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## DEBATE

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### JUDICIAL RECUSAL AT THE COURT

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Later this month, all nine justices will be hearing oral argument on the constitutionality of the Patient Protection and Affordable Care Act and deciding the outcome of the case. But should they? In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court held that a judge of the West Virginia Supreme Court violated the Due Process Clause of the Constitution when the judge failed to recuse himself from a case involving a major campaign contributor. Many cheered the case's outcome, but Professor Ifill believes *Caperton* is an "ominous sign" that a majority of the Court fails to understand how dangerous the appearance of impropriety is in the American judicial system. Professor Segall agrees that the judicial recusal system needs reform, but he disagrees with Professor Ifill over what amounts to an appearance of impropriety. As the need for reform becomes more apparent in light of the constitutional challenges to the Affordable Care Act, Professor Ifill and Professor Segall disagree over whether Justice Thomas or Justice Kagan ought to recuse themselves from the Court's upcoming hearings. Their various perspectives highlight the confusion of contemporary recusal doctrine for America's highest Court and make a strong case that the Court must do a better job of clarifying when a Justice should recuse him- or herself.

## OPENING STATEMENT

*Justice and Appearance of Justice*SHERRILYN A. IFILL<sup>†</sup>

Chief Justice Roberts's 2011 State of the Judiciary address confirmed what many court watchers have long suspected: our Supreme Court fails to appreciate and understand fully how the appearance of bias among the Court's Justices may increasingly undermine the legitimacy of the court's decisionmaking and implicate the due process rights of litigants who appear before the Court. See JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011) [hereinafter, ROBERTS, 2011 REPORT], available at <http://www.supremecourt.gov/publicinfo/year-end/2011yearendreport.pdf>. An early clue to the mindset of the Roberts-led Court on this issue came in 2009 in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). In that case, the Court held that a West Virginia Supreme Court justice's refusal to recuse himself from a case involving a litigant who had donated millions of dollars to secure the justice's election violated the petitioner's due process rights. *Id.* at 2256-57, 2267.

Although many regarded *Caperton* as a positive statement by the Court that judges must withdraw from cases in which their conduct raises an appearance of bias, I took a more skeptical view. *Caperton* could hardly be considered a resounding affirmation of the Court's commitment to ensuring both the fact and appearance of impartiality in judicial decisionmaking. First, the decision was a narrow one. Only a bare majority of the Justices thought that the West Virginia justice's decision to sit and hear a multi-million dollar case affecting the business interests of his benefactor raised due process questions. Second, the majority opinion was a narrow one, with Justice Kennedy explain-

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<sup>†</sup> Sherrilyn Ifill is a professor at the University of Maryland Francis King Carey School of Law, where she has taught since 1993. Her scholarly work is focused on judicial selection and judicial impartiality. Her article, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002), appeared in the *Maryland Law Review* in 2002. In a blog post on Concurring Opinions earlier this year, Professor Ifill responded to Chief Justice Roberts's 2011 State of the Judiciary remarks. See *Sherrilyn Ifill's The Chief Strikes Out*, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/2012/01/sherrilyn-ifills-the-chief-strikes-out.html> (last visited Feb. 15, 2012). Professor Ifill is currently completing a book on race and Supreme Court confirmation hearings.

ing over and over again that the holding was limited only to “extreme” cases. *Id.* at 2265. More robust was the four-member dissenting opinion authored by Chief Justice Roberts, who opened with the charge that the majority’s decision would “undermine rather than promote,” the value of a “fair, independent, and impartial judiciary.” *Id.* at 2267 (Roberts, C.J., dissenting). What comes through most powerfully in Chief Justice Roberts’s dissent is his deep skepticism about the prospect of compelling the recusal of a judge or Justice based on the appearance of bias. This skepticism is never more apparent than when Chief Justice Roberts predicts at the conclusion of his dissent that “opening the door to recusal claims under the Due Process Clause, for an amorphous ‘probability of bias’ [standard] will . . . bring our judicial system into underserved disrepute.” *Id.* at 2274 (quoting the majority). Chief Justice Roberts’s dissent in *Caperton* powerfully foreshadows his resistance to entertaining calls for a more rigorous examination of Supreme Court recusal practice.

The requirement of judicial recusal is based on the constitutional due process right of litigants to have their cases heard by an impartial tribunal. As Justice Kennedy has remarked, “One of the very objects of law is the impartiality of its judges in fact and appearance.” *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring). Under 28 U.S.C. § 455, a federal judge or Justice must withdraw from a cases in which his or her “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (2006). The standard is an objective one, and requires that a judge consider the question not from his or her own perspective, but from the perspective of a reasonable person knowing the facts. *See, e.g., Microsoft Corp. v. United States*, Order Denying Appeal, 530 U.S. 1301, 1302-03 (2000) (statement of Rehnquist, C.J.). The Supreme Court has directed that, in assessing claims raised under § 455(a), the focus “is not the reality of bias or prejudice, but its appearance.” *Liteky*, 510 U.S. at 548 (majority opinion). The appearance standard set out in § 455(a) is consistent with the Court’s determination over sixty years ago that “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14 (1954). The connection between the constitutional due process right of litigants and the appearance of bias standard expressed in § 455(a) is precisely the standard that Chief Justice Roberts in *Caperton* seems to regard as a threat to the judicial system.

Ironically, several years before finding that no constitutional question was raised by the participation of the West Virginia justice in a case involving the state justice’s benefactor, Chief Justice Roberts iden-

tified a circumstance in which, in his view, money paid to judges might raise constitutional issues. In one of his earliest State of the Judiciary reports, Chief Justice Roberts warned that Congress's failure to increase the pay of Article III judges had risen to the level of a "constitutional issue." JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2007), *available at* <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>. Roberts did not identify which aspect of the Constitution is threatened by the admittedly inadequate pay afforded federal judges. It is difficult to see how Congress's failure to increase federal judicial salaries to a competitive market level can raise a constitutional crisis, while the refusal of a judge to disqualify himself from hearing a case affecting a party who donated millions of dollars to securing his judgeship does not. But such is the reasoning of our Chief Justice on this issue.

In his latest report, Chief Justice Roberts attempted to take on the range of emerging critiques that go to the ethical conduct of the Justices. First, he responded to arguments that the Justices should be bound by the Code of Judicial Conduct. ROBERTS, 2011 REPORT, *supra*, at 2-5. He correctly argued that the Code, by its own terms, does not apply to the Supreme Court. *Id.* at 3. It was a bit startling, however, for the Chief Justice to offer, as an explanation for why the Justices need not even voluntarily bind themselves to the standards set out in the Code, the fact that the Justices "may" consult a variety of sources to guide their ethical conduct. *Id.* at 5.

Of course the Justices "may" consult a variety of sources. But do they? Are the sources set out in the Chief Justice's remarks—judicial opinions, treatises, scholarly articles, and disciplinary decisions—consulted by all of the Justices? The Chief Justice himself remarked last year that he does not read law review articles. *See* John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S., Remarks at the Fourth Circuit Court of Appeals Seventy-Seventh Annual Judicial Conference (June 25, 2011). Should we presume that the inclusion of scholarly articles in the list of sources that Justices may consult on ethical questions is merely theoretical? Is there any uniform practice to which the Justices adhere? In sum, Chief Justice Roberts's response gave very little new insight into how the Justices actually approach ethical issues.

More important and detailed was Chief Justice Roberts's effort to respond comprehensively to calls that Justices Kagan and Thomas should each withdraw from hearing the constitutional challenge to the health care law that the Court will hear this Term. At issue was the obligation imposed on all federal judges by 28 U.S.C. § 455.

In my view, the case for Justice Thomas's recusal is considerably more compelling than that for Justice Kagan. Justice Thomas's wife, Virginia Lamp Thomas, has led a Tea Party-affiliated lobbying group that has made the health care law a central target of its work. See Jeffrey Toobin, *Partners*, NEW YORKER, Aug. 29, 2011, at 40, 41. At an event last year, Justice Thomas reportedly made remarks that suggest his endorsement of his wife's political activities, describing her creation of the organization as working "in defense of liberty" and "defending . . . [the] Constitution." *Id.* at 48.

Concerns about Justice Kagan's impartiality arise largely from whether, as Solicitor General in the Obama Administration, she may have been involved in providing advice to members of the Administration on the soundness or constitutionality of the health care law. See Eric Segall, *A Liberal's Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011, 4:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/obamacare\\_and\\_the\\_supreme\\_court\\_should\\_elena\\_kagan\\_recuse\\_herself.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/obamacare_and_the_supreme_court_should_elena_kagan_recuse_herself.html). The evidence is largely limited to an email that then-Solicitor General Kagan sent to a colleague after learning of the passage of the health care legislation. In the email, Kagan remarks, "I hear they have the votes . . . . Simply amazing!" *Id.* Marveling at the fact that the controversial bill garnered sufficient votes to pass hardly seems to rise to the level needed for recusal, but it is certainly fair to ask questions about how involved Kagan may have been in providing counsel to members of the Administration in fashioning the health care law.

In sum, both Justices have been the subjects of legitimate questions about whether they engaged in conduct that raises the appearance of bias and should preclude their participation in deliberations about the health care bill. Of course, the Justices themselves know more than we do about their private conduct and their public statements or involvement with advocates working for or against the legislation. That's why the appropriate process for determining whether Justices Kagan and Thomas should recuse themselves requires each Justice to engage in an objective analysis. Chief Justice Roberts acknowledges this in his State of the Judiciary report. He notes that the "individual Justices decide for themselves whether recusal is warranted under Section 455." ROBERTS, 2011 REPORT, *supra*, at 8. But having set out the appropriate approach to a recusal determination, he then preempts the individual recusal consideration by offering encomiums to the integrity, impartiality, and professionalism of his colleagues and painstakingly emphasizing why Supreme Court Justices should refrain from liberally

acceding to recusal. One might even argue that the timing and substance of the Chief Justice's statement implicitly warns off litigants from using § 455 to seek either Justice Thomas or Justice Kagan's recusal in the health care litigation.

Thus, while no doubt hoping to clarify and elucidate the Court's approach to recusal, and seeking to quell criticism of the Court's practices in this area, Chief Justice Roberts's State of the Judiciary report may raise more concerns than it allays.

Moreover, Chief Justice Roberts's statement fails to address the set of concerns that goes to the heart of the Court's recusal practices. The stunning lack of transparency in these practices remains unchanged, and leaves litigants and the public largely unable to understand, track, or assess how or whether the Court's recusal determinations adhere to the letter and spirit of the statute. Chief Justice Roberts's assurances that the impartiality of his colleagues on the Court is unassailable will allay neither the public's sense of disquiet nor the confusion of litigants, who have few guidelines to assist them in making the important decision about whether to seek the recusal of a Supreme Court Justice. The public and litigants before the Court would benefit from concrete practices that increase transparency. For example, Chief Justice Roberts could ask that his colleagues regularly issue decisions—however brief—explaining their decision of whether to recuse themselves in cases in which recusal motions are filed. This is a small step, but it would vastly improve current practice, in which recusal decisions are a rarity.

One hopes that Chief Justice Roberts will, perhaps through the Judicial Conference, demonstrate a willingness to engage further with the profession on how to improve the Court's recusal practices. Transparency will strengthen the public's confidence in the Court and will better position litigants to protect their constitutional right to have their cases heard by a Court that satisfies both the fact and appearance of impartiality.

## REBUTTAL

*Supreme Court Recusal, the Affordable Care Act, and the Rule of Law*ERIC J. SEGALL<sup>†</sup>

Professor Ifill has written a thoughtful and interesting Opening Statement concerning the recusal and ethical practices of Supreme Court Justices, whether Justices Kagan and Thomas should recuse themselves from the litigation over the Affordable Care Act (ACA), and the importance of Chief Justice Roberts's 2011 year-end report in addressing these issues. See JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>. Our areas of agreement easily outweigh our disagreements. For example, I agree with Professor Ifill that the Justices need to be more transparent about their recusal decisions, that the Justices should voluntarily agree to be bound by the same ethical rules that apply to lower court judges, and that the Chief Justice's report was dissatisfying, question-begging, and at least a little bit arrogant. His calls for the American public and those litigating before the Court to trust that the Justices will act appropriately when considering recusal and ethical issues smack of hubris.

Where Professor Ifill and I disagree is over the relative cases for recusal of Justices Thomas and Kagan in the health care litigation. Professor Ifill believes that the case "for Justice Thomas's recusal is considerably more compelling than that for Justice Kagan." Professor Ifill argues that Justice Thomas's wife created a lobbying group that "made the health care law a central target of its work," and that Justice Thomas himself seemed to endorse those activities at a public event last year. Those facts, according to Professor Ifill, suggest that Justice Thomas's impartiality in the case could reasonably be questioned.

Questions about Justice Kagan's recusal stem from her possible involvement with the health care issue while she was the Solicitor General in the Obama Administration, and the email exchange with Laurence Tribe—at the time a legal advisor to the Administration—in which she said "I hear they have the votes, Larry!! Simply amazing." See Eric Segall, *A Liberal's Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011, 4:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/](http://www.slate.com/articles/news_and_politics/)

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<sup>†</sup> Professor of Law, Georgia State University College of Law. Professor Segall is the author of *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES*, and can be followed on Twitter at @espineseall.

jurisprudence/2011/12/obamacare\_and\_the\_supreme\_court\_should\_elena\_kagan\_recuse\_herself.html. Professor Ifill suggests that these facts probably do not support recusal, though she concedes that reasonable questions about Justice Kagan's involvement with the ACA could and perhaps should be asked.

I think, when all the facts are considered, Professor Ifill understates the reasons Justice Kagan should recuse herself from the ACA litigation and overstates the need for Justice Thomas to recuse. First, as to Justice Kagan, the case for her recusal is strong because of a "perfect storm" of events that are unlikely to repeat themselves again: (1) she was the Solicitor General of the United States when the ACA was furiously debated in Congress and town halls across the country; (2) the ACA is the most controversial and partisan piece of legislation that the Obama Administration has put forward; (3) she was nominated to the Court by President Obama shortly after Congress enacted the ACA; (4) the Court will review the ACA just a few months before President Obama runs for reelection; (5) the President's reelection might well be affected by how the Supreme Court rules; (6) she celebrated the passage of the ACA over email with Professor Tribe; and, (7) both her Office and her Deputy, Neil Katyal, were involved in the Obama Administration's litigation strategy in the lower federal courts on the issue of the ACA's constitutionality. Segall, *supra*.

Federal law requires Supreme Court Justices to recuse themselves if their "impartiality might reasonably be questioned," or if the Justice previously served in governmental employment and in that capacity "participated as counsel, adviser, or material witness concerning the proceeding." 28 U.S.C. § 455(a)–(b) (2006). Under these standards, there is no question that Katyal would have had to recuse himself had he been appointed to the Court. He was a counselor and adviser on the issue and, once having served in that capacity, his "impartiality" could and would be "questioned."

Katyal was working directly for Kagan, and publicly available documents show that he informed her that the Solicitor General's Office would be involved in the health care litigation in the lower courts—not a common occurrence for that office. See Terence P. Jeffrey, *Kagan to Tribe on Day Obamacare Passed: "I Hear They Have the Votes, Larry!! Simply Amazing,"* CNSNEWS.COM (Nov. 10, 2011), <http://cnsnews.com/news/article/kagan-tribe-day-obamacare-passed-i-hear-they-have-votes-larry-simply-amazing>. It simply does not make sense, nor is it good policy, to suggest that the Solicitor General of the United States does not have to recuse herself from a case her Office worked on be-



cause she decided to have no personal contact with the case. In other words, even if Kagan was not technically a “counselor” or “adviser” on the issue, what possible motivation would she have for creating a firewall on this issue between herself and the rest of her office, or in fact the whole Administration? What explanation could she offer to justify the firewall that would not raise questions about her “impartiality” on this issue? It would be an odd rule that the head of a United States agency could avoid future recusals by intentionally staying away from an explosive legal issue *in anticipation* of being asked to serve on the Supreme Court by a President with an enormous stake in that particular issue. It must also be remembered that, as far as we know, the only case Justice Kagan intentionally stayed away from while serving as the Solicitor General was the ACA litigation. In her first Term, she recused herself from twenty-five of the first fifty-one cases before the Court. Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases*, WASH. POST, Oct. 4, 2010, at A15. Why did she work on those cases but not the ACA litigation?

One way to test my hypothesis about Justice Kagan is to imagine what would happen if the Justices were to vote 5-4 to uphold the ACA, with Justice Kennedy siding with the moderate-liberal wing against the four conservatives. Justice Kennedy, as the senior Justice in the majority, would decide who would write the opinion, but it would be extremely unlikely that he would ask Justice Kagan to do so. Thinking about the reasons why, the case for Justice Kagan’s recusal becomes clearer.

The Supreme Court is, of course, a political institution, and its decisions usually reflect the Justices’ values. Nothing in this Rebuttal suggests that the Justices should recuse themselves simply because they have strong political connections to the administration in power or preexisting substantive views about the issues before the Court. We knew how Justices Scalia and Alito felt about abortion before they were on the Court—and the same for Justices Ginsburg and Breyer—but that does not mean they should have recused themselves from abortion cases. And many Supreme Court Justices have resolved issues important to the Presidents who appointed them. But, we do not have a prior case in which a Justice had to resolve a constitutional issue so important to a President running for reelection who appointed that Justice, and where the Justice herself headed a federal agency involved in that very litigation. I am more than willing to say that, if all those things happen again, that future Justice should not hear the case.

Justice Thomas, however, is a different matter. The calls for his recusal stem mostly from his wife’s past activities lobbying against the

ACA, and her making money by doing so, as well as a public statement Justice Thomas made approving of his wife's political activities. I believe that requiring recusal because of a spouse's involvement with an issue, absent a current financial stake in the controversy, is a dangerous precedent. For example, the wife of Judge Reinhardt, who recently wrote the Ninth Circuit's opinion in the Proposition 8 litigation, worked for the ACLU in a leadership capacity for many years and publicly spoke out in favor of same-sex marriage (and maybe even had some contact with the plaintiffs' attorneys in the case). *See Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir. 2011) (denying recusal motion); *see also Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012) (merits opinion). I do not think, however, and neither apparently do any liberals, that Judge Reinhardt needed to recuse himself for those reasons. In his order denying the recusal motion, Judge Reinhardt said that

my wife and I share many fundamental interests by virtue of our marriage, but her views regarding issues of public significance are her own, and cannot be imputed to me, no matter how prominently she expresses them. . . . Because my wife is an independent woman, I cannot accept Proponents' position that my impartiality might reasonably be questioned . . . because of her opinions or the views of the organization she heads.

*Schwarzenegger*, 630 F.3d at 912.

There could come a point where a Justice's spouse is so closely identified with current litigation that their relationship would require recusal, but absent a direct financial stake, it is fair to assume that judges and Justices will decide cases without regard to spousal pressure. A different rule would be difficult to implement and would greatly limit what careers spouses of judges could pursue.

The recusal issues pertaining to Justices Thomas and Kagan do have one thing in common, and here again Professor Ifill and I are in complete agreement. Given the importance of the litigation—politically, legally, and for the future of health care in this country—and the proximity of the case to a presidential election, both Justices should provide a public statement explaining their reasons for not recusing themselves. As Professor Ifill said so well, “Transparency will strengthen the public's confidence in the Court and will better position litigants to protect their constitutional right to have their cases heard by a Court that satisfies both the fact and appearance of impartiality.”

Court commentators have resoundingly criticized Justice Roberts's implicit defense in his year-end report of the Justices' silence on these issues. *See, e.g., Andrew Kreig, Chief Justice's Report Ducks Ethics Scandals,*

JUST INTEGRITY PROJECT, [http://justiceintegrity.org/index.php?option=com\\_content&view=article&id=533&catid=44&sectionid=1&Itemid=1](http://justiceintegrity.org/index.php?option=com_content&view=article&id=533&catid=44&sectionid=1&Itemid=1) (last visited Feb. 15, 2012); Mike Sacks, *Chief Justice Roberts' Defense Of Supreme Court Ethics Doesn't Soothe Critics*, HUFFPOST POLITICS (Jan. 5, 2012), [http://www.huffingtonpost.com/2012/01/05/chief-justice-john-roberts-supreme-court-ethics\\_n\\_1184780.html](http://www.huffingtonpost.com/2012/01/05/chief-justice-john-roberts-supreme-court-ethics_n_1184780.html). There are nonfrivolous reasons for suggesting recusal, and the Justices would further the rule of law by explaining their decisions to stay on the case. Their failure to do so further removes the Court from the American people and will make it much easier for the losing side to argue that the eventual decision resulted more from political and partisan concerns than from good-faith legal analysis.

## CLOSING STATEMENT

*To Recuse or Not to Recuse? The Need for Standards*

SHERRILYN A. IFILL

Professor Segall raises compelling and important questions about Justice Kagan's impartiality based on her involvement or—if I am reading his Rebuttal correctly—her perhaps deliberate *noninvolvement* in discussions surrounding the constitutionality of the developing health care legislation during the time she served as Solicitor General. I suppose that the Solicitor General's deliberate decision not to involve herself with Administration-backed legislation based on the expectation that she would be nominated to the Supreme Court in the near future could raise questions about her impartiality, but it seems like a stretch—more the stuff of conspiracy theory than reasonable question. But as Justice Rehnquist pointed out in *Laird v. Tatum*, the Justice facing a recusal motion is in the best position to know all of the facts. Order Denying Recusal Motion, 409 U.S. 824, 824 n.1 (1972) (memorandum of Rehnquist, J.). Professor Segall rightly argues that an opinion from Justice Kagan could shed light on the motivation for her arms-length stance from the health care legislation during her time as Solicitor General.

With regard to Justice Thomas's support of the work of his wife Ginni Thomas, the comparison to Ninth Circuit Judge Reinhardt in the Proposition 8 case does not change my view. Mrs. Reinhardt's work in the leadership of the ACLU and her public support of same-sex marriage hardly compares to the political activity and inflammatory public statements that have been Ginni Thomas's near-exclusive focus for the past two years. For example, I would not argue that Mrs. Thomas's work for the Heritage Foundation raises questions about Justice Thomas's impartiality in cases involving affirmative action, gun rights, or other issues on which that organization has staked out clear positions. However, Mrs. Thomas's formation of Liberty Central was motivated, developed, and focused almost exclusively on what she and her supporters regard as the "tyrannical" passage of the health care legislation. Mrs. Thomas reportedly suggested that the law was "unconstitutional." Kathleen Hennessey & David G. Savage, *Justice's Wife Seeks Repeal of Healthcare Law*, L.A. TIMES, Oct. 21, 2010, at A9. And in one interview, she called it a "corrupt . . . power grab." *Power Player of the Week: Ginni Thomas* (Fox News television broadcast May 23, 2010),

available at <http://www.libertycentral.org/news/ginni-thomas-talks-about-liberty-central-2/>. Justice Thomas's statements last year in support of his wife's work "in defense of liberty" thus appear to be specifically directed at her activism in opposition to the health care bill. Jeffrey Toobin, *Partners*, NEW YORKER, Aug. 29, 2011, at 40, 48.

Moreover, it is the Court itself that makes the argument that Supreme Court Justices are like no other federal judge. Chief Justice Roberts claims that since Justices cannot be replaced, they should not recuse themselves from cases unless absolutely necessary. See JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>. But isn't this characteristic also the reason that Supreme Court Justices should hold themselves to a higher standard of conduct? Mrs. Thomas is not in the same position as Mrs. Reinhardt or former Pennsylvania Governor Ed Rendell, who was married to Third Circuit Court of Appeals judge Marjorie O. Rendell for forty years. Her husband is a Justice of the one court explicitly created by the Constitution and in which the federal government's judicial power is vested. I am not arguing that Mrs. Thomas should give up her free speech rights, but the consequence of her intemperate statements and targeted activism against the health care law may be that her husband cannot decide the law's constitutionality.

In any case, I would be greatly satisfied if Justice Thomas, like Judge Reinhardt, would write an opinion explaining his decision not to recuse himself from hearing the case. It is not hard to imagine what Justice Thomas would conclude, but his reasoning in presumably rejecting recusal would help future litigants and the public understand how the Justices view the issue of impartiality and the grounds for recusal.

Of course Professor Segall and I are at a significant disadvantage, and our speculation only supports the point on which we both agree. The Justices themselves are in the best position to know the facts that underlie credible claims. Thus, when questions arise, especially in cases of great constitutional import, the Justices should respond with public opinions or statements explaining why they will or will not recuse themselves.

In recently reviewing then-Justice Rehnquist's statement supporting his refusal to withdraw from hearing *Laird v. Tatum*, I was struck that he chose to issue a statement on recusal although "neither the Court nor any Justice individually appears ever to have done so." Order Denying Recusal Motion, 409 U.S. at 824. Thirty-two years later, Justice Scalia emphasized a similar point when he criticized the Sierra

Club for its inability to cite to relevant precedent to support its recusal motion. He remarked:

When I learned that Sierra Club had filed a recusal motion in this case, I assumed that the motion would be replete with citations of legal authority, and would provide some instances of cases in which, because of activity similar to what occurred here, Justices have recused themselves or at least have been asked to do so.

Cheney v. U.S. Dist. Court for D.C., Order Denying Recusal Motion, 541 U.S. 913, 922 (2004) (memorandum of Scalia, J.). Talk about a rock and hard place. Forty years after *Laird* and eight years after the famous duck-hunting case involving the Sierra Club and Dick Cheney, litigants seeking recusal of Supreme Court Justices remain in the same position—unable to cite to Supreme Court precedent largely because the Court refuses to issue written opinions explaining recusal decisions.

The solution is for Chief Justice Roberts and the other Justices to issue a set of procedures governing their recusal practices. These procedures should be uniform and transparent. At a minimum, they ought to require the Justices to issue recusal decisions in cases where recusal motions have been filed. In some instances, these decisions may be one- or two-line summary explanations. But in other cases, the Justices—giving due regard to the weight of the concerns raised, the high-profile nature of the case, factual inaccuracies circulating in the public, and the potentially divisive nature of the case—should offer detailed and clear explanations of their recusal decisions.

As I've said elsewhere, it is unfortunate that we seem to discuss the issue of Supreme Court recusal practice only in the context of high-profile controversial cases. See *The Diane Rehm Show: Conflict of Interest on the Supreme Court* (NPR radio broadcast Aug. 25, 2011), transcript available at <http://thedianerehmshow.org/shows/2011-08-25/conflict-interest-supreme-court/transcript>. The issue is really not about who should recuse themselves from hearing the challenge to the health care law. At issue is a matter that threatens to erode the public's belief in the impartiality of our highest court. We have been grappling with this concern at least since Justice Rehnquist's now widely condemned decision not to recuse himself from hearing *Laird v. Tatum* in 1972, and the Court has still refused to develop a consistent, uniform, and transparent recusal practice.

## CLOSING STATEMENT

*Time for a Change: The Sorry Practice of Supreme Court Recusals*

ERIC J. SEGALL

Professor Ifill and I are in complete agreement that Supreme Court Justices need to “issue a set of procedures governing their recusal practices. These procedures should be uniform and transparent. At a minimum, they ought to require the Justices to issue recusal decisions in cases where recusal motions have been filed. In some instances, these decisions may be one- or two-line summary explanations. But in other cases, the Justices . . . should offer detailed and clear explanations of their recusal decisions.”

Professor Ifill and I, however, remain in disagreement as to whether Justices Thomas and Kagan should recuse themselves from the Affordable Care Act (ACA) litigation. As to Justice Thomas, Professor Ifill points to Mrs. Thomas’s activities with Liberty Central that were “motivated, developed, and focused almost exclusively on what she and her supporters regard as the ‘tyrannical’ passage of the health care legislation.” Professor Ifill further points to general statements made by Justice Thomas in support of his wife’s work defending liberty.

As I explained in my Rebuttal, and as Judge Reinhardt made clear in his opinion denying recusal in the Proposition 8 litigation, it is dangerous business to ask judges and Justices to recuse themselves from cases because of their spouse’s political activities. Why stop at spouses? How about a child, a best friend, or a mother-in-law? Furthermore, imputing to a judge the views of his or her spouse expresses an old-fashioned view of marriage and may deter spouses, most often women, from pursuing important careers. If Judge Reinhardt’s wife is allowed to work for the ACLU of Southern California and frequently espouse the view that same-sex marriage is both desirable and constitutional, without Judge Reinhardt recusing himself from the Proposition 8 litigation, then Ginni Thomas can certainly engage in political activities opposed to the ACA without Justice Thomas having to recuse himself from that case. Justice Thomas’s general and vague support of his wife’s career does not change that calculus in any meaningful manner.

Justice Kagan, however, is in a significantly different situation. Professor Ifill summarizes my argument as centered on Kagan’s “perhaps deliberate *noninvolvement* in discussions surrounding the constitutionality of the developing health care legislation during the time she

served as Solicitor General.” Professor Ifill then argues that the “Solicitor General’s deliberate decision not to involve herself with Administration-backed legislation based on the expectation that she would be nominated to the Supreme Court in the near future could raise questions about her impartiality, but it seems like a stretch—more the stuff of conspiracy theory than reasonable question.”

Professor Ifill has misconstrued and understated my arguments for Justice Kagan’s recusal. The relevant standards are whether Kagan served as an “adviser” or “counsel” on the ACA litigation during her governmental service or whether her “impartiality” could reasonably be questioned. 28 U.S.C. § 455 (2006). On the day the bill was passed, she permitted her Office to work on the case in the lower courts against the Solicitor General’s normal policy of handling only Supreme Court litigation. On that same day, she celebrated the passage of the ACA over email with Laurence Tribe. *See* Eric Segall, *A Liberal’s Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011, 4:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/obamacare\\_and\\_the\\_supreme\\_court\\_should\\_elena\\_kagan\\_recuse\\_her\\_self\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/obamacare_and_the_supreme_court_should_elena_kagan_recuse_her_self_.html). Also on that day, apparently, she decided to remove herself from the case during her remaining tenure as Solicitor General. *Id.* I use the word “apparently” because the government has refused to turn over documents pertaining to Kagan’s work on the case based on the attorney work-product doctrine. Declaration of Valier H. Hall In Support of Defendants’ Motion for Summary Judgment at 14-15, *Media Research Ctr. v. U.S. Dep’t of Justice*, No. 10-2013 (D.D.C. Mar. 15, 2011). To argue on one hand that Kagan was not an adviser or counselor on the case but to argue on the other hand that information regarding her participation in the case is protected by privileges normally reserved for attorneys and their clients is highly suspect.

I am not suggesting that Justice Kagan has not told the truth about her participation or lack thereof in the ACA litigation. I am arguing that her Office’s direct involvement in the case, coupled with the assertion of the work product privilege in response to requests about her participation, suggest that she should not sit on the case. A similar rule has sometimes been applied to United States attorneys who became federal judges. These judges have not been allowed to preside over cases on which their former offices worked, even if they had no direct involvement, because the knowledge and acts of their assistants are imputed to them. *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994).



A few weeks ago, Justice Kagan recused herself from a high-profile affirmative action case involving the admissions policy of the University of Texas. *See* Order Granting Petition for Certiorari, *Fisher v. Univ. of Tex.*, No. 11-345 (Feb. 21, 2012). She has also recused herself from the important Arizona immigration case that the Supreme Court will hear later this Term. *See* Order Granting Petition for Certiorari, *Arizona v. United States*, No. 11-182 (Dec. 12, 2011).

In fact, Justice Kagan has recused herself from many cases over the past two years. It appears that she decided not to work on only one case while she was the Solicitor General—the ACA litigation. What possible reason could she have for working on such high-profile issues as immigration and affirmative action, as well as many other cases, but not the ACA litigation? There is no plausible answer to that question that obviates the need for Justice Kagan to recuse herself from the case.

Professor Ifill and I have both bemoaned the Supreme Court's appalling lack of standards and transparency when it comes to the Justices' recusal decisions. Sadly, from the beginning of this country's history, Supreme Court Justices have decided cases that normal judges would never hear. Chief Justice Marshall decided *Marbury v. Madison*, despite the fact that he and his brother were partly to blame for the plaintiff's injury in the case. Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1202-03. Justice Oliver Wendell Holmes presided over cases that he had previously heard as a judge in Massachusetts, Justice Black ruled on the constitutionality of a federal law that he helped draft, and Justice Rehnquist declined to recuse himself from a case involving a federal law he worked on during his time in the Nixon Administration. *Id.* at 1203-04. These are all unfortunate examples of Supreme Court Justices acting improperly and without integrity. Justice Kagan can either choose to continue this sorry history, or to do the right thing and recuse herself from the ACA litigation. Needless to say, I am not holding my breath for the latter.

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