congress.[83]

First, the Secretary of Defense must transmit to Congress and publish in the Federal Register the proposed criteria for making recommendations regarding base closure and realignment.[84] The law specifies that "military value" should be a primary consideration.[85] After a period allowing for public comment, the Secretary of Defense must publish and transmit to Congress the final criteria.[86] After the criteria are established, the Defense Department then assembles a list of recommended base closures and realignments, publishes that list in the Federal Register, and transmits it to Congress and the Commission.[87]

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[81] Defense Base Closure and Realignment Commission § 2902(c)(2). The President must also designate one of the members to serve as chair of the Commission. *Id.* § 2902(c)(3).

[82] *Id.* § 2912(d)(4).

[83] *Id.* § 2912(a). As part of the most recent force structure plan for the 2005 round of base realignments and closures, the Pentagon was charged with assessing the "probable threats to the national security" and determining the military forces required to meet these threats for the period extending to 2025. *Id.* § 2912(a). The Pentagon was also required to submit to Congress a "comprehensive inventory of military installations world-wide." *Id.* § 2912(b).

[84] *Id.* §§ 2903(b), 2913(a).

[85] *Id.* § 2913(b). The law provides that:

> military value criteria are as follows: (1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness. (2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations. (3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training. (4) The cost of operations and the manpower implications.

Id. The BRAC law also refers to "other criteria" that must be addressed. These are:

> (1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs. (2) The economic impact on existing communities in the vicinity of military installations. (3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel. (4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

Id. § 2913(c).

[86] *Id.* §§ 2913(a)(1), 2913(a)(2).

[87] *Id.* § 2914(a).

Upon receiving the Pentagon's list of proposed base closures and realignments, the Commission begins the process of making its own recommendations.[88] It is required to conduct public hearings and gather information to assess whether the Pentagon's proposals deviate from the force-structure plan or the final criteria published in the Federal Register.[89] The Commission may also add or remove bases from the closure and realignment list.[90] Once the Commission creates its own set of recommendations, it must submit a report containing its findings, conclusions, and recommendations to the President and the congressional defense committees.[91] In the report, the Commission must explain and justify any changes to the recommendations of the Defense Department.[92]

To help ensure that the Commission's judgment remains independent from the Pentagon's, Congress imposes restrictions on how the Commission staffs itself.[93] For example, the staff director cannot have worked for the Department of Defense for the year preceding the creation of the Commission.[94] Moreover, no more than one-third of the Commission's staff can be on detail from the Pentagon.[95]

Once the President receives the Commission's report, he has just two weeks to decide whether to approve or disapprove the Commission's plans.[96] Importantly, the President can only approve the recommendations as a package.[97]

If the President approves the Commission's proposal, he then transmits a report and certification to Congress.[98] The BRAC law then requires the Secretary of Defense to close and realign all military installations as recommended by the Commission and approved by the President *unless* Congress enacts a joint resolution disapproving the Commission's recommendation within forty-five days of the President's transmittal of his report.[99]

The BRAC law also establishes the procedures by which Congress can pass its joint resolution of disapproval. First, the resolution—the exact text

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[88] *Id.* § 2914(d)(1).
[89] *Id.* § 2903(d)(2)(B).
[90] *Id.*
[91] *Id.* §§ 2903(d)(2)(A), 2903(d)(3).
[92] *Id.* § 2903(d)(3).
[93] *Id.* §§ 2902(h), 2902(i).
[94] *Id.* § 2902(h)(1).
[95] *Id.* § 2903(i)(2). A "detail" is a temporary assignment of an employee from one federal agency to another. 5 U.S.C. § 3343 (2006).
[96] Defense Base Closure and Realignment Commission § 2914(e)(1).
[97] *Id.* § 2903(e)(2). However, the President may disapprove some of the recommended closures and send those back to the Commission for reconsideration. *Id.* § 2903(e)(3). The Commission can then prepare a revised list. *Id.* § 2914(e)(2). The President then must act (or decline to act) on the list as a package. *Id.* § 2903(e)(5). No option exists for the President to disapprove some closures and forward the remaining recommendations to Congress. *Id.*
[98] *Id.* § 2903(e)(4).
[99] *Id.* § 2904. If Congress adjourns for the session during which the report is transmitted, the Pentagon is authorized to carry out the Commission's recommended closures and realignments. *Id.* § 2904(b)(1)(B).

of which the BRAC law provides[100]—must be introduced within ten days after the President transmits his report to Congress.[101] The resolution must be referred to the Committees on Armed Services in the House and Senate.[102] If either committee does not report the resolution out to the full chamber, the resolution is automatically discharged from the committee twenty days after the President's transmittal of the report.[103]

The BRAC law provides for streamlined consideration of the resolutions once they leave the committees.[104] Procedural maneuvers lawmakers often use to stall and kill legislation—such as points of order, amendments, and motions to postpone consideration of a resolution or to proceed to consideration of other business—are not allowed.[105] At the conclusion of the debate, a single quorum call may be held, but then "the vote on final passage of the resolution shall occur."[106] Once the vote is taken, a motion cannot be entertained to reconsider the vote.[107]

If one chamber passes the resolution, it goes to the other without referral to a committee.[108] Instead, the receiving chamber acts on the resolution under the same set of floor rules prescribed by the law for when it acts on its own resolution.[109] However, once one chamber passes the resolution, the receiving chamber's resolution is no longer in order, and any legislative action must occur exclusively with regard to the resolution already passed by the other chamber.[110] In the unlikely event that both chambers pass the resolution,[111] it is subject to presidential veto. A veto in this circumstance would seem likely since the President would have already approved the package of base closures before forwarding it to Congress.[112] Finally, assuming that an effort to disapprove the Commission's recommendations fails, the BRAC

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[100] The text of the resolution must be: "That Congress disapproves the recommendations of the Defense Base Closure and Realignment Commission as submitted by the President on ___," with the blank space to be filled in with the appropriate date. *Id.* § 2908(a)(2). The title of the resolution must be "Joint resolution disapproving the recommendations of the Defense Base Closure and Realignment Commission." *Id.* § 2908(a)(3). The resolution cannot have a preamble. *Id.* § 2908(a)(1).

[101] *Id.* § 2908(a).

[102] *Id.* § 2908(b).

[103] *Id.* § 2908(c).

[104] *Id.* § 2908(d).

[105] *Id.* § 2908(d)(2).

[106] *Id.* § 2908(d)(3).

[107] *Id.* § 2908(d)(2).

[108] *Id.* § 2908(e)(1)(A).

[109] *Id.* § 2908(e)(1)(B)(i).

[110] *Id.* § 2908(e)(2).

[111] The chance of bicameral congressional disapproval of the package of recommendations is incredibly remote. As Congress recognized, once a list of proposed closures is released, those legislators whose bases are not on the list can breathe a huge sigh of relief and would almost certainly support the package. Moreover, legislators without a base in their district would similarly see no reason to oppose the Commission's recommendations. *See* 134 Cong. Rec. 17,080 (1988) (statement of Rep. Aspin (D-Wis.))

[112] 134 Cong. Rec. 17,071 (1988) (statement of Rep. Pepper (D-Fla.)).

law provides for automatic appropriations for implementation of the closures and realignments.[113]

The procedural details of the BRAC law show that Congress sought to dispense with many of the procedures, rules, and norms that so often frustrate the development and enactment of federal policy with universal benefits but particularized costs.[114] In fact, the congressional floor debate over the BRAC legislation reveals the extent to which legislators crafted the law with the explicit goal of preventing any aspect of the new base closure procedure from falling victim to the typical congressional maneuvering that stops much legislation.[115] The very procedures that often hold up the passage of a law were reversed in this case to make it more difficult for Congress to veto the Commission's proposals. The BRAC proposal was designed to overcome the "small group of dedicated Members of Congress," who, "applying all of the tricks of the trade, have been very effective in being able to block any base closure for the past 12 years."[116]

The case of the BRAC law is a paradigmatic example of the need for, and success of, recusal legislation. Although broad support existed among lawmakers for closing and realigning outdated and obsolete military bases, electoral constraints, institutional structures, and congressional norms had prevented action. The BRAC law solved this collective action problem by creating an independent, politically insulated entity to make hard choices about specific base closures. By requiring congressional action to stop, rather than to effectuate, the Commission's proposals, Congress turned the obstacles that typically stand in the way of congressional action into shields that protected the Commission's base closure recommendations. By recusing itself, Congress therefore created a mechanism for achieving its policy goals.

B. The Rules Enabling Act of 1934

In contrast to the BRAC law, the features of the Rules Enabling Act that qualify it as a piece of recusal legislation are less apparent on the law's surface. Still, a close examination of the Rules Enabling Act reveals that at its core lie the key functional and motivational features of recusal legislating. While the BRAC law and the Rules Enabling Act are quite different, the structure of each—reliance on an independent commission to formulate needed self-effectuating policy—is a response to the same concerns about Congress's the capacity to legislate in given areas.

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[113] Defense Base Closure and Realignment Commission §§ 2905(a), 2906.
[114] *See supra* Part II.
[115] *See generally* 134 Cong. Rec. 17,057-87 (1988).
[116] 134 Cong. Rec. 17,057 (1988) (statement of Rep. Dickinson (R-Ala.)).

1. Background and Structure of the Rules Enabling Act

Though the Constitution created the Supreme Court and authorized congressional creation of lower courts,[117] it did not address the question of whether those courts or Congress held the power to prescribe procedural rules for the judiciary.[118] When Congress, during its first session, established the federal courts by passing the Judiciary Act of 1789, it authorized them to create rules for "regulating the practice and enforcing the orderly conduct of business."[119] In a separate act, however, Congress ordered that in actions at law (but not in equity or admiralty), each federal court should follow the procedural rules of its home state in effect as of September 1789, regardless of any subsequent changes in state procedures.[120] Then, in 1828, Congress passed a law requiring that the federal courts in states admitted to the Union after 1789 follow the state court rules as constituted in 1828—again, without regard to subsequent changes in state procedure.[121] Finally, in 1872, Congress enacted the Conformity Act, requiring the courts to conform, "as near as may be," to the home state court procedures.[122] After the passage of the Conformity Act, the federal judicial system operated under rules that lacked any semblance of uniformity or stability.[123]

In the early twentieth century, legal scholars and professional organizations began clamoring for rulemaking authority for the Supreme Court, motivated partly by a desire to keep state politics out of court rules and procedures.[124] The opening shot came from Dean Roscoe Pound in his famous 1906 address given to the American Bar Association, *The Causes of Popular Dissatisfaction with the Administration of Justice*.[125] Dean Pound identified "the putting of our courts into politics" as negatively affecting the

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[117] U.S. CONST. art. III, § 1.

[118] 4 CHARLES ALAN WRIGHT & ARTHUR P. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001 (3d ed. 2002).

[119] Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 (current version at 28 U.S.C. § 1652 (2006)).

[120] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (current version at 28 U.S.C. § 1652 (2006)).

[121] Process Act of May 19, 1828, ch. 68, 4 Stat. 278.

[122] Act of June 1, 1872, ch. 255, 17 Stat. 196, 197.

[123] Cheryl L. Haas, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 N.Y.U. L. REV. 135, 139 (1998).

[124] For a thorough account of the push for, and creation of, the Federal Rules of Civil Procedure, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-95 (1982).

[125] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906) [hereinafter Pound, *Popular Dissatisfaction*]. Pound continued to push for federal judicial rulemaking authority up to the enactment of the Rules Enabling Act. A key premise of his effort was the belief that federal rules of procedure should not be subjected to political pressures inherent in the legislative process. *See, e.g.*, Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 602 (1926) [hereinafter Pound, *Rule-Making Power*]; *Judicial Versus Legislative Determination of Rules of Practice and Procedure—A Symposium*, 6 OR. L. REV. 36, 42–45 (1926).

environment of judicial administration.[126] In 1912, the American Bar Association lent its organizational muscle to the cause by creating the A.B.A. Committee on Uniform Judicial Procedure.[127] The group quickly began working with lawmakers to draft a bill to grant the Supreme Court rulemaking authority.[128]

In 1934, the campaign to grant the Supreme Court rulemaking authority finally achieved its goal with the enactment of the Rules Enabling Act.[129] In this Act, Congress gave the federal judiciary the power to promulgate a uniform set of procedural rules. Specifically, the law provides, in relevant part, that:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[130]

Under the Rules Enabling Act ("REA"), the Judicial Conference of the Supreme Court (the "Conference")[131] is responsible for prescribing and pub-

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[126] Pound, *Popular Dissatisfaction*, *supra* note 125, at 415.

[127] *See* The American Bar Association, *Report of the Committee on Uniform Judicial Procedure*, 36 Ann. Rep. A.B.A. 541 (1913).

[128] Burbank, *supra* note 124, at 1050.

[129] Act of June 19, 1934, ch. 651, §§ 1–2, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (2006)).

[130] 28 U.S.C. § 2072 (2006). The 1934 version stated:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*,
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> That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
>
> Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

Act of June 19, 1934, ch. 651, §§ 1–2, 48 Stat. 1064.

[131] Congress created the Conference of Senior Circuit Judges in 1922 to serve as the chief administrative and policymaking body of the U.S. Courts. The Conference advised Congress on possible improvements in judicial administration. In 1948, the name of the group was changed to the Judicial Conference, but the body's principal functions remained unchanged. Robert H. Hall, *Federal Circuit Judicial Councils: A Legislative History and Revisions Needed Today*, 11 Ga. St. U. L. Rev. 1, 2 (1994).

lishing the procedures for adopting new rules.[132] The rules become effective absent congressional action to the contrary.

The law requires that the Conference authorize the appointment of a standing committee for rules of practice, procedure, and evidence to review recommendations for amendments to the relevant rules (currently the Committee on Rules of Practice and Procedure (the "Standing Committee")).[133] The Conference also authorized the appointment of an Advisory Committee on Civil Rules (the "Advisory Committee") to consider suggestions for changes to the rules for potential transmittal to the Standing Committee.[134]

The Advisory Committee drafts amendments and explanatory notes based on the suggestions it accepts and then publishes these amendments and notes for public comment.[135] At the conclusion of the notice-and-comment period, the Advisory Committee submits its final proposal to the Standing Committee, which then decides whether to accept, reject, or modify the proposal.[136] If the Standing Committee approves the proposal, it transmits the proposal to the Judicial Conference.[137] The Judicial Conference then decides whether to forward the proposal to the Supreme Court.[138] Finally, after reviewing the proposals, the Supreme Court transmits accepted proposals to Congress by May 1 of the year in which the proposed rules are to take effect.[139] The effective date of the proposed rule can be no earlier than December 1 of that year.[140] The rule—unless involving an "evidentiary privilege"—takes effect on the proposed date unless Congress acts otherwise.[141]

Through the process created by the Rules Enabling Act, Congress thus recused itself: it delegated to the Supreme Court nearly complete authority over the creation and upkeep of what would become the Federal Rules of Civil Procedure.

2. *Motivations for Congressional Recusal Regarding the Federal Rules of Civil Procedure*

Supporters of the judicial development of procedural rules had several concerns which are reflected in the structure of the Rules Enabling Act.

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[132] 28 U.S.C. § 2073(a)(1) (2006).

[133] 28 U.S.C. § 2073(b) (2006); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL RULEMAKING: THE RULEMAKING PROCESS, A SUMMARY FOR THE BENCH AND BAR (2007), http://207.41.14.183/rules/proceduresum.htm.

[134] *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1998).

[135] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 133.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] 28 U.S.C. § 2074(a) (2006).

[141] 28 U.S.C. § 2074(b) (2006).

First, they sought to depoliticize federal judicial procedure.[142] Proponents of judicial rulemaking did not believe that the conventions of the legislative process were suitable for the thoughtful development of procedural court rules.[143] They viewed Congress as too often beholden to interest groups; legislation as too often subject to logrolling; and legislators as, at best, indifferent to the efficient administration of the courts.[144] As proof, proponents cited New York's Field Code. Developed in the 1840s as the first American example of a unified and simplified code of civil procedure, it became riddled with rules favoring special interest groups because of the state legislature's responsibility for upkeep of the rules.[145] To the extent that it embodied a response to these concerns, the Rules Enabling Act was specifically designed to be "anti-democratic."[146]

Advocates for court-developed procedural rules also argued that legislators lacked the expertise, day-to-day familiarity with legal practice, and time needed to effectively oversee, critique, and revise the rules.[147] As Senator Elihu Root stated in support of judicial rulemaking:

> The whole progress and development of our Government is necessarily toward a greater measure of delegation of authority. As our Government becomes more vast . . . and as more and more duties are imposed upon Congress, it becomes more necessary to delegate more and more. That is the inevitable result of a higher and wider organization. We can, ourselves, no longer consider and pass upon matters of detail.[148]

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[142] Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281, 301.

[143] *See* Bone, *supra* note 134, at 896.

[144] *See, e.g.*, A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 10 (1958); Pound, *Rule-Making Power*, *supra* note 125, at 602; John H. Wigmore*, All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 Ill. L. Rev. 276, 278–89 (1928). The indifference of legislators stems, in part, from the fact that the public does not hold the legislature responsible for the efficient administration of the courts. Levin & Amsterdam, *supra*, at 10.

[145] Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795, 835 (1991) (quoting Reporter, Memorandum to Civil Rules Committee re Questions About the Rulemaking Process (Oct. 18, 1989)).

[146] *Id.* at 842 n.246 (stating that the then-Reporter for the Advisory Committee "believe[d] that the Rules Enabling Act was designed specifically to be 'anti-democratic'"). Professor Mullenix goes on to quote the Reporter:

> The Rules Enabling Act was avowedly antidemocratic in the sense that it withdrew "procedural" law-making from the political arena and made it the activity of professional technicians. The politically responsive organs of government, the legislative and executive branches, were substantially excluded from participation in the process created by the Act, as were those familiar and important influences now often known (perhaps unjustly) by the opprobrium "special interest groups."

Id.

[147] Levin & Amsterdam, *supra* note 144, at 10; Pound, *Rule-Making Power*, *supra* note 125, at 602; Wigmore, *supra* note 144, at 278.

[148] Burbank, *supra* note 124, at 1053.

Unlike Congress, the judiciary could rely on the existing expertise of advisory committees composed of judges and practitioners to study existing practice, infer general principles, and create a "uniform, general, and systemically integrated"[149] set of rules. Judges and those serving on the Advisory Committee understood the practical realities and consequences of procedural rules because they worked with them regularly. Legislators, on the other hand—even those with law degrees and experience in the courtroom—could not be expected to keep abreast of how procedural rules were affecting the administration of the federal courts.

Another related motivation for judicially created rules was to ensure flexibility within the procedural system.[150] As discussed above, the legislative process is typically slow and filled with significant obstacles that prevent much congressional action.[151] Because of this, Congress is not the ideal institution through which to make minor, detailed, procedural modifications to a complex set of rules.[152]

In enacting the REA, Congress created a mechanism for promulgating federal rules free of political interference and developed by experts with the time and flexibility to properly maintain the rules. The REA tasked a separate, independent body with the responsibility for creating self-effectuating rules, recusing itself from this issue.

Thus, despite their differences, the BRAC legislation and the Rules Enabling Act share much the same form with respect to legislative recusal. Both laws delegate to a group other than an administrative agency the responsibility for developing a set of proposals that relate to a policy area falling under Congress's domain. Under each, the recommendations of the delegatee go back to Congress and go into effect unless Congress acts to the contrary. Moreover, the overarching impulse behind the BRAC law and the Rules Enabling Act was also the same: a belief that Congress needed to tie its own hands and allow another group to develop policy recommendations that would be difficult, though not impossible, for Congress to modify.

3. *Congressional Behavior Regarding the Federal Rules of Civil Procedure Since 1934*

Examining the history of the Rules Enabling Act not only provides a better understanding of recusal legislating; it also demonstrates, in contrast to the relatively recent BRAC legislation, how Congress has subsequently responded to its decision to recuse itself. In the seventy-six years during which the Rules Enabling Act has been in existence, Congress has largely

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[149] Bone, *supra* note 134, at 892.

[150] *Id.* at 895; Levin & Amsterdam, *supra* note 144, at 38.

[151] *See supra* Part II.

[152] As Professor Paul Carrington observed, "[C]omplex technical issues of judicial practice cannot sustain attention through the political process. What is everyone's business is no one's special political concern." Carrington, *supra* note 142, at 282.

abided by its decision to stay out of the procedural rulemaking process, except in those few instances in which the political pressures to act were too overwhelming. However, shifting the burden on Congress from enacting legislation to stopping legislation created by a delegatee, the Rules Enabling Act has minimized the effect of these political pressures on policy.

Following Congress's enactment of the Rules Enabling Act in 1934, the Supreme Court promulgated the first Federal Rules of Civil Procedure in 1937. The rules went into effect the next year.[153] For the first thirty-five years after the adoption of these uniform rules, Congress remained on the sidelines as the judicial branch developed, refined, and implemented procedural policies.[154]

In the early 1970s, Congress began to reinsert itself into the development of federal court rules. In November 1972, the Supreme Court promulgated the Federal Rules of Evidence through the Rules Enabling Act process and transmitted the proposed rules to Congress.[155] Four months later, on March 30, 1973, Congress enacted legislation requiring explicit congressional approval for the Rules of Evidence and any subsequent amendments by the Supreme Court to take effect.[156] This change altered the relationship between Congress and the judiciary regarding the development of rules of evidence, eliminating one of the key facets of recusal legislating—the hand-tying fast-track procedure that ensures that the delegatee's proposals take effect absent congressional action to the contrary.[157] This change in procedure was due to Congress's objection to the possible curtailment of certain testimonial privileges, such as the doctor-patient privilege, contained in the

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[153] Orders Re Rules of Procedure, 302 U.S. 783 (1937).

[154] It is inaccurate and unwise to confuse congressional inaction with congressional support for the substance of any particular rule. As Professor Burbank explains, "The experience of the original Federal Rules of Civil Procedure before Congress provides specific support for the rejection of an argument equating congressional inaction with congressional approval." Burbank, *supra* note 124, at 1102 n.396; *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) (stating that "[h]aving due regard to the mechanics . . . of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality").

[155] Wright & Miller, *supra* note 118, § 1007, at 48.

[156] Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973) (cited in 18 U.S.C. § 3771 note (1976)). The law specifically stated that the proposed rules of evidence "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress." *Id.* Unlike with the Federal Rules of Civil Procedure, Congress must now affirmatively act in order for promulgated evidentiary rules to take effect. Congress also considered this very concept when debating the BRAC law, but rejected it because of the likely consequence of politics delaying the implementation of the BRAC Commission recommendations. *See* 134 Cong. Rec. 17,079 (1988) (statement of Rep. Kasich (R-Ohio)). The congressional history of the Federal Rules of Evidence shows the significance of Congress's decision to require congressional affirmation in this legislative context, as Congress has used its influence over the Rules of Evidence to pursue political rewards to the detriment of an impartial criminal justice system. *See, e.g.*, Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 Cath. U. L. Rev. 153, 177–93 (2008).

[157] 87 Stat. 9.

proposed evidentiary rules.[158] Lobbyists representing organized interests concerned about the curtailment of these privileges helped create the "furor" in Congress that led to the 1973 law.[159] However, after blocking the Supreme Court's attempt to promulgate evidentiary rules, Congress found it impossible to draft its own privilege rules because doing so ran "the risk of offending many influential special interest groups."[160] It was not until nearly two years later that Congress enacted a revised set of Federal Rules of Evidence, as well as technical amendments to the Federal Rules of Civil Procedure referencing the new evidentiary standards.[161]

Congress began to involve itself more significantly in the upkeep of the Federal Rules of Civil Procedure in the 1980s. Bypassing the traditional rulemaking process, it directly amended Rule 37 to allow a court to award expenses and fees against the United States for discovery abuses.[162] In 1982, Congress delayed implementation of amendments to Rule 4's service of process provisions.[163] Congress apparently enacted the delaying measure in direct "response to lobbying efforts by various groups" that opposed the changes.[164] Congress then passed its own amendment to Rule 4, authorizing the use of first-class mail as a method for securing a waiver of formal service of a summons; adopting a procedure for ensuring actual receipt; imposing a time limit for completing service of process after the filing of a complaint; and placing the responsibility for ensuring prompt service of a summons and complaint on the plaintiff.[165]

In 1987, Congress considered amending Rule 35 of the Federal Rules of Civil Procedure to allow psychologists to conduct court-ordered mental examinations, which at the time could only be carried out by physicians.[166] That year, Congress decided not to make such a change, citing "deference" to the process prescribed in the Rules Enabling Act.[167] However, the very next year Congress passed legislation changing Rule 35's requirements for

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[158] *See* Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 48-49 (2006).

[159] *Id.*; *see also* COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-52 (1973) (referencing testimony from the American College of Trial Lawyers and the National Legal Aid and Defender Association).

[160] *See* Imwinkelried, *supra* note 158, at 50.

[161] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[162] Equal Access to Justice Act, Pub. L. No. 96-481, § 205(a), 94 Stat. 2325, 2330 (1980) (codified as amended at 5 U.S.C. § 504 (2006)).

[163] *See* Amendments to the Federal Rules of Civil Procedure, 93 F.R.D. 255 (1982); Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246 (1982) (cited in 28 U.S.C. § 2074 note (2006)) (delaying the implementation of the rules promulgated by the Supreme Court).

[164] Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1208 (1987).

[165] Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983) (codified as amended in scattered sections of 28 U.S.C.).

[166] *See* FED. R. CIV. P. 35 and Advisory Committee Notes.

[167] 133 CONG. REC. 16,904 (1987); *see also* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 461 (1993).

mental examinations to allow psychologists to perform the tests. It passed this legislation without reference to the Rules Enabling Act, the Judicial Conference, or the Advisory Committee.[168] The change came as a result of one senator inserting a rider into a criminal drug enforcement bill at the behest of a particular constituent group.[169]

There were negative policy consequences to Congress's rushed and politically motivated alterations of the Federal Rules of Civil Procedure. For example, several technical corrections to Rule 4 that were included in the Judicial Conference's proposal were left out of the congressional change.[170] Additionally, the insertion of "psychologists" into Rule 35 raised questions concerning who qualified as a psychologist under the rule.[171] While these were not particularly troubling consequences, they illustrate the potential problems with interest group involvement in procedural rulemaking.

In 1988, in response to organized interest group concerns that the rulemaking process was too opaque, Congress enacted the Judicial Improvements and Access to Justice Act.[172] That law mandated that the civil rulemaking processes of the Advisory Committee be generally open to the public, with notice periods sufficient to allow "all interested persons to attend."[173] The new law also required a written report explaining any proposed amendments.[174] Although these changes were themselves modest, the debate surrounding the legislation—and its ultimate enactment—demonstrated that Congress was paying attention to the creation of federal rules of procedure. Thus, even though Congress had largely recused itself from the development of procedural policy, it still sought to play a role in establishing the *process* for creating procedural rules.

In 1993, Congress's interest in the Federal Rules of Civil Procedure surfaced again. That year, the Supreme Court transmitted changes to over

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[168] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7047(b), 102 Stat. 4181, 4401 (1988) (codified at 21 U.S.C. § 1501 (2006)); *see also* Walker, *supra* note 167, at 462. Professor Walker elaborates:

> Congress also amended Rule 17 and Rule 71A. Both of these amendments, however, appear to be minor. In the case of Rule 17, the Supreme Court had proposed several amendments intended to gender-neutralize the rules. The Court intended to strike the gender specific phrase "with him" in Rule 17, but the amendments as transmitted failed to include the change, and Congress corrected the apparent oversight. The amendment to Rule 71A corrected an apparent punctuation error by adding the appropriate apostrophe to "taking of the defendants' property."

Id. (internal citations omitted).

[169] *See* Mullenix, *supra* note 145, at 847.

[170] *See id.* at 845–46.

[171] *Id.* at 847.

[172] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified in scattered sections of 28 U.S.C.); Bone, *supra* note 134, at 903–04.

[173] Judicial Improvements and Access to Justice Act § 401, 102 Stat. at 4649 (codified at 28 U.S.C. § 2073(c)(2) (2006)).

[174] *Id.* § 401, 102 Stat. at 4649 (codified at 28 U.S.C. § 2073(d) (2006)); *see also* Walker, *supra* note 167, at 468–69.

forty civil rules.[175] Of these, three provoked varying degrees of congressional concern: proposed revisions to the types of documents subject to Rule 11 sanctions; the proposed mandatory disclosure provision of Rule 26(a)(1) (dealing with mandatory disclosures in discovery); and the elimination from Rule 30(b) of the requirement of a court order or stipulation of the parties to use sound or sound-and-visual means of recording depositions.[176]

On July 30, 1993, Representative William Hughes (D-N.J.) introduced legislation, H.R. 2814, which modified the proposed changes in Rules 26 and 30 to eliminate the mandatory disclosure provision and the change to Rule 30(b).[177] The House passed H.R. 2814 on November 3, 1993.[178] The Senate, having chosen to await the House's action on H.R. 2814 rather than proceed with a separate Senate version of the legislation, had less than a month to act before the Supreme Court's promulgated changes went into effect on December 1. Interest groups representing plaintiffs' lawyers lobbied the Senate on the issue.[179] Efforts to negotiate a compromise failed, and the Senate adjourned on November 24, 1993, without taking action on the legislation.[180] Without explicit disapproval by both houses of Congress, the rule changes, as reported by the Supreme Court, went into effect on December 1, 1993.[181] It is significant that even as Representative Hughes sought to stop the 1993 amendments from taking effect, he expressed support for the Rules Enabling Act and the process by which amendments to the Federal Rules are typically promulgated.[182]

The efforts by Congress over this ten-year span to involve itself in the creation of procedural rules share an important link: politics as the driving force. An appeal to public sentiment (and an opportunity for claiming credit) lay at the heart of the change to Rule 37.[183] The delayed implementation of Rule 4 and Congress's eventual enactment of its own version was the result of interest group pressure.[184] Because of this pressure, Congress hastily pushed aside four years of deliberate study by the Judicial Conference, making changes to the rule less than four months after the Conference's submission of the amended rules and without the benefit of hearings.[185] The legislation amending Rule 35 to allow psychologists to conduct court-ordered mental examinations was a result of lobbying by the American Psy-

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[175] William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure,* 18 Seton Hall Legis. J. 1, 3 n.9 (1993).

[176] *See id.* at 4 & n.13.

[177] *Id.* Representative Carlos Moorhead (R-Cal.) introduced separate legislation on August 6, 1993, to deal with unease over changes to Rule 11. H.R. 2979, 103d Cong. (1993). *See* Hughes, *supra note* 175, at 4 & n.13. The House did not act on that proposed legislation.

[178] 139 Cong. Rec. H8747 (daily ed. Nov. 3, 1993).

[179] Hughes, *supra* note 175, at 10.

[180] *Id.* at 11 & n.40.

[181] *Id.* at 11.

[182] *See, e.g.*, *id.* at 2–3.

[183] This is clear from the name of the law itself: The Equal Access to Justice Act.

[184] Sinclair, *supra* note 164, at 1208.

[185] *Id.* at 1202–04, 1209–10.

chological Association that convinced a single legislative aide to a senator to insert the change into legislation.[186] The same level of interest group pressure prompted passage of the Judicial Improvements and Access to Justice Act,[187] as well as congressional uproar over the 1993 changes to Rules 11, 26(a)(1), and 30.[188]

While the political pressures brought to bear on the Federal Rules of Civil Procedure are potentially troubling, the history of congressional interference with the Rules must be considered in perspective. As noted above, for the first forty years after enactment of the Rules Enabling Act, Congress did not inject itself into the rulemaking process. Further, even during the new period of "increased [congressional] involvement in the federal procedure,"[189] Congress modified rules proposed by the Supreme Court just one time and enacted its own rule amendments without judicial consideration only twice.[190] Moreover, in the last fifteen years, Congress has barely taken notice of rule changes promulgated by the Supreme Court.[191]

Thus, it is reasonable to say that Congress has respected its decision to recuse itself from over-involvement in the Federal Rules. It is equally fair to say that the instances in which Congress has ignored that decision have only strengthened the case for the initial recusal.

C. Congressional Pay Raises and the Commission on Executive, Legislative, and Judicial Salaries

The final example of recusal legislating, congressional pay legislation, would seem to be a perfect candidate for the recusal process, since it epitomizes the sort of conflict of interest for which recusals are warranted. At the same time, the history of and controversy surrounding congressional pay legislation illustrate some of the limitations of the recusal legislating model. In 1967, Congress created the Commission on Executive, Legislative and Judicial Pay (the "Quadrennial Commission") to relieve its members of the political dangers associated with voting for congressional salary increases, as well as to help resolve the stalemates that often occurred when the issue of congressional salaries was raised in Congress. The ultimate demise of the Quadrennial Commission and the manner through which Congress now re-

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[186] *See* Mullenix, *supra* note 145, at 847 & n.271 (noting that the legislative aide subsequently received a commendation from the American Psychological Association).

[187] *See* Bone, *supra* note 134, at 903–04.

[188] *See* Hughes, *supra* note 175, at 5–11.

[189] Wright & Miller, *supra* note 118, § 1001.

[190] Hughes, *supra* note 175, at 2–3.

[191] For a listing of proposals to amend the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992, see *Civil Rules Suggestions Docket (Historical)*, United States Courts, http://www.uscourts.gov/rules/civil_docket.pdf (last visited Nov. 11, 2010). A few lawmakers have expressed interest in amending the Rules. *See, e.g.*, Frivolous Lawsuit Prevention Act of 2009, S. 603, 111th Cong. (2009) (seeking to amend Rule 11 to mandate sanctions for violation of the rule).

ceives salary increases offer important lessons about recusal legislating and illustrate the public's skepticism of wholesale congressional recusal on certain issues.

1. History of Congressional Pay

Controversy over congressional pay dates back to before the existence of Congress. During the Constitutional Convention, debate raged over who should pay legislators, how much they should receive, and how compensation should be adjusted over time.[192] Proposals ranged from ensuring legislators received "liberal stipends" to suggesting that senators not be compensated at all.[193] James Madison suggested that lawmakers' salaries be tied to the price of wheat.[194] Eventually, the Framers settled on a compromise, which became the first clause of Article I, Section 6 of the Constitution: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."[195] Thus, Congress has the responsibility of determining the pay of its members.

From the very first Congress, this obligation has proven vexing. During the initial congressional session in 1789, several members of the House of Representatives were accused of political "demagoguery" for urging a cut in the six-dollar per diem salary proposed by the congressional committee responsible for the matter.[196] Moreover, a feud erupted between the two chambers over whether senators should earn a higher salary when called into special session to consider executive nominations.[197] Compromises on both the overall question of congressional pay and the Senate-House pay difference were eventually reached,[198] but the political gamesmanship and congressional infighting that marked that first compensation legislation foreshadowed the problems that lay ahead.

In 1816, after twenty-seven years of working at the rate of six dollars per day, Congress enacted a law establishing an annual salary of $1,500.[199] Despite efforts to convince the public that this proposal would save the government money,[200] the new law ignited fiery criticism throughout the coun-

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[192] *See, e.g.*, Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 502–08 (1992) (recounting the history of the framing of the Constitution's Compensation Clause).

[193] 2 ROBERT C. BYRD, THE SENATE 1789–89: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 347 (Wendy Wolf ed., 1991).

[194] *Id.*

[195] U.S. CONST. art. I, § 6, cl. 1.

[196] BYRD, *supra* note 193, at 348.

[197] *Id.* at 348–49.

[198] *Id.*

[199] *Id.* at 350.

[200] *Id.*

try.[201] Many members lost reelection efforts that year, with nearly forty percent fewer members returning to Congress than in 1814.[202] In response, the very next session of Congress saw the quick repeal of the $1,500 annual salary and a reversion to the six-dollar per diem salary.[203] It was not until 1856 that legislators considered the issue again and finally voted themselves an annual salary.[204]

By 1873, the lessons from 1816 had been largely forgotten, and Congress enacted legislation increasing the annual salary of its members from $5,000 to $7,500.[205] More audaciously, the law made the raise retroactive for the preceding two years, providing all members with a $5,000 windfall.[206] This legislation sparked a deep public outcry, even prompting the Ohio legislature to ratify a proposed constitutional amendment requiring an interceding election before a salary increase could take effect.[207]

The so-called "salary grab" of 1873 unleashed outrage over congressional pay unequaled before or since.[208] According to the late Senator Robert C. Byrd (D-W. Va.):

> The storm of abuse that broke over members of Congress when the odious bill passed on March 3, 1873, reflected their constituents' lack of sympathy with their plight, especially in the midst of a deepening economic depression. Startled by the ferocity of the outcry, members rushed to return their back pay to the Treasury or donated it to charity.[209]

In January 1874, Congress repealed the salary increase entirely.[210] November's elections still focused on the salary grab and members who had supported the "back-pay steal" were sent packing in droves.[211]

From these efforts, Congress learned the tough political consequences that accompany the responsibility of setting its own salary. On the one hand, this responsibility provides an opportunity for "demagoguery" and political showmanship for lawmakers who fight against and refuse pay increases; on

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[201] *Id.* at 351 (noting that Georgia citizens hanged senators in effigy and that Tennessee voters demanded the resignation of the state's entire congressional delegation).

[202] *Id.* One victim of the outrage was Representative Daniel Webster, who lost reelection in 1816 and did not return to the House of Representatives until 1822. 2 CQ PRESS, CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS 888 (6th ed. 2008) [hereinafter GUIDE TO CONGRESS].

[203] GUIDE TO CONGRESS, *supra* note 202, at 888.

[204] *Id.* at 889.

[205] BYRD, *supra* note 193, at 351–54.

[206] *Id.*

[207] *See generally* Bernstein, *supra* note 192. This amendment would ultimately become the Twenty-Seventh Amendment to the U.S. Constitution, adopted in 1992. *Id.* at 498.

[208] BYRD, *supra* note 193, at 351.

[209] *Id.* at 355.

[210] GUIDE TO CONGRESS, *supra* note 202, at 889.

[211] BYRD, *supra* note 193, at 355.

the other, it represents an electoral time bomb for any member who supports a pay increase.

2. *Congressional Pay Recusal Legislating*

Therefore, after over 150 years of setting its salary through legislation, Congress "sought to develop increasingly subtle and invisible ways of ensuring that congressional salaries would continue to increase, while avoiding the politically risky method of simply voting for pay-raise legislation."[212] In other words, despite overwhelming agreement about the need to act and about the substance of the required action, Congress was constrained from taking legislative action. It therefore wanted to recuse itself from the issue.

The initial method that Congress adopted was the establishment of an independent commission. The first iteration came in 1953 and was called the Commission on Judicial and Congressional Salaries.[213] The Commission was tasked with developing a recommendation for salaries that Congress then had to approve.[214] Through this mechanism, Congress received a significant pay increase in 1955—one that received little public scrutiny, potentially because of the strong national economy.[215]

In 1967, Congress refined the concept of a committee proposing pay increases by enacting its congressional pay recusal legislation. The Postal Revenue and Federal Salary Act[216] created the President's Commission on Executive, Legislative and Judicial Salaries. The Quadrennial Commission, as it became known, comprised nine members, with three appointed by the President, two appointed by the Senate leadership, two appointed by the Speaker of the House, and two appointed by the Chief Justice.[217] The Commission was to review the salaries of members of Congress, federal judges, and top officers of the executive branch every four years and recommend increases.[218]

The Commission was designed to "relieve members of Congress of the politically risky task of periodically having to raise their own salaries."[219] To accomplish this goal, the law established the now familiar recusal procedure. The Commission would submit its recommendations to the President, who would then propose salary adjustments based on the Commission's work in his next budget message.[220] The President's recommendations would take ef-

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[212] Bernstein, *supra* note 192, at 535.

[213] Act of Aug. 7, 1953, Pub. L. 83-220, 67 Stat. 485, 485–87 (codified as amended at 2 U.S.C. § 31 (2006)); Guide to Congress, *supra* note 202, at 890.

[214] 67 Stat. at 486–87.

[215] Byrd, *supra* note 193, at 355.

[216] Act of Dec. 16, 1967, Pub. L. No. 90-206 § 225, 81 Stat. 613, 642–645 (codified as amended at 2 U.S.C. §§ 351–64 (2006)).

[217] *Id.*

[218] *Id.*

[219] Guide to Congress, *supra* note 202, at 890.

[220] Paul Dwyer, Cong. Research Serv., RL 30014, Salaries of Members of Congress: Current Procedures and Recent Adjustments 8 (2003).

fect within thirty days unless Congress disapproved the recommendations or enacted a separate pay measure.[221] Thus, Congress found a way through this recusal legislation to avoid voting on its own raises while still receiving salary increases.

The commission process worked as planned in 1969, when annual salaries went from $30,000 to $42,500 on the recommendation of the Commission.[222] But the very next effort demonstrated that the fears of voter backlash over pay increases were still deeply embedded in the congressional psyche. In 1973, President Nixon failed to name commission members on schedule, thereby pushing the congressional receipt of the President's pay proposal recommendations to 1974, a midterm election year.[223] The Senate killed the proposed increase because of electoral jitters.[224] Over its twenty-year lifespan, the Commission made six salary increase recommendations, with Congress blocking three and accepting three.[225]

Ultimately, political backlash brought about the end of the Quadrennial Commission. In December 1988, the Commission recommended that congressional pay increase fifty-one percent in combination with a ban on honoraria for members.[226] President Reagan supported the fifty-one percent hike and proposed it in his 1989 budget.[227] While the Commission intended—and lawmakers hoped—that the honoraria ban would provide political cover, "it never caught on with the public."[228] Criticism poured in from all corners, with Ralph Nader and conservative talk show hosts alike all criticizing the recommendation.[229] Newspaper editorials further stoked public anger, and congressional offices were flooded with calls and mail from irate constituents.[230]

Much of the anger came not just from the idea of a fifty-one percent salary increase, but also from the recusal process itself. In an attempt to ensure that the raise would become effective without a vote, Speaker Jim Wright (D-Tex.) scheduled almost no legislative business for the first month of the new session.[231] Speaker Wright's effort to avoid a vote on the raise

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[221] Hanlon, *supra* note 45, at 343.

[222] Dwyer, *supra* note 220, at 7, 28.

[223] Guide to Congress, *supra* note 202, at 890.

[224] *Id.* Under the original legislation that created the Quadrennial Commission, one chamber of Congress could block a pay increase. In response to *INS v. Chadha*, 462 U.S. 919 (1983), in which the Supreme Court declared the single-chamber legislative veto unconstitutional, Congress modified the law to require both chambers to pass a resolution defeating a salary increase. *See* Dwyer, *supra* note 220, at 7.

[225] Dwyer, *supra* note 220, at 7.

[226] Guide to Congress, *supra* note 202, at 896.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 897.

[230] *Id.* at 896.

[231] Cong. Quarterly, Congress and the Nation Vol. VIII 1989-1992 965 (1993), *available at* http://library.cqpress.com/catn/catn89-0000013726.

proposal showcased for the public the consequence of the recusal legislating process—to make it difficult to stop a particular policy from taking effect.

Recognizing that anger was building, legislators began to retreat from their support of the fifty-one percent pay hike.[232] Speaker Wright polled his caucus on January 30 and three days later announced a plan to hold a vote to scale back the raise to thirty percent and still ban honoraria.[233] Unfortunately, he proposed holding the vote on February 9—one day *after* the fifty-one percent raise went into effect.[234] Presumably, this would have served two purposes: it would have allowed members to take credit for giving back a raise that had already become effective, while also ensuring that any hiccups along the way led to the maintenance of the fifty-one percent raise.

Speaker Wright's plan satisfied few within or outside of his caucus.[235] On the very day he announced his plan, the Senate passed a resolution to kill the pay raise.[236] On February 6, during a pro forma session in the House, Representative William Dannemeyer (R-Cal.), a fierce critic of the raise, also introduced a resolution to block the increase.[237] Democratic leaders tried to block consideration of the resolution by moving to adjourn.[238] Representative Dannemeyer, however, called for a roll-call vote on the question of adjournment and painted it as a vote on the merits of the raise.[239] Over one hundred Democrats voted against adjournment—an acute display of electoral fear and internal acrimony, given that most procedural votes are party-line affairs.[240] With adjournment no longer an option, Speaker Wright announced that a vote on the pay proposal would take place the next day.[241] On February 7, a resolution disapproving the salary increase passed 380-48.[242]

This was not the first perceived abuse of the recusal process as it related to congressional pay. In 1987, congressional leaders had also failed to schedule a vote on a pay increase until the day after it took effect—thereby merely giving lawmakers an opportunity to cast a meaningless vote against a pay raise once the increase was already guaranteed.[243]

These procedural tricks, and the public's reaction to them, spelled the effective end of the commission approach to congressional salary questions.[244] In 1989, Congress enacted the Ethics Reform Act.[245] Among other things, the law granted the House and Senate portions of the pay increases

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[232] *Id.*
[233] *Id.* at 966.
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] Cong. Quarterly, Congress and the Nation Vol. VII 1985-1988 900 (1990), *available at* http://library.cqpress.com/catn/catn85-0012178791.
[244] *Id.*

they had denied themselves the year before and began the phase-out of honoraria.[246] Significantly, the law also replaced the Quadrennial Commission with the Citizens' Commission on Public Service and Compensation, which, like the Quadrennial Commission, was to meet every four years to propose salary levels to the President for Congress, the judiciary, and top executive officers.[247]

The commission comprised eleven members appointed by the President, five of whom would be citizens randomly selected from voter registration rolls (hence the name "Citizens' Commission").[248] The commissioners were to be appointed every four years, and they were to make recommendations to the President no later than the December 15 after the fiscal year in which the commission was convened.[249] The President was then to submit his own recommendations to Congress on the first Monday after the following January 3.[250] The President's proposals were to be those that he "consider[ed] to be fair and reasonable in light of the commission's report and recommendations, the prevailing market value of the services rendered in the offices and positions involved, the overall economic condition of the country, and the fiscal condition of the Federal Government."[251]

All of these requirements were either identical or similar to those imposed under the Quadrennial Commission structure. The vital difference, however, was that under the new regime the President's proposals could not take effect until approved in a recorded vote by each chamber of Congress.[252] In other words, the Ethics Reform Act negated the "recusal" element of the previous legislation by requiring that Congress publicly endorse any pay increase proposed by the Citizens' Commission and the President.

This change would likely have made the Citizens' Commission a futile exercise because no Congress would want to affirmatively vote itself a pay raise. Likely for this reason, no President has ever appointed anyone to the Citizens' Commission.[253] Instead, Congress has resorted to an alternative means of raising salaries without subjecting its members to votes on the matter: automatic increases tied to the Employment Cost Index.[254] While this approach is still subject to seemingly ever-present political demagoguery re-

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[245] Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified in scattered sections of 2 U.S.C., 5 U.S.C., 10 U.S.C., 18 U.S.C., 26 U.S.C., 31 U.S.C. (2006)).

[246] 5 U.S.C. App. 7 § 501 (2006).

[247] 2 U.S.C. §§ 351–52 (2006).

[248] 2 U.S.C. § 351 (2006).

[249] 2 U.S.C. § 357 (2006).

[250] 2 U.S.C. § 358 (2006).

[251] *Id.*

[252] 2 U.S.C. § 359 (2006).

[253] DWYER, *supra* note 220, at 7.

[254] From 1975–1991 the automatic increase was tied to rate increases given to General Schedule federal employees, but Congress affirmatively had to vote to accept the raise. *See* Postal Service Compliance with Occupational Safety and Health Act, Pub. L. No. 94-82, 89 Stat. 419 (1975) (codified in scattered sections of 2 U.S.C., 5 U.S.C., 28 U.S.C., 31 U.S.C. (2006)).

garding the issue of congressional pay,[255] it has created a much more reliable and consistent mechanism for raising congressional salaries. From 1991 to 2008, Congress accepted the automatic pay adjustment twelve times and declined it just six times[256]—a much higher rate of acceptance than that produced by the Quadrennial Commission's recusal process.

The history of congressional pay legislation reveals two important lessons about recusal legislating. First, the different experiences of the Quadrennial Commission and the Citizens' Commission show that much of the benefit of recusal legislating comes from the absence of an affirmative congressional vote on a delegatee's policy decision. Second, if the American public perceives a harm emanating from recusal legislating, they will rightly reject the process as a self-interested attempt by Congress to avoid political responsibility for difficult or potentially self-serving decisions. Voters stand ready to punish legislators who try to have it both ways. And lawmakers, with reelection always in the foreground, will likely give in to this pressure and stop the recusal process. The case of congressional salaries shows that recusal legislation is not a cure-all; instead it is an approach that is useful in a particular set of situations.

IV. The Benefits and Limitations of Recusal Legislating

The examples of the BRAC law, the Rules Enabling Act, and the Postal Revenue and Federal Salary Act illuminate the functional features of recusal legislation, the motivations that play a role in the passage of such legislation, and some of the benefits and limitations of the mechanism. This Part uses the lessons learned from these case studies to highlight the benefits and a few of the limitations of recusal legislating more directly.

A. *Recusal Legislating Allows Congress to Limit the Intrusion of Electoral Politics in Policymaking*

Congress was designed to be the branch of the federal government most responsive to the citizenry.[257] From the beginning, elections were seen as

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[255] *See, e.g.*, A Bill to Repeal the Provision of Law that Provides Automatic Pay Adjustments for Members of Congress, S. 620, 111th Cong. (2009); A Bill to Repeal the Provision of Law that Provides Automatic Pay Adjustments for Members of Congress, S. 542, 111th Cong. (2009); Stop the Congressional Pay Raise Act, H.R. 156, 111th Cong. (2009); A Bill to Repeal the Provision of Law that Provides Automatic Pay Adjustments for Members of Congress, S. 317, 111th Cong. (2009); Stop the Congressional COLA Act, H.R. 395, 111th Cong. (2009); Delay the Congressional Pay Raise Act, H.R. 282, 111th Cong. (2009); Congressional Pay Reform Act of 2009, H.R. 215, 111th Cong. (2009); A Bill to Repeal the Provision of Law that Provides Automatic Pay Adjustments for Members of Congress, S. 102, 111th Cong. (2009).

[256] Ida A. Brudnick, Cong. Research Serv., 97-1011 GOV, Salaries of Members of Congress: A List of Payable Rates and Effective Dates, 1789-2008 2 (2008); *see also* U.S. Senate, *Senate Salaries Since 1789*, U.S. Senate, http://www.senate.gov/artandhistory/history/common/briefing/senate_salaries.htm (last visited Oct. 26, 2010).

[257] MacNeil, *supra* note 3, at 1–2.

moments of accountability for elected officials, measuring whether a representative had been responsive enough to the concerns and interests of his constituents.[258] With the ratification of the Seventeenth Amendment, requiring the direct election of senators, both chambers of Congress became accountable directly to the people.[259]

Since reelection is a central driving force for most legislators,[260] Congress has created an organizational structure for itself that meets the electoral needs of its members.[261] Congressmen are concerned with both external politics (relating to a legislator's constituents) and internal politics (relating to a legislator's colleagues). But while Congress was intentionally designed to be a political institution, there are times when members of Congress would like nothing more than to act on a policy without the messy interference of politics. Recusal legislating affords Congress its best shot at accomplishing this goal.

For example, one of the primary justifications of judicial rulemaking was the belief that politics should be kept out of the development of procedural court rules.[262] Proponents believed that in order to do this, it was necessary to take away as much control over rulemaking from Congress as possible.[263] The Rules Enabling Act represented a relatively successful effort to use recusal legislating to take the politics out of procedural rulemaking.

The BRAC law and the creation of the Quadrennial Commission also show how recusal legislating can be used to overcome political obstacles to enacting policy. Potential electoral consequences, combined with structural

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[258] Indeed, some of the harshest Anti-Federalist critiques of the proposed constitution rested on the belief that the two-year terms for members of the House and the six-year terms for senators were too long to provide "a due dependence and accountability to . . . constituents." CENTINEL I, *in* THE COMPLETE ANTI-FEDERALIST 130, 142 (Herbert J. Storing ed., 1st ed. 1981). The Anti-Federalist Brutus stated, "Men long in office are very apt to feel themselves independent [and] to form and pursue interests separate from those who appointed them." BRUTUS XVI (1787), *in* THE COMPLETE ANTI-FEDERALIST, *supra*, at 358, 444. The view that elections help ensure a lawmaker's accountability to her constituents remains popular. *See, e.g.*, JOHN ELY, DEMOCRACY AND DISTRUST 131–34 (1980); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92–126 (2d ed. 1979); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 14 (1993); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 813 (1997). For the suggestion that the relationship between elections and accountability is not as strong as has been supposed, see Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005).

[259] U.S. CONST. amend. XVII.

[260] *See, e.g.*, BRUCE CAIN ET AL., THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE 77 (1987); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 37 (2d ed. 1989); MAYHEW, *supra* note 29, at 13.

[261] MAYHEW, *supra* note 29, at 81 (stating that "if a group of planners sat down and tried to design a pair of American national assemblies with the goal of serving members' electoral needs year in and year out, they would be hard pressed to improve on what exists"). For further discussion, see *supra* Part II.

[262] *See supra* notes 124–126, 142–146 and accompanying text.

[263] *See supra* notes 142–146 and accompanying text.

impediments and institutional norms, prevented Congress from acting on the long-recognized, universally agreed upon need to close and realign military bases and from passing salary increases.[264] By recusal legislating, Congress created a mechanism that accomplished its goals by decreasing the political complications inherent in congressional action.

B. Recusal Legislating Reduces the Disproportionate and Undue Influence of Organized Interest Groups in Policy Matters

In political rhetoric,[265] the media,[266] and the minds of Americans,[267] interest groups are viewed with deep suspicion. Legal scholars and political scientists, on the other hand, tend to view interest groups through a more nuanced lens. Some, for instance, argue that interest groups represent most major points of view, and that, therefore, interest group involvement in law-making is part of a free legislative marketplace in which these "representative groups compete for victory, in which good public policy will typically win out, and in which tyranny will be avoided."[268] Other scholars doubt whether interest groups are truly representative of all social interests.[269]

It is beyond the scope of this Article to join in a centuries-old debate over the role of organized interests in our political system.[270] However, to the extent that we believe that organized groups can at least sometimes gain disproportionate or inappropriate influence over policy, recusal legislating

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[264] *See supra* notes 38–77, 192–211 and accompanying text.

[265] *See, e.g.*, Senator Barack Obama, The Second McCain-Obama Presidential Debate (Oct. 7, 2008) (transcript available at the Commission on Presidential Debates, http://www.debates.org/index.php?page=october-7-2008-debate-transcript) ("[W]e're going to have to change the culture in Washington so that lobbyists and special interests aren't driving the process and your voices aren't being drowned out . . . . The key is whether or not we've got priorities that are working for you as opposed to those who have been dictating the policy in Washington lately, and that's mostly lobbyists and special interests."); *see also* Senator John McCain, The Second McCain-Obama Presidential Debate (Oct. 7, 2008) (transcript available at the Commission on Presidential Debates, http://www.debates.org/pages/trans2008c.html) ("There's too much special interests and too many lobbyists . . . . [I]f we get rid of the cronyism and special interest influence in Washington . . . we can act more effectively.").

[266] *See, e.g.*, Richard Almeida, Assistant Professor, Francis Marion Univ., Media Framing of Interest Groups as Special Interests, Address Before the Midwest Political Science Association (Apr. 2-6, 2008) (transcript available at http://www.allacademic.com//meta/p_mla_apa_research_citation/2/6/5/9/7/pages265970/p265970-1.php) (examining media treatment of interest groups in the Social Security reform debate between 2002–2006 and finding that the only frame through which the media described these groups was as "special interests").

[267] ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 88–89 (Norton Garfinkle ed., 2007) (citing public opinion polls showing Americans' dissatisfaction with the perceived influences of organized interest groups).

[268] ESKRIDGE ET AL., CASES AND MATERIALS, *supra* note 17, at 50 (citing WILFRED BINKLEY & MALCOLM MOOS, A GRAMMAR OF AMERICAN POLITICS 7–8 (1950)).

[269] *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 127–28 (1965); ELMER E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 34–35 (1960); Bone, *supra* note 134, at 922–23.

[270] The debate dates to even before America's founding, as demonstrated by James Madison's famous discussion of factions. *See* THE FEDERALIST NO. 10 (James Madison).

can combat that influence by creating a policymaking structure that minimizes the undue influence of interest groups.

By removing congressional responsibility for substantive policy development, recusal legislating creates a situation in which the established relationships and practices of interest groups hold much less sway. Unlike members of Congress, individuals working for a delegatee in the recusal legislating context will be more focused on creating sound policy and less interested in engaging in the type of logrolling and vote-trading on which interest groups rely to push their agendas.[271] Moreover, because delegatees are typically not long-standing agencies with wide-ranging policy responsibilities, but are rather short-term groups formed for a specific purpose, there is less need and opportunity for them to become responsive to the entreaties of interest groups.[272] Furthermore, concerns over agency capture by organized interests or manipulation of agencies by members of congressional committees are minimized.[273]

Indeed, supporters of judicial rulemaking point to the exclusion of organized interest groups as a chief benefit of the Rules Enabling Act.[274] By allowing rules to be crafted by the judiciary rather than legislated by Congress, the Rules Enabling Act creates a "level playing field"[275] where the process of developing rules is more "immune from the pressures, special interests, and vagaries of the political process."[276] In this context, recusal legislating provides a mechanism for limiting the influence of organized interests.

C. Recusal Legislating Allows Congress to Tackle Collective Action Problems That It Would Not Otherwise Address

As discussed above, Congress is generally ill-suited to take action that produces particularized costs but only generalized benefits.[277] The reasons for this are many, including members' fears of reprisal for taking action seen as targeting benefits enjoyed by another member's district, as well as a lack of electoral incentives to act otherwise.[278] Thus, for those policy problems

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[271] Bone, *supra* note 134, at 924–25.

[272] Carrington, *supra* note 142, at 301–03; *see also* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 144 (1997) (arguing that vague delegations inhibit logrolling).

[273] *See* SCHOENBROD, *supra* note 258, at 82–83, 224 n.1 (discussing concerns about agency capture expressed by a variety of scholars).

[274] Carrington, *supra* note 142, at 301–02.

[275] *Id.* at 302.

[276] Bone, *supra* note 134, at 896.

[277] *See supra* Part II; *see also* Mayer, *supra* note 74, at 394.

[278] MAYHEW, *supra* note 29, at 82–83. The effort to impose pay-as-you-go ("PAYGO") rules to federal budgeting can be seen as an attempt to remake the appropriations process into a zero-sum calculation and thereby create incentives to take into account generalized costs.

that represent a classic collective action problem, Congress rarely finds a solution.[279]

Recusal legislating offers a vehicle through which Congress can successfully confront these challenges. The BRAC legislation is perhaps the best illustration of this benefit. After more than a decade of inaction, the BRAC proposal successfully removed many of the barriers that had prevented Congress from addressing the base closure problem. Through recusal legislating, Congress was able to aggregate the benefits of action by highlighting the savings associated with multiple base closures, while at the same time reducing the perception that it was inflicting particularized costs by not affirmatively voting for any specified set of base closures. The availability of credit-claiming opportunities[280] created incentives for legislators to support the BRAC law, while the lack of district-specific policies in the legislation itself reduced concerns about incurring the wrath of powerful colleagues.

Recusal legislating particularly aided lawmakers with military bases in their districts. First, it allowed those lawmakers the same chance at credit-claiming for the aggregated, national benefits of base closings available to other lawmakers. Second, by removing the district-specific decision from Congress's hands—and by creating a procedure that made a military base closure virtually impossible to stop once it was recommended by the BRAC Commission and accepted by the President—the legislation allowed the affected lawmaker to continue to represent his district fiercely without actually preventing needed policy improvements.[281] Thus, by altering incentives (and disincentives), recusal legislating solved a collective action problem, al-

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[279] *See, e.g.*, *id.* at 118 n.73 ("The quality of ego that motivates people to seek political office is not conducive to collective action once they succeed.").

[280] *Id.* at 52–53.

[281] To many legislators, this was a key provision of the BRAC law. Arguing in support of the law as currently formulated, Representative John Kasich (R-Ohio) told his colleagues:

> Frankly, from a political point of view, from the point of view of the membership of this House, if we are going to have base closings, I think it makes far greater sense from a political perspective for yourselves to not . . . be held responsible for being able to stop a bill coming up. It is much easier to be able to make the argument that, "I tried to get a resolution of disapproval, but the Congress just simply wouldn't buy it."

134 CONG. REC. 17,079 (1988). Senator Phil Gramm (R-Tex.) made a similar observation:

> The beauty of this proposal is that, if you have a military base in your district—God forbid one should be closed in Texas, but it could happen—under this proposal, I have 60 days. So I come up here and I say, "God have mercy. Don't close this base in Texas. We can get attacked from the south. The Russians are going to go after our leadership and you know they are going to attack Texas. We need this base." Then I can go out and lie down in the street and the bulldozers are coming and I have a trusty aide there just as it gets there to drag me out of the way. All the people in Muleshoe, or wherever this base is, will say, "You know, Phil Gramm got whipped, but it was like the Alamo. He was with us until the last second."

CAMPBELL, *supra* note 38, at 118.

lowing the advance of a federal policy that Congress saw as necessary but could not enact through traditional legislative means.

While the BRAC law offers the clearest example of the benefits of recusal legislation in changing the dynamics of a collective action problem, the Rules Enabling Act is also instructive for this purpose. Although every lawmaker has at least some constituents with a stake in efficient litigation in the federal court system, constituents do not see their lawmakers as playing a role in the administration of the federal courts.[282] Because they were not held accountable for the workings of the court system, lawmakers saw little potential reward for making changes to the procedural rules of the federal judiciary in the majority of cases.[283]

Furthermore, there was no method to aggregate the benefits of updating the civil rules so as to adjust the incentive structure or alter the dynamics that discouraged collective action. Through recusal legislating, however, Congress could bestow its oversight authority upon the judicial branch, which has a greater stake in the outcome of federal procedural rulemaking. In the Rules Enabling Act context, Congress dealt with its collective action problem by enabling a non-legislative entity to address concerns that likely would otherwise have been ignored.

D. Recusal Legislating Creates a Structure and Procedure for the Necessary Review and Maintenance of Certain Policies

The many obstacles that hinder congressional action make it difficult for Congress to monitor the effectiveness of its policy choices and respond accordingly; Congress therefore must often take a one-shot approach to its legislative concerns. Congressional neglect rightfully may be considered benign in many legislated areas, and it is undoubtedly welcomed by many agencies administering congressional enactments.[284] But in areas in which no agency exists to provide necessary review and maintenance, the lack of congressional attention may be problematic. Recusal legislating presents a mechanism for the proper maintenance of policies that might otherwise suffer from congressional neglect.[285]

The Rules Enabling Act and the congressional pay legislation provide clear examples of this. The Rules Enabling Act permits the Judicial Conference to propose updates to the federal rules as necessary. In fact, injecting

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[282] Levin & Amsterdam, *supra* note 144, at 10.

[283] *Id.*

[284] One way in which Congress can achieve a form of policy upkeep without resorting to a delegation of authority is by indexing benefits. *See generally* R. Kent Weaver, Automatic Government: The Politics of Indexation (1988). That approach has its own problems, of course, and is clearly limited to certain governmental programs, such as salaries and entitlements. *See id.* at 7–9, 248–55.

[285] This is one of the chief advantages of delegating generally, since it gives a non-legislative entity the authority to respond to unforeseen policy needs and conduct maintenance of past policy decisions. *See supra* notes 147-149 and accompanying text.

flexibility and responsiveness into the maintenance of federal procedural rules was one of the motivations behind the adoption of the Act.[286] Because recusal legislating allows the delegatee's (here, the Supreme Court's) determination to go into effect without any accompanying congressional action, it encourages thoughtful and efficient maintenance of a policy prescription without the involvement of politics.

Similarly, through the Quadrennial Commission, Congress created a means by which it would receive regular salary adjustments without having to create new legislation each time a salary increase was necessary. Despite other problems with the Quadrennial Commission, the legislation did provide an effective means to make recurring adjustments to congressional pay.

The BRAC law also provides an example of how recusal legislating ensures flexibility, although in a different way than the Rules Enabling Act or the Quadrennial Commission. The political disincentives discussed above prevented Congress from keeping military base closure decisions in line with new realities.[287] By enacting the original BRAC law, Congress was able to establish a mechanism for developing recommendations and policies that were more aligned with present-day military needs. And, once Congress created the BRAC process, it could renew the Commission as needed. The BRAC law demonstrates that recusal legislating is able not only to increase continual upkeep at the development stage, but also to provide flexibility in Congress's approach to future policy needs.

E. Recusal Legislating Allows Specialized Policies to be Developed Without Concerns about Political Preferences or Interference

A powerful argument in favor of any delegation is that it allows experts to play a leading role in the development of policy.[288] Recusal legislating furthers this goal by delegating to temporary or independent agencies over which Congress has minimal control. Because of the insulated nature of the delegatee, experts acting under the auspices of recusal legislation are afforded even greater freedom to rely on their expertise and are even less influenced by political considerations than experts working within the traditional executive agency context.[289]

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[286] *See, e.g.*, Bone, *supra* note 134, at 894–95.

[287] *See* 134 Cong. Rec. 17,064–65 (1988) (statement of Rep. Kolbe (R-Ariz.)); 134 Cong. Rec. 17,066 (statement of Rep. Morella (R-Md.)).

[288] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1677–78, 1702 (1975) (describing the traditional rationales for delegation).

[289] This idea goes beyond agency capture, noted earlier. *See supra* note 273 and accompanying text. Instead, it relates to the fact that administrative agencies are often headed by political appointees who see it as their responsibility to promote certain political agendas. The way that politics interfered with scientific determinations related to the Endangered Species Act during the George W. Bush Administration offers a perfect illustration of this problem; this is the type of concern that recusal legislating may address. *See* Office of Inspector Gen., Dep't of the Interior, Report of Investigation: Julie MacDonald, Deputy Assistant Secre-

There are three ways in which the design of recusal legislation allows experts to avoid political pressure more effectively than other delegations.[290] First, the entity upon which Congress bestows the delegated authority is less likely to be run by partisan players with political agendas because it is either newly created or independent of congressional and executive controls.[291] The organizational structure of the delegatee body is therefore also less likely to reflect a deeply rooted agenda beyond the goal of developing sound policy.[292] Second, interest groups will not be able to gain access to decision-makers as easily as they would if the decision-making body were more permanent or more tied to congressional control,[293] since interest groups, as "repeat players," rely on established relationships with lawmakers and legislative staffs to advance their interests.[294] Finally, because in the recusal context final policy recommendations do not require congressional approval to become effective, the delegatee need not pay nearly as much (if any) attention to the wishes of legislators, whose desires are often heavily influenced by political considerations.[295] This freedom is further enhanced by the fact that the delegatee is not typically a repeat player in the appropriations process.

One need only look to congressional involvement in the Federal Rules of Civil Procedure for an illustration of the importance of insulating as much as possible the delegatee's policy decision from legislative reconsideration or approval. After the Supreme Court promulgated the 1993 proposed revision to Rule 26—incorporating mandatory discovery disclosures into the rule—interest groups sought Congress's help in blocking the amendment.[296] Lobbying by these groups at the Advisory Committee and Judicial Conference levels had failed, but members of Congress were ready to come to their aid. The revision to Rule 26 only survived because of the expedited, preferential treatment afforded the Supreme Court's proposals under the Rules Enabling Act. Had congressional approval been required before the promulgated rules could take effect, interest groups likely would have succeeded in stopping

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TARY, FISH, WILDLIFE AND PARKS (2007) (finding that Ms. MacDonald altered and manipulated scientific findings, possibly for political reasons).

[290] Recusal legislating does not immunize policy development from political interference. Nevertheless, it can help to reduce the politicization of policy development.

[291] *See* U.S. H. R. COMM. ON GOVERNMENTAL REFORM—MINORITY STAFF, 109TH CONG., THE GROWTH OF POLITICAL APPOINTEES IN THE BUSH ADMINISTRATION (Comm. Print 2006) (showing that administrative agencies are becoming increasingly staffed by political appointees, who often serve political agendas, rather than by civil servants).

[292] In many cases of recusal legislating, there will not be any pre-existing organizational structure in which a political agenda could be embedded. This is because recusal legislation actually creates the entity responsible for the policy. For example, in the BRAC context, Congress went so far as to place restrictions on who could serve as staff to the Commission. *See supra* notes 93–95 and accompanying text.

[293] *See supra* notes 265–76 and accompanying text; *see also* MASHAW, *supra* note 272, at 144.

[294] SCHOENBROD, *supra* note 258, at 82–83 & n.1.

[295] *See* MAYHEW, *supra* note 29, at 15–16.

[296] Hughes, *supra* note 175, at 6–11.

these and other future rule changes.[297] The Advisory Committee itself has stated that it believes increased congressional participation in the consideration of rule promulgation would force the Committee to take political considerations into account when developing its proposals.[298]

In the BRAC context, Congress spent considerable time deliberating the question of whether the BRAC Commission's recommendations should require congressional approval before taking effect.[299] Ultimately, Congress decided that requiring congressional action before implementation of the Commission's recommendations would leave congressmen in the same predicament that they were in prior to the passage of the legislation.[300] Moreover, were the Commission's recommendations implemented only with congressional approval, the Commission would have to consider in advance the political dynamics of its selections and weigh the likelihood of securing congressional support, rather than basing its decision on military efficiency and similarly appropriate factors.

F. Recusal Legislating Provides an Opportunity for Congress to be Self-Reflective

One final noteworthy function of recusal legislating is that it requires Congress to think about its institutional weaknesses and how those weaknesses affect the development of public policy. Congress necessarily does this when it considers recusal legislating because it is inherent in the process of drafting recusal legislation. As Congress weighs the contours of a specific recusal proposal, it must grapple with the congressional barriers the legislation seeks to avoid, and in so doing confronts the reality of these barriers. Perhaps increased awareness can lead Congress to find other ways to minimize the damaging effects of these roadblocks.

The debate over the BRAC legislation is replete with examples of congressional self-reflection, both from supporters and opponents of the bill.[301] As the proposal weaved its way through committees and floor debate, it began to reflect Congress's recognition of its own institutional weaknesses. For example, the law included automatic funding for the Commission and for the implementation of the recommended base closures and realignments;[302] the text of the resolution of disapproval;[303] procedures for stream-

[297] *See* Mullenix, *supra* note 145, at 835. The history of proposed changes to Rule 68 also shows that interest groups are better able to lobby and persuade Congress than they are the Advisory Committee. *See, e.g.*, *id.* at 848–51.

[298] *See id.* at 834–36.

[299] *See* 134 Cong. Rec. 17,079–87 (1988).

[300] *Id.*

[301] *See generally* 134 Cong. Rec. 17,056–87 (1988).

[302] Defense Base Closure and Realignment Commission §§ 2902(k), 2905(a), 2906, 10 U.S.C. § 2687 note (2006).

[303] *Id.* § 2908(a)(2).

lined floor consideration of the resolutions;[304] and a self-effectuating enactment mechanism requiring no explicit congressional approval.[305]

Of course, individual legislators often pay lip service to the goals of minimizing congressional partisanship, logrolling, and "campaign-centered" lawmaking.[306] But recusal legislation prompts Congress, as an institution, to address these problems head-on. Although self-reflection might not result in the wholesale reconsideration of organizational structures and institutional norms, it is nevertheless a step in the right direction.

G. *The Limits of Recusal Legislating*

Despite its benefits, the circumstances under which recusal legislation is a viable and valuable option for Congress are admittedly limited. The approach works only in those circumstances where Congress agrees both on the need to act and on the substantive action that should be taken, but recognizes that, for particular structural reasons, it cannot or will not act.

Thus, the value of recusal legislating might be limited to the following policy decisions: (1) the revocation of existing benefits; (2) the imposition of particularized (or targeted) costs; (3) the granting of unpopular benefits; or (4) the recurring maintenance of existing policy.

The first two types of policy decisions are opposite sides of the same coin. The BRAC law provides a perfect example of how recusal legislating serves a valuable function to Congress in this regard, since it was a case in which Congress needed to both revoke benefits and impose costs on particular districts. Absent a process by which Congress could recuse itself from making the final base-closure decisions, it seems possible—perhaps even likely—that it would now be over thirty years since the last military base closure.

Despite the legislation's ultimate demise, the history of the Quadrennial Commission suggests the value Congress might see in using recusal legislating to overcome political hurdles that prevent it from granting necessary benefits to an unpopular group.

Lastly, the Rules Enabling Act provides an example of the final type of policymaking that is well-suited for recusal legislating: the frequent upkeep

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[304] *Id.* § 2908(d).

[305] *See id.* § 2904. The Supreme Court has also held that judicial review of the Commission's recommendations is unavailable, except with regard to claims brought under the National Environmental Policy Act ("NEPA"). *See* Dalton v. Specter, 511 U.S. 462, 476–77 (1994); *id.* at 483 (Souter, J., concurring) (stating judicial review is still available under the NEPA); *see also id.* at 479 (stating that the "text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission's or the Secretary's compliance with it is precluded").

[306] The BRAC debate is full of such examples. *See generally* 134 CONG. REC. 17,056–87 (1988). Special thanks to Professor David Menefee-Libey for allowing the Author to borrow from the title of his book. DAVID MENEFEE-LIBEY, THE TRIUMPH OF CAMPAIGN-CENTERED POLITICS (2000).

of relatively uncontroversial policies. As the history and motivations behind granting the Supreme Court procedural rulemaking authority illustrate, congressional structures, procedures, and institutional incentives make the maintenance of certain policies difficult or impossible. Moreover, unlike economic policies for which Congress can rely on automatic adjustments through cost-of-living indexing, no mechanized option exists for Congress to make necessary updates to non-economic policies such as the Federal Rules.[307] Recusal legislating gives an independent entity that ability.

V. Assessing Recusal Legislating

Recusal legislating offers numerous benefits to lawmakers and the nation. There are, however, several potential criticisms of the practice that must be explored before it is possible to properly assess its future role.

The first critique of recusal legislating is common to most forms of congressional delegation: the practice is undemocratic.[308] The United States is a democracy, albeit a representative one. A key feature of a democracy is that the people have a say in the determination of the laws and policies under which they live. Delegations and, by extension, recusal legislating, undermine the democratic principle of our governing system by taking policymaking out of the hands of democratically elected representatives and placing it in the hands of an unelected few.[309] Indeed, recusal legislating is arguably even more anti-democratic than traditional agency delegation because the conferral of authority extends to a non-administrative agency, thereby removing a significant role for a democratically elected executive to play in the policy's development.[310]

Moreover, as David Mayhew has said: "Congress exhibits a particular kind of popular democracy. It tends to incorporate popular ways of thinking—the tropes, the locutions, the moralisms, the assumptions, the casual stories, and the rest that structure the meaning of political life in the mass

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[307] *See supra* note 284. The BRAC law can also be seen in this light. By the time Congress enacted the law, dozens of bases were considered to be obsolete or unnecessary, yet Congress was incapable of updating America's military base policy. *See supra* notes 74–77 and accompanying text. BRAC was a response to the need for procedures to address this maintenance problem.

[308] *See, e.g.*, Schoenbrod, *supra* note 258, at 99–106. There may also be concerns over the constitutionality of this practice. But given the dormant status of the Supreme Court's non-delegation doctrine, and especially because the Rules Enabling Act and the BRAC Commission both survived constitutional challenges before the Court, I will leave for another time the constitutional questions raised by recusal legislating. *See Dalton*, 511 U.S. at 462 (upholding BRAC commission recommendations); Sibbach v. Wilson, 312 U.S. 1, 9–10 (1941) (upholding the Rules Enabling Act).

[309] Schoenbrod, *supra* note 258, at 99.

[310] *See, e.g.*, Mashaw, *supra* note 272, at 152–53 (arguing that because the President is democratically elected, the responsiveness link between citizens and governmental policies effectuated by executive branch agencies remains).

public."[311] Unlike Congress, the entity to which Congress delegates its authority in the recusal legislating context is not representative of the people.

However, this critique loses much of its force when we consider that recusal legislating is limited to situations in which Congress has effectively already made a policy determination, but is simply placing the final articulation of that policy in the hands of a non-legislative entity as a means of getting past a procedural stalemate or collective action problem. In such cases, the people's voice is still being heard in the initial determination of the policy itself. Moreover, because Congress can still reverse the policy suggested by the commission if motivated by a strong enough political will to do so, policy choices that are truly contrary to congressional intent will still not be effectuated under the recusal system.

A second, related critique of recusal legislating is aimed at the way it subverts the accountability of representatives to their respective constituents.[312] Delegations allow elected officials to claim credit for the benefits of legislation while shielding themselves from blame for the unpopular results of the lawmaking process.[313] The result is that delegations have become one of the means of incumbent entrenchment. David Schoenbrod, one of the leading critics of congressional delegation, argues that Congress's reliance on delegation "shortcircuits" the democratic option of refusing to reelect legislators by "allowing our elected lawmakers to hide behind unelected agency officials."[314]

The BRAC law and congressional pay legislation certainly support the idea that legislators can use recusal legislating to claim credit, shift blame, and even stand up as heroic—albeit doomed—opponents of policy decisions ostensibly made by the delegatee.[315] But the unaccountability of delegatees is not a drawback in all instances. The very purpose of recusal legislation is to remove political pressures in those situations where those pressures lead to suboptimal results. Moreover, by creating self-effectuating policy proposals that automatically become law in the absence of congressional action, recusal legislating still preserves political pressure—it simply reverses the direction of this pressure, holding legislators just as accountable for their vetoes as for their affirmations of policies.

Finally, it may appear to some that recusal legislating undercuts several framework principles of our governmental structure. As any student of U.S. history can explain, the Constitution was a monumental achievement which incorporated a delicate balancing of political theories, sociological

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[311] David R. Mayhew, *Is Congress "the Broken Branch"?*, 89 B.U. L. Rev. 357, 360 (2009).

[312] This differs from the concern that recusal legislating is anti-democratic in that it focuses on whether citizens will be able to hold their elected representatives *accountable* for a failure to create policies reflecting the public view, rather than on whether those policies accurately reflect the public view in the first place.

[313] Schoenbrod, *supra* note 258, at 9–10.

[314] *Id.* at 14.

[315] *See supra* note 281 (quoting Senator Phil Gramm (R.-Tex.) discussing the BRAC law).

prejudices, and competing realities and interests.[316] Many of the core decisions reached in 1787 represent what could be called framework values. Recusal legislating could be viewed as threatening several of these values embedded in the United States' governmental system since its founding.

For example, recusal legislating challenges the framework principle that lawmaking should be difficult. Our system was designed to stymie congressional action unless such action enjoyed broad support.[317] Recusal legislating allows Congress to avoid legislating the details of a policy and creates an alternative, streamlined means for consideration of the specific policy pronouncement of the delegatee. Opponents could argue that, in doing so, recusal legislating allows Congress to circumvent the constitutional features intended to impede the enactment of laws.

A second framework value undermined by recusal legislating is the importance of the size of the body creating the law.[318] The larger the legislative body, the greater the diversity of represented interests and, according to some, the greater the likelihood of wise policymaking.[319] Recusal legislating replaces this large body with a smaller group of individuals whose experiences and interests are much narrower.

The value of transparency is also undermined by recusal legislating. Professor Jeremy Waldron emphasizes the value of the legislature's "transparent dedication to lawmaking."[320] He explains, "It is particularly important in a democracy that the place where the laws are made be publicly known and identified."[321] Congress has implicitly recognized the importance of this function by attempting to make administrative decisions more accessible to the public—particularly through notice and comment and open

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[316] Cal Jillson, American Government: Political Development and Institutional Change 34-38 (5th ed. 2009).

[317] *See* The Federalist No. 73, at 422–23 (Alexander Hamilton) (Kathleen M. Sullivan ed., 2009); Ely, *supra* note 258, at 133–34 (stating that "one reason we have broadly based representative assemblies is to await something approaching a consensus before government intervenes"); Schoenbrod, *supra* note 258, at 107–18. Professor Schoenbrod views this framework value as a means employed by the Framers of the Constitution to protect liberty, defined as "the people's right to be left alone by government except when some genuinely public purpose warrants intervention." Schoenbrod, *supra* note 258, at 107.

[318] Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. Rev. 335, 340–45 (2009).

[319] *Id.*

> For the many, each of whom is not a serious man, nevertheless could, when they have come together, be better than those few best—not, indeed, individually but as a whole, just as meals furnished collectively are better than meals furnished at one person's expense. For each of them, though many, could have a part of virtue and prudence, and just as they could, when joined together in a multitude, become one human being with many feet, hands, and senses, so also could they become one in character and thought. That is why the many are better judges of the works of music and the poets, for one of them judges one part and another and all of them the whole.

Id. at 343 (quoting Aristotle, Politics 95-96 (Peter L. Philips Simpson trans., The Univ. of N.C. Press 1997) (c. 350 B.C.E.)).

[320] *Id.* at 336.

[321] *Id.* at 339.

meeting requirements.[322] Because recusal legislating shifts the responsibility for lawmaking away from Congress and towards an entity largely unknown to the public, it diminishes the transparency of governmental functions.[323]

However, while these framework values may be challenged by recusal legislating, others are promoted and preserved. For example, while it is true that the Framers sought to prevent excesses in lawmaking, they also made clear during the Constitutional Convention and debates over ratification that they wanted an effective, efficient, and active legislature.[324]

Similarly, while a larger, more robust legislative body has benefits, so too does a smaller, more refined policymaking group. Indeed, the Framers paid careful attention to making sure that the national legislature did not grow too large.[325] Additionally, the congressional committee system itself is an acknowledgement of the positive attributes of assigning certain responsibilities to smaller policymaking bodies, as is the system of agency delegations more generally.

Finally, while it is axiomatic that representatives' work generally ought to be open and accessible to their constituents, in reality, congressional transparency is hardly universal. Legislators draft legislation out of public view and negotiate amongst themselves and with outside interests behind closed doors. While voice votes are generally reserved for uncontroversial matters, there is no shortage of examples of voice votes on incredibly contentious issues.[326] In fact, one could argue that almost all things representatives do on Capitol Hill are inaccessible to their constituents. Thus, despite its drawbacks, recusal legislating is still, on balance, the right response to particular legislative impasses.

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[322] *See, e.g.*, Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–53 (2006).

[323] In fact, this concern is heightened with recusal legislating, because the delegation might not be to an entity covered by the Administrative Procedure Act. *See, e.g.*, Dalton v. Specter, 511 U.S. 462, 476 (1994) (holding that the actions of the Secretary of Defense and the BRAC Commission cannot be reviewed under the APA because they are not "final agency actions," and that the actions of the President under the BRAC law cannot be reviewed under the APA because the President is not an "agency"). Notably, notice and comment was not required under the Rules Enabling Act until the 1988 Judicial Improvements and Access to Justice Act. *See* 28 U.S.C. § 2073 (2006).

[324] *See, e.g.*, 1 Records, *supra* note 4, at 448 (James Madison speaking of giving the government sufficient energy); *id.* at 483–84 (statement of James Wilson that "[b]ad Governts. are of two sorts. 1. that which does too little. 2. that which does too much: that which fails thro' weakness; and that which destroys thro' oppression. Under which of these evils do the U. States at present groan? under the weakness and inefficiency of its Governt. To remedy this weakness we have been sent to this Convention").

[325] *See id.* at 51, 150–52, 318–41 (Madison's notes detailing the debate over representation in, and the size of, the national legislature); *see also* The Federalist Nos. 55, 56, and 62 (James Madison) (discussing the importance of the size of the House and Senate).

[326] *See generally* Michael S. Lynch & Anthony J. Madonna, Viva Voce: Implications from the Disappearing Voice Vote (Mar. 2008) (manuscript presented at the 2008 Annual Meeting of the Midwest Political Science Association), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/2/6/6/2/6/pages266269/p266269-1.php.

VI. Conclusion

Part IV described the four types of lawmaking scenarios that seem best-suited for recusal legislation: (1) the revocation of existing benefits; (2) the imposition of particularized (or targeted) costs; (3) the granting of unpopular benefits; and (4) the recurring maintenance of existing policy. If recusal legislating caught hold, a growing number of lawmakers might turn to this mechanism to develop and promote more nationally minded legislation. Indeed, the potential reach of recusal legislating is wide. Some have proposed using a BRAC-like commission to resolve questions about the location of radioactive waste facilities[327] and the closure of Amtrak stations and Department of Agriculture extension offices.[328] Recently, President Obama proposed a BRAC-like commission to make recommendations regarding the growing budget deficit.[329] Such a commission may also be an effective way to reduce wasteful earmarks and pork-barrel spending. It is also not too much of a stretch to imagine that recusal legislating could offer a means of addressing legislative concerns over subsidy programs, immigration policies, and criminal sentencing law reforms. In addition, while determining its own salary may represent the single greatest congressional conflict of interest, not far behind are laws related to the functioning of our democracy—namely, election, campaign-finance, and voter eligibility laws. Recusal legislating may offer some hope for the resolution of these complex and politically difficult issues.

The study of recusal legislating reveals that some policy matters should not be left to the standard procedures of the legislative process. Electoral constraints and ambitions, organizational structures, and institutional norms can all combine to frustrate lawmaking that serves the national interest. Occasionally, Congress recognizes this fact and wisely recuses itself from particular areas of policy development.

The BRAC law, the Rules Enabling Act, and the Quadrennial Commission illustrate the key advantages of recusal legislating: limiting the role of electoral and interest group politics in policy development; providing a means for tackling collective action problems that would otherwise go unaddressed; establishing a structure for the upkeep and maintenance of past policy decisions; and creating an opportunity for congressional self-reflection about institutional weaknesses and how those limitations affect the development of public policy.

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[327] *See, e.g.*, Michael B. Gerrard, Whose Backyard, Whose Risk 186–87 (1994).

[328] *See* Kenneth R. Mayer, *The Limits of Delegation: the Rise and Fall of BRAC*, 22 Regulation, no. 3, 1999, *available at* http://www.cato.org/pubs/regulation/regv22n3/limitsofdelegation.pdf.

[329] *See, e.g.*, Peter Nicholas & Christi Parsons, *Obama Presents $3.8 Trillion Budget; Calls for Fiscal Commission*, Concord Monitor, Feb. 2, 2010, http://www.concordmonitor.com/article/obama-presents-38-trillion-budget.

Although it is true that recusal legislating carries with it some potential drawbacks, limiting recusal legislating to the particular situations in which it is appropriate, as outlined above, would mitigate some of these concerns. Moreover, overcoming the stalemate that blocks consensus lawmaking in the national interest is a benefit that outweighs the drawbacks of the practice.

It would be ideal if America's congressional structures never frustrated worthwhile federal lawmaking. But we go forward with the legislative system that was bequeathed to us by the Framers over 220 years ago and built up over time through the traditions of the men and women who have served in Congress. Recusal legislating offers one means by which Congress can make that legacy work more effectively for Americans.