**CHANGING ETHICAL AND RECUSAL RULES FOR SUPREME COURT JUSTICES**

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Dear Chairmen and Ranking Minority Members,

Justices of the United States Supreme Court have not adopted and are not subject to a comprehensive code of judicial ethics. Nor are denials of motions to recuse by individual justices required to be in writing or subject to review. Recent media reports have focused public attention on this situation. The purpose of this letter is to issue a nonpartisan call for the implementation of mandatory and enforceable rules to protect the integrity of the Supreme Court.

Canon 1 of the Code of Conduct for United States Judges explains the importance of judicial ethics:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.

This Code of Conduct is applicable to all federal judges *except* Supreme Court justices.

Decisions of Supreme Court justices have the broadest impact, are frequently divisive, and often turn on the vote of a single justice. Yet, while all other federal judges are required to abide by the Code of Conduct, and are subject to investigation and sanctions for failure to do so, Supreme Court justices look to the Code for mere "guidance," and are not obligated to follow the Code's rules.

Ethical conduct by judges is essential to the integrity of all courts, as the Supreme Court recently recognized in *Caperton v. A.T. Massey Coal Co.*:

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."[1]

[1] *Caperton v. A.T. Massey Coal Co.*, __U.S. __, 129 S. Ct. 2252, 2266-67 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002)). "State" interest in this setting meant governmental interest.

In light of the role the Code of Conduct plays in protecting the integrity of the judiciary, justices on our nation's highest court should set the standard for judicial ethics by adhering to the same ethical rules as other judges. In our view, voluntarily looking to the Code of Conduct for "guidance" has proved insufficient.

Similarly, justices must be subject to an enforceable, transparent process governing recusal. The impartiality of justices, and, as a result, the integrity of the Supreme Court, has come under question because the primary recusal statute – 28 U.S.C. § 455 – fails to meet this standard for Supreme Court justices. On recusal motions, justices may sit in silent judgment of their own impartiality, with no opportunity for review, even though the standard to be applied is the *appearance* of bias, which by necessity depends on the views of others.

*Caperton* illustrates the hazards of allowing self-judging on recusal questions. In that case, a West Virginia Supreme Court justice, acting alone, denied multiple motions to recuse himself, despite benefitting from substantial campaign contributions made directly or indirectly by the president of a company with an outstanding $50 million judgment against it on appeal before the judge. He then sided with the company in a 3-2 decision vacating the judgment. The Supreme Court reversed on due process grounds, holding that the justice's view of his own impartiality did not matter so much as whether the appearance of his impartiality was compromised.[2] Critically, the Court held that an independent inquiry was needed "where, as here, there is no procedure for judicial fact-finding *and the sole trier of fact is the one accused of bias*."[3]

Unlike *Caperton*, where the Supreme Court reversed the self-judged view of a single state court judge, there is no review procedure for recusal decisions by Supreme Court justices. Individual justices rule themselves on motions to recuse, or decide *sua sponte* to recuse in cases where no motion is filed. No written opinion is required in either situation. The opacity and non-reviewability of this process erodes public confidence in the integrity of the Court. The fundamental principle that "no man may be a judge in his own case" was articulated by Lord Coke in the seventeenth century, yet inexplicably we still allow Supreme Court justices to be the sole judge of themselves on recusal issues.

Adherence to mandatory ethical rules by justices, and requiring transparent, reviewable recusal decisions that do not turn solely on the silent opinion of the challenged justice will reinforce the integrity and legitimacy of the Supreme Court. Therefore, we strongly urge your committees to hold hearings and advance legislation to:

1. Apply the Code of Conduct for United States Judges to Supreme Court justices;
2. Establish a set of procedures to enforce the Code's standards as applied to Supreme Court justices;
3. Require a written opinion when a Supreme Court justice denies a motion to recuse; and

[2] A public opinion poll found that 67% of West Virginians doubted the judge would be fair and impartial. *Id.* at 2258.
[3] *Id.* at 2263 (emphasis added).
* School affiliations are listed for identification purposes only, and shall not be construed as the endorsement of any institution.

4. Determine a procedure, or require the Court to do so, that provides for review of a decision by a Supreme Court justice not to recuse himself or herself from a case pending before the Court.

Sincerely,

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