A SUPREME COURT JUSTICE’S RECUSAL DECISIONS SHOULD BE TRANSPARENT AND REVIEWABLE
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For more information on this report, contact AFJ's Washington headquarters.

Alliance for Justice
11 Dupont Circle NW, Second Floor
Washington, DC 20036
202.822.6070

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Background

All federal judges – including Supreme Court justices – are required to recuse themselves from any case in which their impartiality “may be reasonably be questioned,” creating an objective standard that hinges on the appearance of bias. The statute governing recusal – 28 U.S.C. § 455 – also sets forth a number of specific circumstances which demand recusal such as when the judge has personal knowledge of the disputed facts, a personal bias concerning a party to the case, earlier involvement in the case as a lawyer or material witness, or a financial interest in any party or subject matter of the case.

It is a basic maxim that no one should be a judge in his or own case. Yet Supreme Court justices are allowed to do just that when a party brings a recusal motion challenging a justice’s impartiality. While the decision of a lower court judge not to recuse from a case can be appealed to a higher authority, Supreme Court justices get the final word on whether they may sit. Exacerbating this problem is a lack of transparency, as justices are not required to issue a written opinion explaining recusal decisions.

That’s why over 140 law professors recently sent a letter calling on Congress to hold hearings and implement legislation to increase the transparency and accountability of recusal decisions. The Court’s method of handling recusal motions must be changed, either through Congressional legislation or by the Court itself, to protect public confidence in the integrity of the Court and the impartiality of its justices.

The Court’s Recusal Process Must Be Reformed

A recent Supreme Court case, Caperton v. A.T. Massey Coal, Inc., provides an object lesson in the hazards of a self-policing judiciary, in which individual judges determine whether or not their impartiality can reasonably be questioned. In Caperton, West Virginia Justice Brent D. Benjamin received substantial campaign contributions made from the president of a company with an outstanding $50 million judgment against it on appeal before the judge. Justice Benjamin denied three motions to recuse himself, and then voted in the 3-2 majority to reverse the judgment against the company. A public opinion poll indicated that 67% of West Virginians doubted Justice Benjamin would be fair and impartial.

The Supreme Court reversed Justice Benjamin’s decisions not to recuse himself on the basis that the risk of actual bias was so high that it violated petitioners’
constitutional due process rights. It did not matter what Justice Benjamin thought of his own potential for bias; the key was whether the appearance of impartiality was compromised. The Court emphasized the need for an objective test to evaluate whether an interest rises to such a degree that the average judge might become biased, rather than relying on a judge’s self-evaluation of actual bias. “The difficulties of inquiring into actual bias and the fact that the inquiry is often a private one, simply underscore the need for objective rules,” the Court added. 8 The Court held that the need for an independent inquiry is particularly important “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*, the Court has not applied it to itself; an individual justice continues to serve as the judge in his or her own case when deciding recusal motions. Further review of a justice’s decision whether or not to recuse is important for several reasons. The possibility of review would force justices to take challenges to their impartiality more seriously. 10 It would also ensure that the recusal statute is not a dead letter. As Professor Jeffrey Stempel of William S. Boyd School of Law has noted, allowing Supreme Court justices to review their own recusal motions leaves the recusal statute as “substantive law without force” because “the statute may only be applied if the allegedly biased justice voluntarily chooses to follow the law faithfully.”

While a lower court judge’s decision not to recuse from a case can be appealed to a higher court or to an *en banc* panel, Supreme Court justices get the final word. Continuing to allow Supreme Court justices to 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, the opacity and non-reviewability of the process has already threatened to undermine the Court’s integrity.

For example:

- In 1945, Justice Black declined to recuse himself from *Jewel Ridge Coal Corp. v. Local 616*, and cast the deciding vote in a 5-4 verdict in favor of clients represented by his former law partner. 12 In a motion for rehearing after the decision, Justice Black’s participation in the case was challenged on the ground that the victorious litigants were represented by Black's former law partner. Despite this conflict of interest, Justice Black refused to recuse himself from the motion to rehear, resulting in a denial of the motion and an affirmation of the Court’s decision. Justice Black’s decision not to recuse was perceived as outrageous and was criticized by his fellow Justice, Robert Jackson. 13
• In 1972, Justice Rehnquist’s failure to recuse himself from *Laird v. Tatum* caused such a stir that Congress amended the recusal statute. The case involved a challenge to the constitutionality of a Nixon Administration domestic surveillance program targeting American dissidents to the Vietnam War. Although Rehnquist had previously testified before Congress in support of the program and had substantial knowledge of and interest in the case, he refused to step aside from the case, and cast the deciding vote upholding the constitutionality of the program. The backlash to Rehnquist’s non-recusal was strong and encouraged Congress to amend the recusal statute to enact a stricter and more comprehensive framework.

• In 2003, a prominent legal ethicist argued that Justice Breyer should have recused himself from *Pharmaceutical Research and Manufacturers of America v. Walsh*, in which an association of drug manufacturers, including three in which Justice Breyer held stock, brought suit challenging the constitutionality of state regulations aimed at keeping drug costs down for consumers. Some legal ethicists criticized Justice Breyer’s decision not to recuse himself, despite his potential financial conflict of interest.

• In 2004, just weeks after the Supreme Court granted certiorari in a public records case brought by the Sierra Club against then-Vice President Dick Cheney, Justice Scalia went duck hunting with Cheney and accepted a free ride on the Vice President’s plane. Despite widespread public criticism questioning his appearance of bias in the case, Justice Scalia refused to recuse himself. In a memorandum opinion denying the Sierra Club’s motion to recuse, Justice Scalia wrote that he “would have been pleased to demonstrate [his] integrity” by disqualifying himself from the case, but nonetheless decided there was no basis for recusal. He then cast his vote in support of Vice President Cheney’s position.

• In 2011, the advocacy organization Common Cause filed a petition with the Department of Justice, requesting that it file a Rule 60(b) motion seeking the invalidation of last year’s *Citizens United v. FEC* ruling on the basis that Justices Scalia and Thomas should have recused themselves. The petition alleged the impartiality of both justices could reasonably be questioned under 18 U.S.C. § 455(a) due to their 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. Common Cause also alleges that Justice Thomas had an obligation to recuse himself under 18 U.S.C. § 455(b), due to a financial conflict of interest created by his wife’s employment at Liberty Central, a conservative political...
organization that stood to benefit from unrestricted corporate donations made possible by *Citizens United*.

**Criticisms of Reform Are Unwarranted**

Proponents of the status quo raise generally raise one of two arguments. First, they note that when a Supreme Court justice recuses from a case, there is no replacement, creating a so-called “duty to sit.” Second, some critics claim that congressional attempts to reform the Court’s recusal process are unconstitutional. Neither objection justifies continuing to allow Supreme Court justices to judge their own recusal motions.

**The “Duty to Sit” is No Excuse to Ignore the Recusal Statute**

Despite clear statutory rules establishing when a judge of justice is forbidden from sitting on a case, the so-called “duty to sit” is sometimes invoked as justification for not recusing from a case in which a conflict might exist. The duty to sit is most widely invoked at the Supreme Court where there is a chance recusal may result in a 4-4 split, delaying the resolution of the issue until another case brings it before the Court again. For instance, Justice Breyer has said that he has “a duty to sit because there is no one to replace me if I take myself out, and that could sometimes change the result [of a proceeding].”

While a 4-4 split at the Supreme Court is an understandably undesirable outcome, in reality, 4-4 splits are very rare. Research by Alliance for Justice shows that out of the 567 cases in which a justice has recused since the modern day recusal statute was enacted in 1974, only 32 – less than 6% – have resulted in a 4-4 split. Moreover, while a 4-4 split may not be a desirable outcome, a 5-4 split in which the allegedly biased justice casts the deciding vote is very arguably worse. 5-4 splits are always controversial, but never more so than when the deciding vote is cast by a potentially biased justice, calling into question the legitimacy of the decision itself.

Moreover, Congress intended to do away with the duty to sit when it revised the recusal statute in 1974 by creating an objective standard for recusal that is not dependent on subjective bias.

**Reforming the Court’s Recusal Process is Constitutional**

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.

Congress has the constitutional authority to legislate on matters affecting the Supreme Court, so long is it does not interfere with the judicial function. The
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Framers knew that Congress would have to exercise oversight of the Court, and specifically tasked Congress with doing so in a number of ways, such as delineating the Supreme Court’s appellate jurisdiction and setting the number of justices. Over the years, Congress has exercised its authority over the judiciary to protect the integrity of the courts by doing things like requiring Article III judges to disclose their financial holdings. Such legislation is not viewed as a threat to federal judges’ independence, or as an unconstitutional interference with the judicial function.

Further, existing law already provides that all federal judges (including Supreme Court justices) must recuse themselves under certain circumstances. There is no reason to think that Congress has the authority to require a judge or justice to recuse in a particular circumstance, but lacks the constitutional authority to ensure that the process by which a justice decides whether to recuse him or herself is conflict-free.

**Conclusion**

Despite the fact that the current recusal statute applies to all federal judges, including Supreme Court justices, Supreme Court justices are left to their own devices when deciding whether or not a conflicting interest warrants recusal. 28 U.S.C 455 does not require justices to explain their decisions, nor does it provide any process at all for reviewing those decisions. As 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.”

Recently over 140 law professors sent a letter to Congress, urging Representatives to hold hearings and implement legislation to address this need for transparency and accountability in judicial recusal decisions. In March, Representative Murphy (D-CT) introduced a piece of 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.

A means for accountability and transparency in Supreme Court recusal decisions is necessary to ensure an independent and impartial Court. The integrity of the judiciary is dependent upon public confidence in judicial impartiality. Justice Breyer, in his dissent in *Bush v. Gore*, referred to that public confidence as a “public treasure” that is “vitaly necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.” The Court must act to protect that integrity by reforming its process for reviewing challenges to a justice’s impartiality. If it fails to do so, Congress should intervene and require it to do so.
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Notes

1 28 U.S.C. § 455(a) requires a judge to recuse him or herself from whenever the judge’s “impartiality might reasonably be questioned.” This prong of the recusal statute governs the mere appearance of impartiality, regardless of the judge’s subjective state of mind. In addition, 28 U.S.C. § 455(b) requires a judge to recuse him or herself when specific triggers are met, including: (1) personal bias toward a party or knowledge of a disputed fact, (2) previous involvement as or with a lawyer in the matter, (3) previous involvement in the case through government employment, (4) a financial conflict of interest, or (5) close relationships with a lawyer, party, or witness in the case.

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3 28 U.S.C. § 455

4 1 EDWARD COKE 141, INSTITUTES (“Aliquis non debet esse judex in propria causa.”); In re Murchison, 349 U.S. 133, 136 (1955) (“[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome”); Caperton, 129 S. Ct. at 2259 (citing THE FEDERALIST NO. 10, at 59 (James Madison) (J. Cooke ed., 1961)).

5 By Supreme Court tradition, challenges to a justice’s impartiality are referred to and decided by the challenged justice. While a district court judge’s decision not to recuse can be appealed to the Circuit Court of Appeals, and a Circuit Court judge’s decision can be reviewed en banc or appealed to the Supreme Court, the decision of a Supreme Court justice not to recuse from a case is final and not subject to any further review.

6 Caperton, 129 S. Ct. at 2258.

7 Id.

8 Id. at 2263.

9 Id. (emphasis added).

10 See Jeffrey W. Stempel, Rehnquist, Recusal, and Reform, 53 Brooklyn L. Rev. 589, at 640.

11 Id. at 642-43.


13 Jewel Ridge Coal Corp. v. Local 6167, 325 U.S. 897, 897 (1945).


16 538 U.S. 644 (2003). By a vote of 6-3, the Court ruled against the drug manufacturers association, upholding the constitutionality of the state’s prescription drug program. Justice Breyer voted with the majority.

17 Monroe Freedman, Judicial Impartiality in the Supreme Court — The Troubling Case of Justice Stephen Breyer, 30 Okla. City U.L. Rev. 513, 527 (2005). While the parties in that case did not file a disqualification motion, any such motion would have been decided solely by Justice Breyer — whose failure to recuse on his own initiative suggests he would have found such a motion meritless.


19 Id.
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20 *Cheney v. United States Distric Court*, 542 U.S. 367 (2004). By a vote of 7-2, the Court found in favor of Cheney and the other government officials.

21 *Citizens United v. FEC*, 130 S.Ct. 876 (2010), was a 5-4 decision overturning Supreme Court precedent in which both Justices Scalia and Thomas were in the majority.

22 An invitation to a 2011 Koch retreat touted the fact that both justices have been featured at past retreats. Understanding and Addressing Threats to American Free Enterprise and Prosperity 13 (Sept. 24, 2010), at 13, available at http://images2.americanprogressaction.org/ThinkProgress/secretkochmeeting.pdf.


24 When Congress amended § 455 in 1974 to create an objective standard for recusal, its intent was to “promote public confidence in the impartiality of the judicial process . . . .” H. R. Rep. No. 93-1453, 1974 at 6355. Congress, by clarifying § 455, attempted to remove the old “duty to sit” doctrine, a subjective test which required “a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a ‘duty to sit’.” *Id.* See also *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (holding that revisions to § 455 eliminated the doctrine of “duty to sit”).

25 That authority is located in a number of sources, including the Necessary and Proper Clause in Article I, the “Exceptions Clause” in Article III, and by implication arising from the fact that Article III is not self-executing.

26 Congress’ authority for legislating issues affecting the Court dates back to the Judiciary Act of 1789, which required the Supreme Court justices to “ride circuit,” and put significant restrictions on the Supreme Court’s appellate jurisdiction. To give a few more modern examples, statutes in place today impose administrative duties on the Chief Justice, see, e.g., 28 U.S.C. 331; establish specialized courts staffed by Article III judges (such as the FISA court), see, e.g., 50 U.S.C. 1803; establish the number of justices constituting a quorum, see 28 U.S.C. 1; and set the rules of procedure and evidence that all courts must follow. See FRPC; FRCP; FRE.

27 See 5 U.S.C. 101-111. Additionally, under current law, federal judges are prohibited from hearing a case that he or she decided while serving on a lower court to avoid the obvious appearance of bias that would result. See 28 U.S.C. 47.


29 http://ajf.org/judicial_etics_sign_on_letter.pdf

30 http://www.govtrack.us/congress/billtext.xpd?bill=h112-862