Supreme Court Justices’ Recusal Decisions Should be Transparent and Reviewable

It is a basic precept that no one should be a judge in his or her own case. Yet this is exactly what Supreme Court justices are allowed to do when a party claims they must step aside from a case. Despite the fact that the current recusal law applies to all federal judges, including Supreme Court justices, Supreme Court justices get the final word when deciding whether they must recuse.

A federal law, 28 U.S.C. § 455, requires all federal judges, including Supreme Court to recuse themselves from any case in which their impartiality “may be reasonably be questioned.” The statute also sets forth a number of specific circumstances when a judge must recuse, such as when the judge has a financial interest in any party or subject matter of the case.

By tradition, Supreme Court justices are allowed to rule on the merits of recusal motions brought against them. And unlike other federal judges, when a Supreme Court justice denies a motion to recuse, there is no possibility of further review and the Supreme Court justice gets the final word on his or her right to sit. They are not even required to issue a written decision explaining their decision.

Continuing to allow Supreme Court justices to self-review their own recusal motions, with no possibility of review, erodes public confidence in the integrity of the Court and the sense that justice is being administered fairly. In several cases, allowing the justice who is allegedly biased to have the final say on whether or not they must recuse has already threatened to undermine the Court’s integrity. For example:

- In Laird v. Tatum, Justice Rehnquist refused to recuse himself from a case challenging the constitutionality of a program to spy on Vietnam War protestors, even though he had helped to develop the program as a government lawyer.

- In 2004, Justice Scalia went duck hunting with Dick Cheney and accepted a free ride on Air Force Two just weeks after the Supreme Court agreed to hear a case in which the Vice-President was a party. Despite widespread public criticism questioning his appearance of bias in the case, Justice Scalia refused to recuse himself.

- This year, some have called for Justices Scalia and Thomas to recuse themselves from last year’s Citizens United v. FEC ruling. It has been argued that the impartiality of both justices could reasonably be questioned due to their alleged attendance at a closed-door retreat hosted by Koch Industries, a politically active corporation that supported and has benefited from Citizen United’s dismantling of campaign finance laws.
The Court continues to allow justices to judge their own recusal motions despite the fact that just two years ago it recognized that the Constitution requires an objective process for resolving recusal motions brought against state court judges. In *Caperton v. A.T. Massey Coal*, the Court held that a state court judge should have recused himself because he had received significant campaign contributions from one of the parties. It did not matter that the judge believed he was not biased and could be impartial. The Court emphasized the need for an objective test to evaluate whether a judge might appear biased, especially “where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias.” Despite recognizing this bedrock principle in *Caperton*, an individual justice continues to serve as the judge in his or her own case when deciding recusal motions.

This needs to change, either through Congressional legislation, or by the Court itself adopting new recusal policies. Questions have been raised as to whether Congress has the constitutional authority to legislate changes to the Court’s recusal practice. The Constitution’s text and long historical practice suggest that it does. Representative Murphy (D-CT) has introduced legislation which would require the Justices to disclose their reasoning behind a recusal decision as well as require the Court to develop a process of review for those decisions.

As William S. Boyd School of Law Professor Jeffrey Stempel has observed:

“Political candidates do not get to count the votes themselves. Referees, not the athletes, call fouls at sporting events. The usher, not the patron, determines whether proper payment has been made. Requiring the Supreme Court to operate in a similar manner concerning recusal would achieve a most valuable consistency.”

Learn more about the need for ethics reform at *aquestionofintegrity.org*.