AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 211 The Contemporary Era – Judicial Power and Constitutional Authority

John Roberts, **"Year-End Report on the Federal Judiciary"** (2011)

As the U.S. Supreme Court prepared to hear a constitutional challenge to President Obama's 2010 health care reform law, activists on both sides of the issue focused their attention on the justices who would sit in judgment of the law. Justice Elena Kagan was appointed to the Supreme Court by Obama in August 2010. Before joining the Court, Kagan was the solicitor general in the Obama administration, in charge of the office in the Department of Justice that developed the legal strategy for defending administration policies in court. Kagan claimed that she had not "played a substantial role" in formulating the litigation strategy for the health care law before leaving the administration. Opponents of the law asserted that Kagan should recuse herself from hearing the case, but Kagan declined. Supporters of the health care law believed that Justice Clarence Thomas should recuse himself from the case. His wife is a conservative activist and lobbyist on national policy issues, including health care. Thomas also declined to recuse himself.

Chief Justice John Roberts used his annual report on the state of the federal judiciary to defend his colleagues and outline the general principles that should govern recusal by Supreme Court justices. This led the advocacy group Freedom Watch (which was calling for Kagan's recusal) to denounce the chief justice for "selling out 'We the People'" in order to protect the Court's own interests.[1] The full Court refused to hear arguments on the recusal issue. Do the "unique circumstances" of the Supreme Court justify a distinct recusal policy? Should justices be reluctant to recuse themselves?

. . . . The Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court.

The governing statute . . . states, as a general principle, that a judge shall recuse in any case which the judge's impartiality might reasonably be questioned. That objective standard focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts. . . .

. . . . Like lower court judges, the individual Justices decide for themselves whether recusal is warranted . . . . There is only one major difference in the recusal process: There is no higher court to review a Justice's decision not to recuse in a particular case. This is a consequence of the Constitution's command that there be only "one Supreme Court." The Justices serve on the Nation's court of last resort.

. . . . [I]f the Supreme Court reviewed those [individual] decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

Although a Justice's process for considering recusal is similar to that of the lower court judges, the Justice must consider an important factor that is not present in the lower courts. Lower court judges can freely substitute for one another. . . . [I]f a Justice withdraws from a case, the Court must sit without its full membership. A Justice accordingly cannot withdraw from a case a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.

As with other ethical questions, Justices and lower federal court judges contemplating recusal can take good counsel from the principles set forth in Canon 14 of the original 1924 Canons of Judicial Ethics.

[1] Brief of Amicus Curiae Freedom Watch in Support of Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan, *National Federation of Independent Business v. Sebelius*, U.S. Supreme Court (2012).

That Canon addresses judicial independence. It provides that a judge "should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism." Such concerns have no role to play in deciding a question of recusal.

I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law.

. . . .

As Alexander Hamilton put it in *The Federalist* No. 78, federal judges must "unite the requisite integrity with the requisite knowledge" to carry out their duties under the Constitution and laws. Throughout our Nation's history, instances of judges abandoning their oath "to faithfully and impartially discharge and perform" the duties of their office have been exceedingly rare. . . . [A]t the end of the day, no compilation of ethical rules can guarantee integrity. Judges must exercise both constant vigilance and good judgment to fulfill the obligations they have all taken since the beginning of the Republic.