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## Invisible Justices: How Our Highest Court Hides from the American People

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## INVISIBLE JUSTICES: HOW OUR HIGHEST COURT HIDES FROM THE AMERICAN PEOPLE

Eric J. Segall\*

### INTRODUCTION

The Supreme Court of the United States is one of the least transparent governmental institutions in the United States. The Justices' reluctance to show themselves on camera has been debated and criticized at length but is only one small part of a more disturbing and consistent pattern of secrecy. The Court acts in mysterious ways across a broad range of official duties. This Article examines how the Court uses that secrecy to hide important aspects of its work from the American public. In addition to forbidding cameras in their courtroom,<sup>1</sup> the Justices follow different and less onerous ethical and professional rules than all other federal judges.<sup>2</sup> The Justices do not have to and almost never explain important recusal decisions even when a party has filed an official motion alleging that the Justice is

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1. Clerk of Court: Supreme Court of the United States, *Guide for Counsel in Cases to be Argued Before The Supreme Court of the United States* 3 (Oct. 2015), [http://www.supremecourt.gov/oral\\_arguments/guideforcounsel.pdf](http://www.supremecourt.gov/oral_arguments/guideforcounsel.pdf) (stating that lawyers are not allowed to have electronic devices, including cameras, in the court room and that “news cameras are not allowed in the [Supreme] Court building”); *Frequently Asked Questions*, SUPREMECOURT.GOV, [http://www.supremecourt.gov/faq\\_visiting.aspx](http://www.supremecourt.gov/faq_visiting.aspx) (last visited Apr. 31, 2016) (noting that “no photography is allowed inside the Courtroom at any time” and additionally visitors should “refrain from taking . . . cameras . . . cell phones . . . [and] other electronic devices” into the Courtroom when the Court is in session); *On Cameras in Supreme Court, Souter Says, 'Over My Dead Body'*, N.Y. TIMES (Mar. 30, 1996), <http://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html> (“Justice Souter and Justice Anthony M. Kennedy made it clear that even though Federal appeals courts allow cameras to cover proceedings, television will not be allowed in the Supreme Court any time soon.”).

2. Nancy Smith, *What? Accountability for U.S. Supreme Court Justices . . . Finally?*, SUNSHINE STATE NEWS (Apr. 22, 2015, 6:00 PM), <http://www.sunshinestateneeds.com/story/what-accountability-us-supreme-court-justices-finally> (stating that Supreme Court Justices should be subject to a code of ethics just like all federal judges and describing a bill—the Supreme Court Ethics Act—that has been reintroduced in Congress to accomplish that goal); *see infra* text accompanying notes 185 and 204.

biased or has an improper interest in the litigation.<sup>3</sup> The Justices have no obligation to make their official, taxpayer-funded papers public after they leave office.<sup>4</sup> The Justices do not even have to disclose their individual votes on whether to hear or not hear the very few cases they decide to accept to each year.<sup>5</sup>

The Justices, no doubt, need their independence to perform their jobs, but the Court as an institution does not have to remain a mythical and mysterious place shrouded in secrecy and removed from meaningful public inspection. There is a general presumption of transparency in our democracy that requires strong evidence of harm before the government is allowed to act in secret.<sup>6</sup> This presumption, however, does not apply to our highest court to the shame of the Justices, the institution, and ultimately, our democracy.

## I. CAMERAS

Going into the last week of June 2015, the Supreme Court of the United States was on the verge of handing down blockbuster cases on same-sex marriage and the Affordable Care Act.<sup>7</sup> Millions of Americans waited anxiously for the Justices to interpret the Constitution and federal statutory law and answer fundamental

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3. See Christopher Riffle, *Ducking Recusal: Justice Scalia's Refusal to Recuse Himself from Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), and *the Need for a Unique Recusal Standard for Supreme Court Justices*, 84 NEB. L. REV. 650, 667 (2005) ("Currently, a Justice's recusal decision is completely autonomous and definitive. Even if there is some question regarding the appropriateness of the Justice's decision, there is no statutory provision to be invoked that would allow such an inquisition.").

4. Eric J. Segall, *What Are the Supreme Court Justices Hiding?*, L.A. TIMES (May 5, 2014, 11:09 PM), <http://www.latimes.com/opinion/op-ed/la-oe-segall-supreme-court-transparency-20140505-story.html> (arguing that Supreme Court Justices' papers should be deemed public property, as are the papers of other government officials whose "salaries are paid by taxpayers," after "taking into account reasonable privacy concerns").

5. Eric J. Segall, *Let's Lift the Supreme Court's Veil of Secrecy*, L.A. TIMES (Oct. 7, 2014, 5:04 PM), <http://www.latimes.com/opinion/op-ed/la-oe-1008-segall-scotus-anonymous-certiorari-20141007-story.html> (arguing that the practice of the Supreme Court not revealing which Justices voted for or against hearing a case—unless a Justice writes a dissent—is inconsistent with government transparency in a democracy).

6. *Id.*

7. See *infra* notes 8, 11, and accompanying text; see also Richard Wolf, *6 Major Cases Await Supreme Court Rulings*, USA TODAY (June 25, 2015, 10:11 AM), <http://www.usatoday.com/story/news/politics/2015/06/25/supreme-court-major-cases-remaining/29106717/>.

questions about how we define ourselves as a country. No one (other than the Justices) knew on which specific days the Court would hand down these decisions (the Justices never inform the public in advance), but most everyone knew that the cases were forthcoming.

Over two dramatic June days, for many, the world changed. Justice Anthony Kennedy, a Ronald Reagan appointed Republican from California, announced that the Supreme Court had decided by a bitterly divided 5–4 vote that same-sex couples have a constitutional right to marry just like heterosexual couples.<sup>8</sup> Thousands of Americans, gay and straight, wept for joy.<sup>9</sup> Others, of course, believed the decision to be both a tragic mistake and a terrible usurpation of power by five Justices.<sup>10</sup>

The Supreme Court also announced that the attempt by a few die-hard objectors to gut the Affordable Care Act would not succeed. By a vote of 6–3, the Court rejected the challengers’ bizarre argument that *federal* health exchanges could not offer *federal* tax subsidies.<sup>11</sup> Millions of Americans would continue to be able to afford health insurance. During this same time period, the Court also handed down

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8. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (holding that “the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived . . . from that Amendment’s guarantee of the equal protection of the laws” and thus, “the Fourteenth Amendment requires a State to license a marriage between two people of the same sex”).

9. Sebastian Ivory, *Today We Celebrate but Tomorrow We Get Back to Work*, HUFFINGTON POST (June 29, 2015, 2:07 PM), [http://www.huffingtonpost.com/sebastian-ivory/today-we-celebrate-but-tomorrow-we-get-back-to-work\\_b\\_7674880.html](http://www.huffingtonpost.com/sebastian-ivory/today-we-celebrate-but-tomorrow-we-get-back-to-work_b_7674880.html).

10. *Call to Action Scholars Statement*, CAMPAIGN FOR AMERICAN PRINCIPLES, <https://campaignforamericanprinciples.com/scholars-statement> (last visited Apr. 13, 2016) (“Because we stand with President Lincoln against judicial despotism, we also stand with these distinguished legal scholars who are calling on officeholders to reject *Obergefell* as an unconstitutional effort to usurp the authority vested by the Constitution in the people and their representatives. At the same time, we stand with the four dissenting Supreme Court justices in *Obergefell* who rightly noted that the judicially imposed redefinition of marriage is a judicial power grab that will—as Justice Alito wrote in his dissent—’vilify Americans who are unwilling to assent to the new orthodoxy.’”); *Judicial Watch on Supreme Court’s Ruling in Obergefell v. Hodges*, JUDICIAL WATCH (June 26, 2015), <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-statement-on-supreme-courts-ruling-in-obergefell-v-hodges> (“The exercise of raw judicial power by five justices should be resisted under law and overturned.”).

11. *King v. Burwell*, 135 S. Ct. 2480, 2484 (2015) (holding that tax credits are available to individuals in states that have a Federal Exchange, and stating that “[s]ection 18031(i)(3)(B)’s requirement that all Exchanges create outreach programs to ‘distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B’—would make little sense if tax credits were not available on Federal Exchanges.”).

divided opinions on redistricting, the death penalty, and other important issues.<sup>12</sup>

No one but a few reporters and about 250 people saw the Court announce these decisions.<sup>13</sup> C-Span offered to televise the proceeding so that those interested could gather around their televisions, tablets, and smart phones to observe history, but the Justices refused that request.<sup>14</sup>

There will never be any video or even photographic evidence of these historic cases. When law professors teach these cases to future generations of students, neither will be able to see how proud Justice Kennedy was to provide equal rights to gay Americans or how Justice Roberts turned away a politically inspired challenge to President Obama's signature legislation.<sup>15</sup> Truly historic governmental business was transacted largely in private away from the American people.

There are compelling reasons to televise Supreme Court proceedings, both the oral arguments and the decision days, and few persuasive objections to keep them off the air. It is well past time the Supreme Court enters modern times and joins most of the states as well as the supreme courts of Canada, Brazil, and the United Kingdom, and allow live television coverage of its official business.<sup>16</sup>

#### A. *The Arguments For and Against Cameras*

The first argument in favor of cameras in the Supreme Court is a simple one: The oral arguments and decision days are already public events, C-Span is willing to televise them at its own expense, and there are obviously many Americans who want to witness the

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12. Wolf, *supra* note 7.

13. *Visiting the Court*, SUPREME CT. HIST. SOC'Y, [http://www.supremecourthistory.org/htcw\\_visiting.html](http://www.supremecourthistory.org/htcw_visiting.html) (last visited Apr. 13, 2016) ("The public seating capacity is approximately 250; but for the most dramatic cases and special occasions there is never enough room.").

14. Judge Steve Leben & Judge Kevin S. Burke, *Supreme Court Itself Will Be Tested as it Hears Health-Case Arguments*, MINN POST: COMMUNITY VOICES (Mar. 26, 2012), <https://www.minnpost.com/community-voices/2012/03/supreme-court-itself-will-be-tested-it-hears-health-case-arguments>.

15. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

16. Kyu H. Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning From Abroad?*, 2012 BYU L. Rev. 1989, 1990-92 (2012).

proceedings.<sup>17</sup> We normally have a strong presumption that open government hearings will be, well, open. As Dean Erwin Chemerinsky has written: “Supreme Court proceedings, of course, are government events and there should be a strong presumption that people should be able to watch government proceedings. Arguments in the Supreme Court always have been open to the public, but relatively few can attend in person.”<sup>18</sup>

In addition to the normal presumption of transparency, there are a myriad of cultural, educational, historical, and civic benefits to allowing cameras at the Supreme Court. The American people could watch lawyers and judges argue over our most controversial, divisive, and sometimes partisan issues, with mutual respect, civility, and deference. Especially in these overly partisan times, the oral arguments could set an example of how public officials can disagree, sometimes bitterly, without undue rancor.

Our national museums could display the Court’s most important cases with the Justices on video arguing over the issues and announcing the results. Students in elementary and secondary schools, colleges, and law schools could gain better insight and understanding about the Court and great historical debates over race relations, abortion, gun control, and voting rights by actually seeing the Justices perform their duties. Perhaps most importantly, when the Court hands down landmark decisions like last term’s same-sex marriage opinion, millions of Americans could gather together in a moment of national pride (or anguish) and political engagement which would be markedly different from hearing the news second hand from a few select journalists.

Balanced against all of those benefits are a few unpersuasive arguments the Justices routinely trot out against cameras in the Court. Perhaps the most famous statement made by a Justice opposing cameras was Justice David Souter’s admonition that “the day you see a camera come into our courtroom, it’s going to roll over my dead

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17. See Erwin Chemerinsky, Opinion, *Time to Televise Supreme Court Proceedings*, ORANGE CO. REG. (Mar. 19 2014), <http://www.oregister.com/articles/court-606042-arguments-supreme.html>.

18. *Id.*

body.”<sup>19</sup> Souter explained that he was concerned that statements made during oral arguments could be taken out of context by the media and that the “judiciary is not a political institution . . . nor is it part of the entertainment industry.”<sup>20</sup>

Justice Souter’s concern that cameras should not be allowed because the Court is not a “political institution” is particularly revealing. Although the political or legal nature of the Court’s decision-making is beyond the scope of this paper, one does not have to be a core legal realist to appreciate that the Justices make fundamentally important decisions about many of our country’s most controversial issues based largely on vague text, contested history, and precedents that can be interpreted in many different ways.<sup>21</sup> Justice Souter’s vehement opposition to cameras was probably based on his desire to maintain the Court’s image as an apolitical font of law rather than a values laden (and at least somewhat if not mostly political) institution.

Other Justices have also expressed concern that the media might distort out-of-context snippets of Court proceedings if cameras were allowed in the Courtroom.<sup>22</sup> For example, testifying in front of Congress on the Court’s budget, Justice Stephen Breyer said, “If you see on television a person taking a picture of you and really mischaracterizing [what you say], the first time you see that, the next day you’ll watch a lot more carefully what you say. Now that’s what’s worrying me.”<sup>23</sup>

Dean Chemerinsky once again has provided a persuasive response:

I have heard justices express concern that if television cameras were allowed, the media might broadcast excerpts that offer a misleading impression of arguments and the

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19. *On Cameras in Supreme Court*, *supra* note 1.

20. *Id.*

21. *See generally* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012).

22. *See* Tal Kopan, *At Sequestration Hearing, Breyer, Kennedy Say Cameras in the Courtroom Too Risky*, POLITICO (Mar. 14, 2013, 12:59 PM), <http://www.politico.com/blogs/under-the-radar/2013/03/at-sequestration-hearing-breyer-kennedy-say-cameras-in-the-courtroom-too-risky-159328>.

23. *Id.*

court. But that is true when any government proceeding is taped or even when reporters cover any event. A newspaper or television reporter could quote a justice's question or a lawyer's answer out of context. The Supreme Court should not be able to protect itself from misreporting any more than any other government institution can do so.

The justices might be afraid that an excerpt of oral arguments might be used for entertainment purposes; perhaps they will even be mocked. But that is a cost of being a democratic society and of holding a prominent position in government. In no other context would Supreme Court justices say that government officials can protect themselves from possible criticism by cutting off public access.<sup>24</sup>

Some Justices have expressed fears that their fellow Justices, lawyers, or both may misbehave and grandstand if cameras were allowed in the Supreme Court.<sup>25</sup> For example, Justice Anthony Kennedy has said that with cameras there may be an “insidious temptation to think that one of my colleagues is trying to get a sound bite for the television” and that would “alter the way in which we hear our cases, the way in which we talk to each other, the way in which we use that precious hour.”<sup>26</sup> How the Justices behave, however, is in their own control and not an excuse to hide their official public duties from the American people. To the extent there is concern over lawyers misbehaving, the Justices are more than capable of preventing lawyers from playing to the cameras in an inappropriate manner.<sup>27</sup>

Perhaps the strongest (yet still not persuasive) objection to cameras in the Supreme Court is that the public may perceive or come to

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24. Chemerinsky, *supra* note 17.

25. Kristin Linsley Myles et al., *Supreme Court Watch: Cameras in the Courtroom?*, 38 S.F. ATT'Y MAG. 49, 51 (2012), <https://www.sfbar.org/forms/sfam/q22012/scw-cameras-in-the-courtroom.pdf>.

26. *Id.*

27. *Id.*



believe that oral arguments play a larger and more significant role in the Justices' final decisions than they actually do.<sup>28</sup> Justice Sonia Sotomayor, one of many Justices who was more open-minded about cameras during her confirmation hearings than after ascending to the bench, has said that televising oral arguments "could be more misleading than helpful . . . . It's like reading tea leaves."<sup>29</sup> Justice Antonin Scalia argued that televising oral arguments would present a misleading view of the Court both because oral arguments account for little of what the Court actually does and snippets of the arguments would be taken out of context.<sup>30</sup>

None of these arguments, however, apply in the least to the dramatic June decision days when the Justices do nothing more than announce their decisions in nationally watched cases. There, the Justices completely control the message they want to send and how much or little information they provide to the public.

Moreover, it is not up to government officials to decide what already public information should be shared with the public. If the American people overstate the importance of oral arguments or take "snippets" out of context, the Justices have many different ways to correct those misapprehensions.<sup>31</sup> Additionally, keeping the arguments secret and hidden away might in fact give them an importance out of proportion to their actual relevance.<sup>32</sup> If the arguments are not that important, what is the harm of putting them on television for all the world to see?

The Justices make the transcripts and audio recordings of oral arguments available for public inspection.<sup>33</sup> But for new generations of young Americans raised on YouTube and iPhones, live streaming

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28. Sam Baker, *Justice Sotomayor no Longer Backs Television Cameras in Supreme Court*, THE HILL (Feb. 7, 2013, 7:25 PM), <http://thehill.com/homenews/news/281765-sotomayor-no-longer-backs-cameras-in-supreme-court>.

29. *Id.*

30. Stephanie Condon, *Scalia: Cameras in the Court Will "Miseducate" People*, CBS NEWS (July 26, 2012, 11:37 AM), <http://www.cbsnews.com/news/scalia-cameras-in-the-court-will-miseducate-people>.

31. Gabe Roth, *Why Doesn't the Supreme Court have Cameras?*, MSNBC (July 25, 2015, 9:41 AM), <http://www.msnbc.com/msnbc/why-doesnt-the-supreme-court-have-cameras>.

32. See Condon, *supra* note 30.

33. Myles et al., *supra* note 25.

and television coverage of important news events is the most important information currency.<sup>34</sup>

Numerous state courts and other countries have allowed cameras in their courtrooms for a long time with overwhelmingly positive results.<sup>35</sup> For example, Chief Justice Maureen O'Connor of the Ohio Supreme Court has written essays and op-eds supporting the use of cameras in Ohio courtrooms and recounting the beneficial positive effects of cameras in the courtrooms.<sup>36</sup> Her conclusion is that “the objective evidence is persuasive that open, transparent courtrooms—including broadcast proceedings with reasonable restrictions—support public understanding of the courts and foster trust and confidence in the judicial system.”<sup>37</sup>

Over forty states now allow use of cameras, video streaming, or both throughout their systems including in their supreme courts.<sup>38</sup> The O.J. Simpson case notwithstanding,<sup>39</sup> there have been few complaints about the use of cameras with judges and lawyers saying their presence does not adversely affect the proceedings.<sup>40</sup> In addition, the high courts of Canada, the United Kingdom, and Brazil also televise their proceedings.<sup>41</sup> All three countries report positive experiences.<sup>42</sup>

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34. See Doug Gross, *Survey: More Americans Get News from Internet than Newspapers or Radio*, CNN (Mar. 1, 2010, 12:12 PM), <http://www.cnn.com/2010/TECH/03/01/social.network.news/index.html>.

35. *Cameras in the Courtroom*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/cameras-courtrooms> (last visited Apr. 13, 2016); S.M. Oliva, *Put Cameras in the Supreme Court*, REASON.COM (Apr. 13, 2014, 12:00 PM), <https://reason.com/archives/2014/04/13/put-cameras-in-the-supreme-court/print>; see *infra* notes 38–42 and accompanying text.

36. E.g., Maureen O'Connor, *Cameras Do Belong in the Courtroom*, WASH. POST (July 18, 2013), [https://www.washingtonpost.com/opinions/cameras-do-belong-in-the-courtroom/2013/07/18/e4bc45bc-ee2f-11e2-bb32-725c8351a69e\\_story.html](https://www.washingtonpost.com/opinions/cameras-do-belong-in-the-courtroom/2013/07/18/e4bc45bc-ee2f-11e2-bb32-725c8351a69e_story.html).

37. *Id.*

38. *Utah Joins States with Courts Open to Cameras*, RADIO TELEVISION DIG. NEWS ASSOC. (Mar. 28, 2013, 1:30 PM), [http://www.rtdna.org/article/utah\\_joins\\_states\\_with\\_courts\\_open\\_to\\_cameras](http://www.rtdna.org/article/utah_joins_states_with_courts_open_to_cameras).

39. See Times Editorial Board, *Another Casualty of the O.J. Trial: Cameras in Courtrooms*, L.A. TIMES (June 11, 2014, 8:08 PM), <http://www.latimes.com/opinion/editorials/la-ed-oj-20140611-story.html>.

40. Ronald D. Rotunda, *Cameras in the Supreme Court*, VERDICT (Nov. 9, 2015), <https://verdict.justia.com/2015/11/09/cameras-in-the-supreme-court>.

41. Youm, *supra* note 16, at 1990.

42. See *id.* at 2005–31.

While all of this progress is being made elsewhere, the Supreme Court of the United States is resisting this trend of openness and transparency. In his 2014 Year End Report, which was “embargoed” as usual until 6:00 p.m. on New Year’s Eve, Chief Justice John Roberts tried to make the case that the Court has historically and appropriately been slow to embrace new technology. Chief Justice Roberts explained his views in the Year End Report:

Under our constitutional scheme, the courts are neutral arbiters of concrete disputes that rely on parties with genuine grievances to initiate the process and frame the issues for decision. The courts’ passive and circumscribed role directly affects how courts deploy information technology. The courts understandably focus on those innovations that, first and foremost, advance their primary goal of fairly and efficiently adjudicating cases through the application of law.<sup>43</sup>

The controversial premise of this rather opaque argument, that the Justices are “neutral arbiters” who play a “passive and circumscribed” role in our “constitutional scheme,” sounds a lot like the famous “umpire” analogy Chief Justice Roberts set out during his confirmation hearing.<sup>44</sup> But, as the author of *Shelby County v. Holder*<sup>45</sup> and of the concurrence in *Citizens United v. FEC*,<sup>46</sup> two controversial and powerful exercises of the judicial power, Chief Justice Roberts should know better. Polls show the Court losing favor with the American people, who are becoming increasingly skeptical that politics are not significantly involved in the Court’s decisions.<sup>47</sup>

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43. CHIEF JUSTICE JOHN G. ROBERTS, JR., YEAR END REPORT ON THE FEDERAL JUDICIARY 4 (2014), <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf>.

44. *Id.*; *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

45. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2617 (2013).

46. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

47. Nick Gass, *Poll: Disapproval of Supreme Court Reaches New High*, POLITICO (Oct. 2, 2015, 8:50 AM), <http://www.politico.com/story/2015/10/poll-supreme-court-approval-rating-214363>.

There may have been a time when the Justices remaining mysterious and out of the public eye helped perpetuate the “neutral arbiter” myth but with the advent of the internet, iPhones, and computer tablets of every variety the people can now see their leaders in many different ways on a variety of different mediums.<sup>48</sup> The secrecy that Chief Justice Roberts believes breeds confidence now likely produces suspicion.

No one is asking the Court to thoughtlessly embrace brand new technology that may implicate security, administrative, or privacy concerns. The call is for the Justices to allow C-Span to cover already public hearings where the Court performs its basic functions: hearing oral arguments and announcing its decisions.<sup>49</sup> Vague and unsubstantiated fears of lawyer or Justice showboating or possible public misperception of the nature of these already open proceedings should not deprive the American people of access to their government.<sup>50</sup> The Court should allow cameras into all of its proceedings where members of the public are invited. Anything less than allowing that full coverage suggests that the Justices are hiding from the very people they are supposed to work for and who pay their salaries. That is no way to run our country’s highest Court.

## II. RECUSAL

On January 10, 2014, the Supreme Court announced that Justice Samuel Alito was recused from an important case involving the streaming of free television programs.<sup>51</sup> This information came in the form of a simple statement alongside the granting of the writ of certiorari that stated: “Justice Alito took no part in the consideration or decision of this petition.”<sup>52</sup>

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48. ROBERTS *supra* note 43.

49. *See Chemerinsky, supra* note 17.

50. Rotunda, *supra* note 40.

51. WNET Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3403 (U.S. Jan. 10, 2014) (No. 13-461).

52. *Id.*

No reasons were given, but the implications for the large television networks that brought the suit were significant because, with Alito recused, a four-to-four tie vote would have meant the lower court decision would be affirmed and the networks would lose the case.<sup>53</sup> Although officially there was no way to know why Alito recused himself, the best guess was that he owned stocks in one or more of the companies involved in the case.<sup>54</sup> The mere fact that we have to guess at such an important decision demonstrates the lack of transparency in the Court's recusal process.

On April 16, 2014, the Supreme Court announced in a routine entry on its docket that "Justice Alito is no longer recused in this case."<sup>55</sup> Again, Justice Alito provided no reason for this decision.<sup>56</sup> The speculation was that he had sold the stock that he likely held in one or more of the companies.<sup>57</sup> This change had significant implications for the case because now a four-to-four tie vote was no longer possible.

We never learned why Justice Alito first recused himself in the case and suddenly, on the eve of oral argument, did not, but he should have explained his mysterious change of heart. If he had a sincere, neutral desire to make sure a full Court could hear the case that would seem to be a legitimate reason, but what if the change was prompted by his desire to make sure one of the parties in the case would win? That motivation seems far less appropriate. Moreover, a federal judge who decides to sell stock in a company so that he can sit on a case may defer the capital gains if he reinvests in certain government-approved instruments.<sup>58</sup> There is nothing wrong with this incentive to sit on a case, but it arguably makes it even more

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53. *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *rev'd sub nom*, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

54. Lyle Denniston, *Alito Rejoins the Court in Two Cases*, SCOTUSBLOG (Apr. 16, 2014, 5:15 PM), <http://www.scotusblog.com/2014/04/alito-rejoins-the-court-in-two-cases>.

55. *Id.*

56. *Id.*

57. *Id.*; see also Jonathan Handel, *Justice Alito Rejoins Aereo Supreme Court Case*, HOLLYWOOD REP. (Apr. 16, 2014), <http://www.hollywoodreporter.com/thr-esq/justice-alito-rejoins-aereo-supreme-696950>.

58. Marianna Bettman, *Judicial "Unrecusal"*, LEGALLY SPEAKING OH. (Jan. 6, 2012), <http://www.legallyspeakingohio.com/2012/01/judicial-%E2%80%9CUnrecusal%E2%80%9D>.

important to know why the Justices sometimes recuse, why they do not, and most importantly, why they sometimes change their minds right before the case is argued.

The law of recusal is essential for the rule of law to function effectively.<sup>59</sup> Judges deciding cases and controversies must be impartial and unbiased.<sup>60</sup> This age-old idea of judicial fairness can be traced back to Roman times.<sup>61</sup> Without fair judges, there can be no justice.<sup>62</sup>

In this country, since 1792, Congress has required federal judges to recuse themselves from hearing any case in which they have a financial interest or have served as counsel for either party.<sup>63</sup> This old recusal statute has been amended many times since then in an effort to ensure greater judicial impartiality, but is still in place today, supported by all of the policy considerations that engendered it in the first place.<sup>64</sup> If the public does not have a strong belief that judges decide cases without bias or personal stake, the public will not have confidence in the transparency and fairness of their decisions.<sup>65</sup>

Federal laws require all federal judges, including Supreme Court Justices, to recuse themselves from deciding cases in a large number of situations.<sup>66</sup> Although the statute governing recusal is complex, the central purpose of the requirements is that the judges should not hear cases when they (or immediate family members) have a financial or other personal interest in the case, when they have previously expressed their views on the outcome of the case, or when they

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59. Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1140 (2011).

60. *Id.* at 1118, 1118 n.70.

61. *Id.* at 1112 (stating a Roman judge could be disqualified before trial on grounds of suspicion). The Torah states that bribes or other personal considerations could cloud a judge's judgment and therefore cause a judge to recuse himself. Rabbi Yissocher Frand, *Small Favors*, TORAH.ORG, <http://www.torah.org/learning/ravfrand/5772/devarim.html> (last visited Apr. 13, 2016).

62. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 532 (2005).

63. *Id.* at 539.

64. See Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1545 (2012).

65. See Frost, *supra* note 62, at 532.

66. Bias or Prejudice of a Judge, 28 U.S.C. § 144 (2012); Disqualification of a Justice, Judge, or Magistrate Judge, 28 U.S.C. § 455 (2012). Section 144 applies only to district court judges while section 455 applies to all federal judges, including the Supreme Court. *Id.*

served as a lawyer on the case in an official capacity.<sup>67</sup> All of these requirements are a subset of the first section of the recusal statute that is a catch-all provision requiring recusal where a judge's "impartiality might reasonably be questioned."<sup>68</sup> The statute measures impartiality through an objective standard that requires recusal if a hypothetical reasonable person would find that the judge's impartiality could be questioned.<sup>69</sup>

Unfortunately, unlike recusal for lower court judges,<sup>70</sup> the law applicable to the Supreme Court contains no enforcement mechanisms.<sup>71</sup> In other words, whether a Supreme Court Justice should recuse herself from a case is within the discretion of that particular Justice with no required review of that decision at any level.<sup>72</sup> This exclusive authority has led to controversial and non-transparent decisions by Supreme Court Justices who refused to recuse themselves when the circumstances strongly suggested different outcomes.<sup>73</sup>

Supreme Court scholars have observed that there are major flaws with how the Court decides recusal questions.<sup>74</sup> For example, the Justices have rarely written public memoranda explaining a decision to recuse or not recuse in a particular case.<sup>75</sup> This silence is a serious threat to the rule of law, the transparency of judicial decision-making, and the public's confidence in the Court. A glaring example of this lack of transparency and threat to the rule of law occurred when Justice Elena Kagan failed to communicate about her decision not to

67. See Virelli, *supra* note 64, at 1545 n.19.

68. 28 U.S.C. § 455(a).

69. Marcia G. Robeson, Annotation, *Construction and Application of 28 U.S.C.A. § 455(a) Providing for Disqualification of Justice, Judge, Magistrate, or Referee in Bankruptcy in Any Proceeding in Which His Partiality Might Reasonably Be Questioned*, 40 A.L.R. FED. 954 (1978).

70. 28 U.S.C. § 144.

71. See Virelli, *supra* note 64, at 1550, 1565–66.

72. See *id.*

73. Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1189–90 (2011).

74. Frost, *supra* note 62, at 533.

75. Virelli, *supra* note 73, at 1202–05. The author could only find three such examples in American history: one by Justice Rehnquist, one by Justice Scalia (both discussed later in the chapter), and one by Justice Jackson criticizing a decision by Justice Black not to recuse himself in a particular case. *Id.*

recuse herself in the initial litigation over President Obama's Affordable Care Act (ACA).<sup>76</sup>

*A. Justice Kagan and the ACA*

During her first term on the Supreme Court, Justice Elena Kagan recused herself from almost one-third of the cases on the Court's docket,<sup>77</sup> and she eventually recused herself from nationally important and controversial immigration<sup>78</sup> and affirmative action cases.<sup>79</sup> Although she never explained why (and, under the rules, she did not have to explain—a transparency issue in and of itself), presumably Justice Kagan recused herself from these cases because federal law requires a Justice to recuse if she had been a lawyer on the case before she sat on the Court.<sup>80</sup> Justice Kagan had likely worked on these cases while heading the United States Solicitor General's Office.<sup>81</sup>

On March 21, 2010, the United States House of Representatives passed the ACA, otherwise known as “Obamacare.”<sup>82</sup> The Senate passed the bill a few months earlier, making the final passage a major political victory for President Obama halfway through his first term.<sup>83</sup>

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76. *Id.* at 1183.

77. Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 82 (2011).

78. Stephen Dinan, *High Court to Consider Ariz. Migrant Law*, WASH. TIMES (Dec. 12, 2011), <http://www.washingtontimes.com/news/2011/dec/12/supreme-court-will-hear-arizona-immigration-law-ca/?page=all>.

79. Robert Barnes, *Supreme Court Agrees to Reconsider Use of Race in College Admission Decisions*, WASH. POST (Feb. 21, 2012), [https://www.washingtonpost.com/politics/supreme-court-agrees-to-reconsider-use-of-race-in-college-admission-decisions/2012/02/21/gIQA2viJRR\\_story.html](https://www.washingtonpost.com/politics/supreme-court-agrees-to-reconsider-use-of-race-in-college-admission-decisions/2012/02/21/gIQA2viJRR_story.html).

80. 28 U.S.C. § 455(b)(1)–(4) (2012).

81. Susan Navarro Smelcer & Kenneth R. Thomas, *From Solicitor General to Supreme Court Nominee: Responsibilities, History, and the Nomination of Elena Kagan*, CONG. RESEARCH SERV. 1, 15 (June 23, 2010), <https://www.fas.org/sgp/crs/misc/R41299.pdf>.

82. H.R. 3590 (111th): *Patient Protection and Affordable Care Act*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/111-2010/h165#> (last visited Jan. 27, 2016).

83. *Id.*; Terence P. Jeffrey, *Kagan to Tribe on Day Obamacare Passed*, CNS NEWS (Nov. 10, 2011, 1:49 PM), <http://cnsnews.com/news/article/kagan-tribe-day-obamacare-passed-i-hear-they-have-votes-larry-simply-amazing>.



At the time, Elena Kagan was the Solicitor General of the United States responsible for representing the United States Government in the Supreme Court.<sup>84</sup> Upon hearing the news that the ACA had passed, then-General Kagan wrote to Professor Laurence Tribe of Harvard Law School, at the time also a member of the Obama Administration, “I hear they have the votes, Larry!! Simply amazing.”<sup>85</sup> The email’s subject line was “fingers and toes crossed today!”<sup>86</sup> Her hope that the law would pass was obvious from these exchanges with one of the leading constitutional law scholars in the United States.<sup>87</sup>

Then-General Kagan’s deputy, Neal Katyal, had previously asked her whether the Solicitor General’s Office should be involved in the litigation strategy in the lower courts should the law be passed and then challenged in court.<sup>88</sup> General Kagan told her deputy that the Office should be involved from the very beginning, and later Katyal informed her of a meeting at the Department of Justice to discuss that strategy.<sup>89</sup> There is no evidence that Kagan had any direct involvement in the case after that decision was made, but she clearly communicated to her deputy the importance of the case. Eventually, Katyal argued a few of the lower court cases challenging the ACA, and he has since said that he did so without input from Kagan (though he worked directly for her at the time).<sup>90</sup>

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84. *Id.*

85. *Id.*

86. *Id.*; 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).

87. Jeffrey, *supra* note 83. Professor Laurence Tribe is considered the leading liberal constitutional law scholar of his time. Ben Jacobs, *Harvard Scholar: Ted Cruz’s Citizenship, Eligibility for President ‘Unsettled’*, GUARDIAN (Jan. 10, 2016, 8:48 PM), <http://www.theguardian.com/us-news/2016/jan/11/laurence-tribe-ted-cruz-donald-trump-citizen-president>.

88. See Josh Blackman, *The Question No One Asked at Justice Kagan’s Confirmation Hearing: Why Did She Wall Herself Off from the Obamacare Litigation*, WASH. POST (Sept. 8, 2013, 9:01 PM), <http://volokh.com/2013/09/08/question-one-asked-justice-kagans-confirmation-hearing-wall-obamacare-litigation>.

89. Jonathan Turley, *Should Kagan Recuse Herself from the Health Care Case?*, JONATHAN TURLEY (Nov. 15 2011), <http://jonathanturley.org/2011/11/15/should-kagan-recuse-herself-from-the-health-care-case>.

90. Terence P. Jeffrey, *Kagan Assigned DOJ Lawyer Who Argued Obamacare Cases in Appeals Courts*, CNS NEWS (June 3, 2011, 1:04 PM), <http://www.cnsnews.com/news/article/kagan-assigned-doj-lawyer-who-argued-obamacare-cases-appeals-courts>.

On August 5, 2010, less than six months after the passage of the law, Elena Kagan was confirmed by the Senate as an associate justice of the United States Supreme Court.<sup>91</sup> When the Court eventually decided to hear the legal challenges to Obamacare, there were numerous calls in the press—mostly by conservatives,<sup>92</sup> but also by a few liberals,<sup>93</sup> for Justice Kagan to recuse herself from the case because the Solicitor General's office worked on the litigation in the lower courts. Conservative group Freedom Watch filed a formal motion for oral argument on the issue of whether Justice Kagan should participate in the case at the Supreme Court stage.<sup>94</sup>

The argument for Justice Kagan's recusal in the Obamacare case was based on numerous points.<sup>95</sup> Although perhaps none of these aspects of her involvement with the ACA prior to the case alone required recusal, their *cumulative effect* demonstrated that Justice Kagan should have seriously considered recusing herself:

1) Elena Kagan was the Solicitor General of the United States working for President Obama at the highest levels of the Administration at the time the ACA was furiously debated in Congress and town halls across the country;<sup>96</sup>

2) The ACA was the most controversial and partisan piece of legislation that the Obama Administration put forward;<sup>97</sup>

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91. Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html>.

92. Robert Barnes, *Roberts Defends Supreme Court Colleagues on Recusal Issue*, WASH. POST (Dec. 31, 2011), [https://www.washingtonpost.com/politics/roberts-defends-supreme-court-colleagues-on-recusal-issue/2011/12/29/gIQAp9fySP\\_story.html](https://www.washingtonpost.com/politics/roberts-defends-supreme-court-colleagues-on-recusal-issue/2011/12/29/gIQAp9fySP_story.html); Mark Maynes, *Legislating a Supreme Court Recusal Process*, WESTREFERENCEATTORNEYS.COM (Mar. 22, 2011), <http://blog.legalsolutions.thomsonreuters.com/legal-research/legislating-a-supreme-court-recusal-process>; Michael B. Mukasey, *The ObamaCare Recusal Nonsense*, WALL ST. J. (Dec. 5, 2011), <http://online.wsj.com/article/SB10001424052970204012004577070162911944188.html>; Editorial, *The Supreme Court's Recusal Problem*, N.Y. TIMES (Nov. 30 2011), [http://www.nytimes.com/2011/12/01/opinion/the-supreme-courts-recusal-problem.html?\\_r=0](http://www.nytimes.com/2011/12/01/opinion/the-supreme-courts-recusal-problem.html?_r=0).

93. Segall, *supra* note 86.

94. Bill Mears, *High Court Turns Aside Recusal Request on Health Care Challenge*, CNN.COM (Jan. 23, 2012, 5:57 PM), <http://www.cnn.com/2012/01/23/politics/scotus-health-care-recusal/>.

95. See Eric J. Segall, *Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331, 338 (2012)

96. *Id.*

97. *Id.*

3) President Obama nominated Elena Kagan to the Supreme Court shortly after Congress enacted the ACA,<sup>98</sup>

4) The Supreme Court reviewed the constitutionality of the ACA in the middle of President Obama's reelection campaign,<sup>99</sup>

5) The President's reelection might well have been significantly affected by how the Supreme Court ruled on the constitutionality of the ACA;<sup>100</sup>

6) Elena Kagan celebrated the passage of the ACA over email with Professor Tribe and indicated that she was pleased that it passed and had been rooting for it to be passed;<sup>101</sup> and

7) Both Kagan's Office and her top deputy, Neal Katyal, were directly involved in the Obama Administration's litigation of the case in the lower federal courts urging that the ACA be upheld.<sup>102</sup>

In light of these undisputed facts, Justice Kagan's decision not to even address the recusal issue was inappropriate. The public had no way of knowing why Justice Kagan thought it was appropriate to hear the case because she offered no formal explanation and did not have to. Her recusal in many other cases (without comment) did not help the problem.<sup>103</sup> Why did she pick one case, and to the best of our knowledge, only one case, to not work on while she was the Solicitor General? Was it so she could hear the challenge to the ACA as a Supreme Court Justice? If so, shouldn't she then have recused herself?

Given Justice Kagan's silence, two substantial issues arose. First, many thought that Justice Kagan's "impartiality" vis à vis the ACA could reasonably be questioned given the importance of the issue to the President and the fact that she was nominated during the controversy.<sup>104</sup> Would President Obama have nominated someone to

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98. *Id.*

99. *Id.*

100. *Id.*

101. Segall, *supra* note 95.

102. *Id.*

103. *The World's 100 Most Powerful Women: Elena Kagan*, FORBES, <http://www.forbes.com/profile/elena-kagan> (last visited Apr. 13, 2016).

104. Segall, *supra* note 95, at 338; James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 145-46 (2013).

the Court unless he was reasonably sure she would vote to retain his most important legislative achievement during his campaign for reelection? The conversation—indeed, the skepticism—among legal pundits and talking heads was high.<sup>105</sup>

Second, many believed that Justice Kagan was a “lawyer” on the ACA litigation in light of the fact that her office unquestionably worked on the case in the lower courts.<sup>106</sup> Interested parties made both of these arguments in a formal motion presented to the Court during the ACA litigation.<sup>107</sup> But, sadly, no hearing was held on the issue.<sup>108</sup>

Even for those citizens who strongly supported the ACA, like this author, Justice Kagan’s possible impartiality posed a difficult and important question.<sup>109</sup> For example, if as many predicted the law was to be upheld five to four, was there any reasonable scenario in which Justice Kagan could have written the majority opinion? After all, her office and the lawyers who worked directly for her had litigated the case in the lower courts.<sup>110</sup> Even non-lawyers understood and pondered the conflict.<sup>111</sup> The fact that such a result was hard to imagine should have demonstrated that Justice Kagan’s

105. See, e.g., Joan Biskupic, *Calls for Recusal Intensify in Health Care Case*, USA TODAY (Nov. 20, 2011, 8:56 PM), <http://usatoday30.usatoday.com/news/washington/story/2011-11-20/supreme-court-obamacare-health/51324806/1>; Stephen Dinan, *Health Case Raises Recusal Questions for Kagan, Thomas*, WASH. TIMES (Nov. 14, 2011), <http://www.washingtontimes.com/news/2011/nov/14/court-announcement-raises-recusal-questions-kagan-/?page=all>; Ronald Rotunda, *Evidence Mounts against Justice Kagan for Recusal in ObamaCare Suit*, FOX NEWS (Jan. 26, 2012), <http://www.foxnews.com/opinion/2012/01/26/evidence-mounts-against-justice-kagan-for-recusal-in-obamacare-suit>.

106. See Segall, *supra* note 95.

107. Brief of Amicus Curiae Freedom Watch in Support of Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (U.S. 2012) (Nos. 11-393, 11-398 and 11-400).

108. See Mears, *supra* note 94.

109. See Editorial, *Health Care and the Court*, WASH. POST (Dec. 4, 2011), [https://www.washingtonpost.com/opinions/health-care-and-the-court/2011/12/02/gIQA1FbjTO\\_story.html](https://www.washingtonpost.com/opinions/health-care-and-the-court/2011/12/02/gIQA1FbjTO_story.html).

110. See Mears, *supra* note 94.

111. See generally Ben Johnson, *Kagan’s Participation in ObamaCare Decision may have Violated Judicial Ethics and Federal Statute*, LIFE SITE NEWS (June 29, 2012), <http://www.lifesitenews.com/news/kagans-participation-in-obamacare-taints-the-decision>; Tom Thurlow, *Elena Kagan: The ObamaCare Recusal that Wasn’t*, AMERICAN THINKER (June 21, 2012), [http://www.americanthinker.com/2012/06/elena\\_kagan\\_the\\_obamacare\\_recusal\\_that\\_wasnt.html](http://www.americanthinker.com/2012/06/elena_kagan_the_obamacare_recusal_that_wasnt.html). But see Jess Bravin, *Research Casts Doubt on Roberts as Author of ACA Dissent*, WALL ST. J. L. BLOG (July 3, 2013), <http://blogs.wsj.com/law/2013/07/03/research-points-away-from-roberts-as-author-of-aca-dissent>.

“impartiality” was at a minimum in doubt. Moreover, because it is indisputable that her chief deputy Katyal would have had to recuse himself from the case had *he* been the newly minted Justice on the Court (because he was the lawyer of record on the case below), it makes little sense that his boss—to whom he answered—was impartial enough to sit on the case.

Finally, it appears that the *only* litigation Justice Kagan deliberately refrained from working on during her term as the Solicitor General of the United States was the ACA case.<sup>112</sup> Why that case and not the important affirmative action case or the controversial immigration law case or the other hundreds of cases from which she recused herself? This disturbing question (*never answered* by Justice Kagan) raised substantial issues about her decision to hear the ACA case and her impartiality with respect to it.

The point is not that Elena Kagan should have recused herself from the ACA case. Rather, the lesson is that she should have handled her decision not to recuse differently. In fact, she did nothing and said nothing. When a non-party moved for oral argument on the recusal question, the motion became an official part of the record in the case.<sup>113</sup> Still, the Court denied the motion 8-0 *with no explanation (although at least Justice Kagan did not participate in that decision)*.<sup>114</sup>

The issues surrounding Justice Kagan and Obamacare vividly demonstrate the transparency problems with the Court’s recusal procedures. Professor Amanda Frost detailed these problems in an article in which she pointed out the many ways recusal procedures differ from the normal methods of adjudication:

Unlike almost any other area of the law, the process by which judges decide whether to recuse themselves ignores the systems usually employed to resolve disputes in a fair and impartial manner. As a general matter, the recusal

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112. See Editorial, *supra* note 109.

113. Orders in Pending Cases (Jan. 23, 2012), <http://www.supremecourt.gov/orders/courtorders/012312zor.pdf>.

114. *Id.*

process is usually not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision. Most importantly, *the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself*, even though that judge has an obvious personal stake in the matter. [T]his very ad hoc and informal process, rather than any problem with the substantive standards for recusal . . . has led to the recurring dissatisfaction with the law.<sup>115</sup>

All of these problems arose with Justice Kagan's refusal to even address the recusal issues in the Obamacare case. There was never an adversarial hearing on the appropriateness of her failure to recuse, the public never learned the truth or falsity of many of the relevant facts, the law as to the meaning of the word "lawyer" in the recusal statute remained undefined for further purposes, and we never heard from Justice Kagan on the topic (other than a few general remarks at her confirmation hearing before the controversy arose). Although the motion to recuse in this case came from a non-party, there are no requirements that the Justices act differently when such a motion comes through a party to the case. This lack of transparency is a serious flaw in the process that Professor Frost, among others, argues needs to be remedied with federal legislation.<sup>116</sup>

The Obamacare case was one of the most important Supreme Court decisions of this century, keeping the public's attention for years. It could have (or maybe did play) a major role in a national election. The issue of whether Justice Kagan should participate in the case was discussed in major newspapers, online journals, and was the subject of a formal motion—likely a meritorious one—before the

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115. Frost, *supra* note 62, at 536 (emphasis added).

116. *Id.* at 552, 558; Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1251 (2002); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 643 (1987); Virelli, *supra* note 73, at 1190–91.

Court.<sup>117</sup> If Justice Kagan had been a lower court judge, at least other judges would have reviewed her decision not to recuse as a matter of appeal. Yet, Justice Kagan was silent, her decision was unreviewable, and once again the Supreme Court of the United States acted in almost total secrecy.

### B. Justice Rehnquist and the Failure to Recuse

The troubling case of Elena Kagan and the ACA is not an isolated instance of a Supreme Court Justice facing a difficult recusal issue. Another disturbing example is *Laird v. Tatum*,<sup>118</sup> and Justice William Rehnquist's failure to recuse.<sup>119</sup>

Prior to becoming a Supreme Court Justice, Rehnquist was the head of the Office of Legal Counsel (OLC) inside the Department of Justice.<sup>120</sup> This Office provides legal advice to the president on difficult legal questions.<sup>121</sup>

While Justice Rehnquist was the head of the OLC, there arose a dispute over the legality of a widespread domestic surveillance program implemented by the military.<sup>122</sup> The Army allegedly spied on American citizens critical of the Vietnam War.<sup>123</sup> As part of the Nixon Administration, Rehnquist spoke out publicly (and in front of Congress) on the constitutional validity of the program and even testified that the lawsuit challenging the program should be dismissed for lack of jurisdiction.<sup>124</sup>

By the time the case reached the United States Supreme Court, and after the court of appeals had found that it had jurisdiction over the case, Rehnquist was an associate justice.<sup>125</sup> He not only had a "personal and professional stake in the legality and continued

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117. Lyle Denniston, *A Note on Kagan and Health Care*, SCOTUSBLOG (Jan. 23, 2012, 10:40 AM), <http://www.scotusblog.com/2012/01/a-note-on-kagan-and-health-care/>; Mears, *supra* note 94.

118. *Laird v. Tatum*, 409 U.S. 824 (1972).

119. See Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 851–63 (2009).

120. *Id.* at 852.

121. *Id.* at 852–53 n.113.

122. *Id.* at 852.

123. *Id.*

124. *Id.* at 852–53.

125. Stempel, *supra* note 119, at 854.

operation of the program, [and had] formed views on this particular program's constitutionality prior to ascending to the bench," but he also "appeared to have partiality toward the government's view of both the procedural and substantive merits of any challenge to the surveillance program."<sup>126</sup> Nevertheless, Justice Rehnquist decided to sit on the case. The plaintiffs' claims were eventually dismissed for lack of jurisdiction by a 5–4 vote.<sup>127</sup> Had Justice Rehnquist recused himself, the case would have gone forward because a tie vote in the Supreme Court would have affirmed the lower court decision finding jurisdiction proper.

In a rare public statement by a Supreme Court Justice, Rehnquist tried to justify his decision to review the case despite his obvious prejudgment of its merits.<sup>128</sup> As he explained (in a concept that would later be adopted by Justices Roberts and Scalia), Supreme Court Justices have a "duty to sit" unless the case for recusal is crystal clear.<sup>129</sup> Here, Justice Rehnquist said, it was not:

Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified. These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. *I think that the policy in favor of the 'equal duty' concept is even stronger in the case of a Justice of the Supreme Court of the United States.* There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification

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126. *Id.* at 853.

127. *Laird v. Tatum*, 408 U.S. 1, 3 (1972).

128. *Laird v. Tatum*, 409 U.S. 824, 837–38 (1972).

129. *Id.*



whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not ‘bending over backwards’ in order to deem one’s self disqualified.<sup>130</sup>

History has not been kind to Justice Rehnquist’s decision to sit on *Laird v. Tatum*.<sup>131</sup> When he was nominated to be Chief Justice in 1986, the issue of his failure to recuse in *Laird* arose again, with national experts on judicial ethics testifying in Congress that Justice Rehnquist acted as “a ‘judge in his own case,’” and arguing that there was at least “a reasonable question as to his impartiality.”<sup>132</sup>

If Rehnquist is correct that Supreme Court Justices have a higher obligation to sit on cases than lower court judges, then perhaps he (as well as Justice Kagan in the ACA case) acted reasonably. If, however, doubts should be resolved in favor of recusal, perhaps to maintain the public’s faith in the justice system or to insure fair and impartial justice, then it is hard to imagine that Rehnquist should have resolved a case involving a spying program he publicly defended while a member of the Administration that created the program after he publicly said the case should be dismissed for lack of jurisdiction (a result he voted for when he became a Justice).

### C. *Recusal and the Constitution*

The issue of judicial recusal can in some cases be so important that it even rises to the constitutional level. The Fifth Amendment

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130. *Id.* (internal citations omitted).

131. Stempel, *supra* note 119, at 861.

132. *Id.* at 862.

guarantees every litigant in state and federal court the “due process of law.”<sup>133</sup> If a judge or justice sitting on a case is actually biased, or even if there is a probability of actual bias, this constitutional protection may be triggered.<sup>134</sup>

The Supreme Court identified this aspect of recusal in an important and interesting case involving the West Virginia Supreme Court.<sup>135</sup> In *Caperton v. A.T. Massey Coal Co.*,<sup>136</sup> Caperton and his coal companies (Caperton) alleged that the defendant, A.T. Massey Coal Co. (Massey), fraudulently canceled a contract “after conducting cost-benefit analyses,” concluding that “it was in [Massey’s] financial interest to” completely destroy Caperton’s business.<sup>137</sup> In 2002, a West Virginia jury returned a verdict for Caperton for fifty million dollars, finding that Massey intentionally tried to destroy Caperton’s business in “utter disregard” of Caperton’s rights.<sup>138</sup>

Aware that the West Virginia Supreme Court would consider the appeal and knowing that judicial elections were coming in 2004, Don Blankenship—Massey’s chairman, chief executive officer, and president—decided to strongly support attorney Brent Benjamin in his campaign to defeat incumbent Justice Warren McGraw, who was up for reelection to the West Virginia Supreme Court.<sup>139</sup>

After the fifty million dollar jury verdict, but before Massey appealed to the West Virginia Supreme Court, Blankenship spent enormous sums of money and devoted great energy trying to ensure that Benjamin would defeat the incumbent McGraw.<sup>140</sup> In addition to directly contributing the \$1,000 maximum to Benjamin’s campaign committee, Blankenship gave almost \$2.5 million to “And for the Sake of the Kids,” a political organization supporting Benjamin.<sup>141</sup> Blankenship also spent over \$500,000 on direct mailings, letters, and

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133. U.S. CONST. amend. V.

134. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009).

135. *Id.* at 872–73.

136. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008).

137. *Caperton*, 556 U.S. at 872.

138. *Id.* at 872.

139. *Id.* at 873.

140. *Id.*

141. *Id.*

television and print advertisements, to support Benjamin in his quest to become a justice of the West Virginia Supreme Court.<sup>142</sup> Blankenship's three million dollars in contributions exceeded the total amount spent by the rest of Benjamin's supporters and three times the total spent by Benjamin's own campaign committee.<sup>143</sup>

With this massive financial help from Massey, Benjamin defeated McGraw and won the seat on the West Virginia Supreme Court.<sup>144</sup> In October 2005, Caperton filed a motion to disqualify the newly elected Justice Benjamin from the case under both the due process clause of the United States Constitution and the West Virginia Code of Judicial Conduct because of the conflict of interest caused by Blankenship's substantial campaign support of Justice Benjamin.<sup>145</sup> Benjamin denied the recusal motion in April 2006, on the basis that he found "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial."<sup>146</sup>

Eventually, the West Virginia Supreme Court reversed the fifty million dollar jury verdict Caperton won against Blankenship and his company by a vote of 3–2, with Justice Benjamin (not surprisingly) joining the majority opinion.<sup>147</sup> Caperton sought a rehearing and again moved for disqualification of Benjamin, as well as another Justice, Elliot "Spike" Maynard.<sup>148</sup> Photos were discovered of Justice Maynard "vacationing with Blankenship in the French Riviera while the case was pending."<sup>149</sup>

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142. *Id.*

143. *Caperton*, 556 U.S. at 873 ("Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.")

144. *Id.* ("[Benjamin] received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%).")

145. *Id.* at 873–74.

146. *Id.* at 874.

147. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008).

148. *Caperton*, 556 U.S. at 874–75; see Keith R. Fisher, *Selva Oscura: Judicial Campaign Contributions, Disqualification, and Due Process*, 48 DUQ. L. REV. 767, 788 (2010).

149. *Caperton*, 556 U.S. at 874.

Justice Maynard granted Caperton's recusal motion.<sup>150</sup> Meanwhile, another Justice, Larry Starcher, also recused himself from any further involvement in the case based on his public criticism of Blankenship's direct and substantial role in the 2004 judicial elections.<sup>151</sup> In his memorandum on recusal, Starcher urged Justice Benjamin to recuse himself because "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' created a cancer in the affairs of this Court."<sup>152</sup> Justice Benjamin, however, declined that suggestion from his colleague and again denied Caperton's motion that Benjamin recuse himself from the motion to rehear the case.<sup>153</sup> Benjamin did not explain himself.<sup>154</sup>

The West Virginia Supreme Court then granted a rehearing on some of the legal issues decided in prior proceedings, with Justice Benjamin now acting as the Chief Justice.<sup>155</sup> He personally selected two other judges to replace the recused Justices, and Caperton moved to disqualify Justice Benjamin for the third time. Benjamin again refused, despite the fact that polls showed that over 67% of West Virginians doubted that Benjamin would be either fair or impartial.<sup>156</sup>

A divided court (one might say a circus) again reversed the jury verdict by another 3–2 vote with Benjamin again in the majority. The dissenting Justices said that "the majority opinion" was "unsupported by the facts and existing case law," and was "fundamentally unfair."<sup>157</sup> The dissent also noted that there were serious "due process implications" due to Benjamin's failure to disqualify himself from the case.<sup>158</sup>

Four months later, Justice Benjamin filed yet another opinion, again defending the merits of the reversal of the jury verdict and his

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150. *Id.*

151. *Id.* at 874–75.

152. *Id.* at 875.

153. *Id.*

154. *See* Fisher, *supra* note 148, at 788.

155. *Caperton*, 556 U.S. at 875.

156. *Id.* Benjamin countered that a "push poll" was "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 292 n.11 (W. Va. 2008)).

157. *Id.*

158. *Id.*

own decision not to recuse. He said again that he had no “direct, personal, substantial, pecuniary interest”<sup>159</sup> in the matter and concluded that the motion to recuse “seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”<sup>160</sup> He did not acknowledge that these very types of suppositions and innuendo were behind the recusal rules in the first place—rules put in place to ensure that judges were fair and that the public perceived them to be so.

Finally, the Supreme Court of the United States decided to hear the case.<sup>161</sup> The same Court that has Justices who virtually never explain their own decisions to recuse or not to recuse overturned both Benjamin’s decision not to recuse himself and the reversal of the jury verdict. In its opinion, the Court said that although most recusal issues do not rise to the level of a constitutional violation and are controlled by state law and local judicial codes, when there is “the probability of actual bias on the part of the judge or decision-maker” the due process clause does come into play.<sup>162</sup> The Court held that, as a matter of constitutional law, Justice Benjamin should have recused himself from the case. Justice Kennedy, writing for the majority, said the following:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the

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159. *Id.* at 876 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986)).

160. *Caperton*, 556 U.S. at 876.

161. *Id.*

162. *Id.* at 877 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

apparent effect such contribution had on the outcome of the election.<sup>163</sup>

Although the *Caperton* case raises unusual issues of campaign support for state supreme court judges, the majority's holding that, at a certain level, the probability of actual bias rises to a constitutional violation shows why recusal motions against the Justices of the United States Supreme Court raise such important concerns. Litigants with strong recusal motions (such as the plaintiffs in the *Laird* case) may bring with them the constitutional concern for fair hearings consistent with due process. Those motions should be addressed the same way the Supreme Court treated the motion in *Caperton*, with a full adversarial process and a publicly available written explanation. Yet, when a recusal motion is directed to a Supreme Court Justice, there is virtually never a public hearing or written opinion. Perhaps one of the reasons for this lack of process is the controversial "duty to sit" relied upon by Justice Rehnquist in the *Laird* case (though at least in that instance he wrote a public explanation).

#### D. The "Duty to Sit"

Every year the Chief Justice of the United States Supreme Court issues a year-end report summarizing the state of the federal judiciary.<sup>164</sup> In December 2011, amidst a media frenzy discussing whether Justices Kagan and Thomas should both recuse themselves from the ACA litigation,<sup>165</sup> Justice Roberts used the report to address these concerns (among other ethical issues discussed in the next section), though he did not mention either Justice by name.<sup>166</sup>

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163. *Id.* at 884.

164. *Chief Justice's Year-End Reports on the Federal Judiciary*, SUPREME CT. OF THE U.S., [www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx](http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx) (last visited Apr. 14, 2016).

165. Justice Thomas's wife had formed a lobbying group to fight the President's health care law. Mike Sacks, *Justice Elena Kagan in Health Care Case?*, HUFFINGTON POST (Nov. 18, 2011, 7:45 PM), [http://www.huffingtonpost.com/2011/11/18/supreme-court-health-care-justice-elena-kagan-recusal\\_n\\_1102337.html](http://www.huffingtonpost.com/2011/11/18/supreme-court-health-care-justice-elena-kagan-recusal_n_1102337.html).

166. CHIEF JUSTICE JOHN G. ROBERTS, JR., YEAR END REPORT ON THE FEDERAL JUDICIARY 7 (2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

The Chief Justice began by stating that 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.”<sup>167</sup> He then summarized many of the principles of recusal set forth in the applicable laws and intimated that the Justices take these rules seriously. Chief Justice Roberts then distinguished the Supreme Court Justices from lower court judges:

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. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge’s place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership. *A Justice accordingly cannot withdraw from a case as 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.<sup>168</sup>

Justice Roberts is correct that a Justice should not recuse herself from a case simply “as a matter of convenience or simply to avoid a controversy.”<sup>169</sup> But his statement that “the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court *must* sit without its full membership,” does not necessarily justify a different and more lax recusal requirement for Supreme Court Justices.<sup>170</sup> The requirements of judicial fairness and impartiality are central to the rule of law and a fair justice system.

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167. *Id.*

168. *Id.* at 9 (emphasis added).

169. *Id.*

170. *Id.* (emphasis added).

Yet, the “duty to sit” has also been expressed by other Justices. For example, in a rare opinion issued by a justice in a recusal matter, Justice Scalia justified his decision to stay on a case involving then-Vice President Dick Cheney partly on the grounds that, although lower court judges should possibly “resolve any doubts in favor of recusal,” because if they so recuse, their places would be “taken by another judge,” on “the Supreme Court . . . the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.”<sup>171</sup> Justice Scalia also argued that Supreme Court Justices should have different recusal standards than other judges because, when a Justice recuses herself, that is the equivalent of a vote against the party who lost the case who needs five votes out of nine to reverse the decision because after the recusal of a Justice, the moving party only has an eight-Justice Court.<sup>172</sup>

The problems with the notion that Supreme Court Justices should have different recusal standards than lower court judges because they cannot be replaced are two-fold. First, there is no basis in constitutional text, history, or case law to assume that it is inevitable that a Supreme Court Justice could not be replaced by either another living justice or possibly a random alternating panel of lower court judges. That Article III of our Constitution provides there “shall” be “one Supreme Court,” does not mean that the Court has to be made up of the same nine identical judges for every case that is heard. Professors Michael Dorf and Lisa McElroy have argued that reading the Constitution to require that the same nine Justices must hear every case would be an overly formalistic reading of Article III and inconsistent with the best reading of text and history.<sup>173</sup> Second, if the phrase “one Supreme Court,” means the same Justices have to hear every case, then every recusal would be unconstitutional.<sup>174</sup> The

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171. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915 (2004).

172. *Id.* at 915–16.

173. McElroy & Dorf, *supra* note 77, at 107–12; *see* U.S. CONST. art. III, § 1.

174. U.S. CONST. art. III, § 1 (“The judicial [p]ower of the United States, shall be vested in one supreme Court . . .”); McElroy & Dorf, *supra* note 77, at 110–11.



Constitution simply should not be interpreted to reach such a bizarre interpretation.

In sum, there are numerous problems with how the Supreme Court currently handles recusal issues. The current recusal process (1) does not provide for a full adversarial hearing, (2) does not implicate a known body of written case law, (3) usually does not result in a written decision by the judge sought to be recused, and (4) there is no formal appeal of the decision to other judges. All of the important protections and safeguards built into the normal litigation process are missing from the Justices' recusal disputes.

To those who care about transparency, the Supreme Court recusal process is fundamentally flawed. In her excellent article, Professor Frost offered solutions to improve the process.<sup>175</sup> First, the law should be amended to give parties an official time period within which to file recusal motions after first receiving information that the judge hearing their case may be biased or suffer from a conflict of interest.<sup>176</sup> Second, judges should be *required* to disclose information to the parties that may lead to the appearance of impropriety. Third, the law should require that no judge be the judge of his own recusal.<sup>177</sup> At the Supreme Court level, this would mean that recusal motions should be resolved by the eight other Justices (or possibly a changing subcommittee of the Court). Fourth and finally, but perhaps most importantly, judges should be required to give written reasons for the grant or denial of a motion to recuse.<sup>178</sup> This statement of reasons can be short in easy cases, but the public's faith in the judicial process would be greatly increased by judges being transparent about the reasons they recuse or not in hard cases.<sup>179</sup> This requirement is especially important in the case of Supreme Court Justices, given that there is no appellate review of a Justice's decision to participate in a case.

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175. See Frost, *supra* note 62, at 581–90.

176. *Id.* at 582.

177. *Id.* at 583–84.

178. *Id.* at 589–90.

179. *Id.*

### III. ETHICAL RULES

Congress has passed a comprehensive set of ethical rules governing the off-the-bench activities of lower federal court judges. These rules prohibit federal judges from taking part in political activity,<sup>180</sup> accepting certain gifts,<sup>181</sup> and being the keynote speaker or guest of honor at dinners<sup>182</sup> and receptions for political organizations.<sup>183</sup> The overriding purpose of these detailed regulations is announced in the introduction of the ethical rules:

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. The provisions of this Code should be construed and applied to further that objective.<sup>184</sup>

Despite those noble objectives, the Supreme Court of the United States is not formally governed by these or any other rules governing their off-the-bench activities.<sup>185</sup> In his 2011 year-end report, Chief

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180. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 5 (2011), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>. The code states:

(A) General Prohibitions. A judge should not:

(1) act as a leader or hold any office in a political organization;  
 (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or  
 (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

(B) Resignation upon Candidacy. A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

(C) Other Political Activity. A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

*Id.*

181. *Id.* at Canon 4D(4).

182. *Id.* at Canon 4C.

183. *Id.* at Canon 5A.

184. *Id.* at Canon 1.

185. ROBERTS, *supra* note 166, at 3.

Justice Roberts argued that, because Article III of the Constitution requires that there “shall” be one Supreme Court, but that Congress may “from time to time” create lower federal courts, nobody other than the Court itself can make rules for the Justices.<sup>186</sup> The Chief also said that the Justices, by internal memoranda, have voluntarily agreed to follow the financial disclosure and gift regulations in the rules, but that the rest of the Code, including the sections about public appearances, are not binding on the Justices albeit they are a “starting point and a key source of guidance for the Justices.”<sup>187</sup>

Justice Roberts’s 2011 report on the ethical obligations (or lack thereof) of the Justices is troubling. Why would the Justices agree to be bound by some of those rules (binding on all other federal judges) but not others? Additionally, Justice Roberts’s conclusion that the Justices are completely free to adopt, or not, any ethical rules they see fit—no matter what Congress says—is highly questionable. Although the Constitution does require a Supreme Court,<sup>188</sup> Congress is free within broad limits to shape the Court’s appellate jurisdiction (which is almost the Court’s entire jurisdiction) as Congress sees fit. Article III provides that the Supreme Court shall have appellate jurisdiction “with such exceptions, and under such regulations as the Congress shall make.”<sup>189</sup> If Congress can shape, limit, or perhaps even remove the Court’s entire appellate jurisdiction, why can it not adopt reasonable “regulations” governing the Court’s ethical duties? There may be some limits to that power or Congress could potentially emasculate the Court through extreme regulation, but Justice Roberts never adequately explained why the quite rational ethical rules now in place that bind other federal judges are beyond Congress’s power.

The Justices’ decision not to be bound by the same rules governing lower court judges has led to a number of controversies surrounding their off-the-bench activities. For example, Justices Scalia, Thomas, and Alito regularly participate in numerous events (and de facto fund

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186. U.S. CONST. art. III, § 1; ROBERTS, *supra* note 166, at 4.

187. ROBERTS, *supra* note 166, at 5.

188. U.S. CONST. art. III., § 1.

189. U.S. CONST. art. III., § 2.

raisers) for conservative organizations.<sup>190</sup> In both January 2007 and January 2008, Justices Scalia and Thomas attended meetings sponsored by the politically-active Koch brothers at a posh resort in Southern California.<sup>191</sup> Justice Alito has spoken at dinners held by the politically conservative magazine, the *American Spectator*.<sup>192</sup> The Code of Ethics for lower courts prohibits judges from participating in fundraising activities, or using or permitting “the use of the prestige of judicial office for that purpose.”<sup>193</sup> If the Court were bound by those rules, it is at best unclear whether these Justices could have engaged in those activities.

For the last few years, the conservative Justices have also repeatedly been invited to be special guests of the annual conference of the Federalist Society, a prominent organization dedicated, in its own words, to

[R]eordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law [and] restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.<sup>194</sup>

On the Federalist Society’s own website, Justice Roberts introduces a tribute video to the organization celebrating its twenty-fifth anniversary.<sup>195</sup> The video proclaims our Constitution’s

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190. R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for Supreme Court*, WASH. POST (Feb. 23, 2011, 10:40 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022304975.html>; Rmuse, *Justices Thomas and Scalia Violate Judicial Ethics by Headlining Right Wing Fundraisers*, POLITICUSUSA (Nov. 16, 2013, 11:59 AM), <http://www.politicususa.com/2013/11/16/justices-thomas-scalia-violate-judicial-ethics-headlining-wing-fundraisers.html>.

191. Smith, *supra* note 190.

192. *Id.*

193. *Id.*

194. ABOUT US: THE FEDERALIST SOCIETY, <http://www.fed-soc.org/aboutus> (last visited Apr. 14, 2016).

195. The Federalist Society, *25th Anniversary Tribute Video*, YOUTUBE (Nov. 15 2007),

“preference for free markets rather than centralized government control,” and discusses the “wrong turn” taken by many “liberal professors” who discuss issues in “only one way.”<sup>196</sup>

The Federalist Society is home to many nationally famous conservative members, including Randy Barnett, the Georgetown law professor who devised much of the litigation strategy in the first Obamacare case, and numerous other law professors who consistently file amicus briefs in the Supreme Court on hotly debated constitutional issues such as abortion, affirmative action, and campaign finance reform.<sup>197</sup>

In addition to attending the national convention of this organization on numerous occasions, Justice Thomas was the 2013 keynote speaker featured at the main dinner with an audience exceeding 1,000 people, including Justices Scalia and Alito.<sup>198</sup> A lower court judge probably could not have played that role given the federal prohibition on such judges being the keynote speaker or guest of honor at dinners and receptions for political organizations.<sup>199</sup> It is one thing for the Justices to give talks to diverse academic and civic organizations, but quite another for them to lend their public persona on numerous occasions to an organization whose very mission is to further a conservative and libertarian constitutional agenda.

Of course, not only conservative Justices frequently visit academic and civic organizations with a decided political tilt. Justices Breyer, Sotomayor, Stevens, and Ginsburg have all been featured speakers at the liberal American Constitutional Society obviously helping that organization raise funds for its many causes.<sup>200</sup>

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<http://www.youtube.com/watch?v=PEsxcuP-Sv4>.

196. *Id.*

197. EXPERTS: THE FEDERALIST SOCIETY, <http://www.fed-soc.org/experts/> (last visited Apr. 14, 2016).

198. *See* 2013 NATIONAL LAWYERS CONVENTION: EVENTS: THE FEDERALIST SOCIETY, <http://www.fed-soc.org/events/detail/2013-national-lawyers-convention> (last visited Apr. 14, 2016); David Lat, *Justice Clarence Thomas Speaks!*, ABOVE THE LAW (Nov. 15, 2013, 1:34 PM), <http://abovethelaw.com/2013/11/justice-clarence-thomas-speaks-and-oh-what-a-speech/>.

199. CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 180.

200. Michael McGough, Opinion, *Are Supreme Court Justices Becoming “Party Judges?”*, L.A. TIMES (May 14, 2014, 3:16 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-bishops-partisanship-20140514-story.html>.

Regardless of whether these Justices have actually violated the ethical obligations applicable to lower federal judges, the Court's dismissive attitude towards those rules is highly disturbing, especially when it comes to the public's perception of the Court's commitment to the rule of law. Over the last few years, over one-hundred public interest organizations,<sup>201</sup> and a group of over one-hundred law professors, have formally asked that the Court fully embrace all of the ethical rules binding on lower court judges.<sup>202</sup> The executive vice-president of one of those public interest organizations stated that “[t]he nation’s highest court shouldn’t have the lowest ethical standards.”<sup>203</sup> Additionally, [a]pplying the Code of Conduct to the Supreme Court is a common sense move that will help ensure that Americans can count on basic fairness throughout our judicial system.”<sup>204</sup>

Congresswomen Louise Slaughter, who has sponsored legislation attempting to place the Court under the same rules as other courts, has put it this way: “[U]nlike all other federal judges, the justices of the U.S. Supreme Court are not bound by a code of ethics.”<sup>205</sup> In light of this long-term public outcry over the ethical practices of the Supreme Court, Justice Roberts’s 2011 year-end report was even more disheartening.<sup>206</sup> His “trust us because we are good people approach” to this problem is unsatisfactory, especially because the public comes to trust the Justices through the Court’s actions, not merely its words. After all, the hundreds of lower court judges actually bound by the ethics rules were also nominated by the President and confirmed by the Senate and are supposed to be men and women of good character and strong ethics. Yet, they must follow sensible guidelines governing their off-the-court activities. Supreme Court Justices should not be treated differently.

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201. Lisa Graves, *Supremely Unseemly Conduct by Supreme Court Justices Spurs Call for Mandatory Ethics Rules*, PR WATCH (Jan. 9 2012, 1:10 PM), <http://www.prwatch.org/NODE/11226>.

202. Smith, *supra* note 190.

203. Graves, *supra* note 201.

204. *Id.*

205. *Ethics and Accountability*, CONGRESSWOMAN LOUISE M. SLAUGHTER, <http://www.louise.house.gov/issues/ethics> (last visited Apr. 14, 2016).

206. Roberts, *supra* note 166.

The public needs to have faith in its judicial system—especially the highest Court in the land. If anything, the nine Justices of that Court should be bound by more detailed and tougher ethical guidelines than lower court judges who number in the hundreds. Indispensable elements of a just and transparent Court are that the Justices engage in ethical off-the-Court activities, and that they explain difficult recusal questions transparently and openly. Congress should add the Justices to the ethical statutes covering lower federal court judges. As I said in the *Los Angeles Times* shortly after Justice Roberts issued his 2011 report, “this request for blind allegiance and judicial silence smacks of hubris.”<sup>207</sup> The American people deserve better.

#### IV. THE MYSTERIOUS WRIT OF CERTIORARI

[T]he screening function is inextricably linked to the fulfillment of the Court’s essential duties and is vital to the effective performance of the Court’s unique mission “to define the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal system.”

Justice William Brennan<sup>208</sup>

Every year the Supreme Court of the United States receives over 7,500 requests from litigants who have lost their lawsuits in the lower courts and seek reversal of those decisions.<sup>209</sup> Lawyers spend thousands of hours working on briefs supporting those requests, and the parties pay those lawyers significant amounts of money. In recent years, the Court has granted approximately seventy-five to eighty of those requests per year.<sup>210</sup>

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207. Eric J. Segall, Op-Ed, *An Ominous Silence on the Supreme Court*, L.A. TIMES (Feb. 12, 2012), <http://articles.latimes.com/2012/feb/12/opinion/la-oe-segall-kagan-recusal-20120212>.

208. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 394 (2004).

209. *The Judicial Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/judicial-branch> (last visited Apr. 16, 2016).

210. *Frequently Asked Questions*, SUPREME CT. OF THE U.S., <http://www.supremecourt.gov/>

Our country has a strong, vested interest in which cases the Court deems worthy of its attention because those cases may well dictate national policy across the spectrum of important social, legal, educational, political, and economic issues. Yet, despite the public significance of the certiorari process, the Justices decide which cases to hear “according to vague guidelines that afford them maximum discretion, based on very little collegial deliberation, with virtually no public disclosure or explanation of their actions and subject to no precedential constraints.”<sup>211</sup>

Although there are instructions concerning the timing and structure of the briefs that need to be submitted,<sup>212</sup> and some vague considerations the Court may take into account in the process of deciding whether a case is worthy of its attention,<sup>213</sup> there are no rules or statutes governing exactly how many Justices it takes to hear a case or any other important issues surrounding the writ of certiorari.<sup>214</sup> The present informal practice is that it takes four Justices to agree to grant certiorari for a case to be heard.<sup>215</sup> The Justices keep secret who votes to grant the petitions and never provide reasons for denying a petition to hear a case, though dissenting Justices will occasionally write separately to argue that a petition that did not get four votes should have been granted.<sup>216</sup> No formal record of the votes to grant or deny certiorari is ever published.<sup>217</sup>

There are many important things we do not know about the mysterious writ of certiorari, but one thing is certain: how the

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faq.aspx#faqqi9 (last visited Apr. 16, 2016).

211. Cordray & Cordray, *supra* note 208, at 390.

212. *See* SUP. CT. R. 15 & 29, <http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf> (providing wide-ranging rules from detailed formatting requirements to content restrictions).

213. *Id.* at 10. Rule 10 sets forth a number of considerations including whether there has been a circuit split on the issue, whether the decision decided an important issue of federal law, or whether the decision is inconsistent with other decisions of the Court. In the rule, the Court makes clear that these criteria are “neither controlling nor fully measuring the Court’s discretion . . .” *Id.*

214. *See id.* at 10–16.

215. *See Supreme Court Procedures*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Feb. Apr. 20, 2016).

216. Cordray & Cordray, *supra* note 208, at 402.

217. *Id.*



Justices decide which of the very few cases, out of the thousands coming from the lower courts, they select to hear is more akin to the “Star Chamber” model of judging than an open and transparent process befitting a representative democracy.<sup>218</sup>

*A. What Cases do the Justices Have to Hear?*

Article III of the Constitution divides the Supreme Court’s jurisdiction into original and appellate jurisdiction.<sup>219</sup> In the landmark case of *Marbury v. Madison*,<sup>220</sup> the Court held that it could not exercise original jurisdiction (even if Congress wanted it to) except in the three narrow categories expressly set forth in Article III: cases involving ambassadors, other “public [m]inisters and [c]onsuls,” and where a state is a party.<sup>221</sup> In all other cases, most of which arise under federal law or the Constitution, the Court has appellate jurisdiction.<sup>222</sup> Although Congress cannot add to the Court’s original jurisdiction, the Justices can (and do) send cases within their original jurisdiction to the lower courts for review first if they so desire.<sup>223</sup> Virtually all of the cases the Court hears are pursuant to its appellate jurisdiction.<sup>224</sup>

From the time the Constitution was ratified until 1925, the Supreme Court had to hear most cases within the jurisdiction that Congress granted.<sup>225</sup> This was not a huge problem until the late nineteenth century when the country began industrializing and Congress enacted many new laws leading to increased federal

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218. The Star Chamber was a court of law that sat at the Palace of Westminster that held trials in secret. Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 326 (2010) (stating that “[t]he English Court of the Star Chamber is subject to an enduring legacy, having become a synonym for secrecy, severity and extreme injustice”). It has been described as having “stripped the delinquent of his constitutional defence . . . and left him open to the capricious and tyrannical will and humour of arbitrary judges . . .” THE COURT OF STAR CHAMBER, OR SEAT OF OPPRESSION 9 (1768).

219. U.S. CONST. art. III, § 1.

220. *Marbury v. Madison*, 5 U.S. 137 (1803).

221. U.S. CONST. art. III, § 2.

222. *Id.*

223. *Supreme Court Procedures*, *supra* note 215.

224. *Id.*

225. See Cordray & Cordray, *supra* note 208, at 392.

litigation.<sup>226</sup> The Justices at that time lobbied to have more discretion in their caseload, leading to the Judiciary Act of 1925,<sup>227</sup> which was also called “The Judges’ Bill” because of who worked hard to get it passed.<sup>228</sup> This law gave the Justices more control over their docket selection, but still required them to resolve all cases on appeal where a federal court struck down a state law or a state court rejected a federal claim asserted by the plaintiff.<sup>229</sup> The Justices eventually found a way to evade this mandatory appellate jurisdiction by frequently deciding cases with summary affirmances, meaning on the basis of the opinion by the lower court.<sup>230</sup> Eventually, in 1988, the Justices achieved what they had long wanted—the almost complete abolition of its mandatory jurisdiction.<sup>231</sup>

Today, the Supreme Court has almost 100% control over its own docket, a power wielded by only a few other courts.<sup>232</sup> For example,

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226. *Id.*

227. *Id.*

228. *Id.*

229. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.).

230. Cordray & Cordray, *supra* note 208, 393–94.

231. The Supreme Court Case Selections Act of 1998, Pub. L. No. 100-352, 102 Stat. 662 (codified as amended in scattered sections of 28 U.S.C.).

232. The spectrum of discretion regarding certiorari is evidenced by courts throughout the globe. The Federal Constitutional Court of Germany has little discretion in denying cases, but is able to alleviate its docket by a rigorous screening process:

[T]he Court’s procedure still reflects the strongly held and perhaps quixotic view—dating back to the era of the Court’s origins—that every person filing a Constitutional Complaint is, in principle, entitled to a decision on the merits.

As a result, the overwhelming majority of decisions of the Constitutional Court are not rendered by a full Senate, but rather by three-judge committees (Kammern) whose task is to screen and decide most of these Constitutional Complaints. These screening committees function in the following manner: if a committee finds that a Constitutional Complaint is clearly without merit—or if it is otherwise unacceptable on certain other grounds—the committee dismisses the Complaint. If, in contrast, the committee finds that the Complaint is clearly meritorious, it may issue a decision in favor of the complainant. In both kinds of cases, the committee’s decision must be unanimous, and it is unreviewable.

Peter E. Quint, *Leading a Constitutional Court: Perspectives from the Federal Republic of Germany*, 154 U. PA. L. REV. 1853, 1862 (2006) (internal footnotes omitted). The Supreme Court of South Korea, however, must decide all appeals. Jin Yeong Chung & Sungjean Seo, *Litigation and Enforcement in South Korea: Overview*, PRACTICAL LAW, <http://us.practicallaw.com/8-381-3681> (last updated Aug. 1, 2015). Canada’s justices, however, have a level of discretion regarding certiorari comparable to the United States Supreme Court justices. See Benjamin Alarie & Andrew J. Green, *Docket Control at the Supreme Court of Canada: What’s Behind the Screen?* 3 (Chicago Law School Workshop on Judicial

the United States Courts of Appeals have to hear virtually every case appealed from the federal trial courts.<sup>233</sup> Whereas twenty percent of the cases heard by the Supreme Court of Canada come to the justices through mandatory jurisdiction,<sup>234</sup> our Supreme Court, by contrast, almost never has to hear a case.<sup>235</sup>

That our Supreme Court has virtually unfettered discretion to decide which cases it will hear suggests that the process for those decisions should be open and transparent. If the justices had little control over their docket, like most other courts, there would be less need to understand what factors go into the decision-making process. Because the Supreme Court decides whether to hear cases pursuant to vague and often unknowable criteria, subjective to each justice, however, the public should know as much as possible about that process. In truth, we know very little.

#### B. *What We Do Not Know*

The most troubling aspect of the process through which the Court decides which cases to hear is that the Justices do not identify which of them voted to hear a case.<sup>236</sup> Moreover, the Court has never explained why it keeps the votes on whether to grant a writ of certiorari secret from the American people.<sup>237</sup> It is perhaps understandable why the Court would not disclose the votes for the 7,500 or so cases the Court decides not to hear (given the administrative burden that it would place on the Court), but why not disclose such information for the seventy-five or so cases the Court does decide to hear? There are strong arguments that this information is important and relevant to public discussion.

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Behavior, Draft Paper, Mar. 20, 2014) [http://www.law.uchicago.edu/files/files/alarie\\_docket\\_control.pdf](http://www.law.uchicago.edu/files/files/alarie_docket_control.pdf) (“There is a process by which justices not on the panel can object to decisions to grant or deny leave, but the decision is ultimately up to the three panel members.”).

233. *Appeals*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/appeals> (last visited Apr. 20, 2016).

234. Alarie & Green, *supra* note 232.

235. *Supreme Court Procedures*, *supra* note 215.

236. Segall, *supra* note 5.

237. *See id.*

For example, it is well accepted that, prior to Justice Scalia's death, Justice Kennedy was the all-important swing vote on the Court in most important areas of constitutional law including abortion and affirmative action.<sup>238</sup> The conventional wisdom was that there were four conservative Justices on the Court both ready to end affirmative action on a national basis and to return the issue of abortion to the states, whereas there were four liberal votes to allow the states to use affirmative action but also to protect the right to choose from state prohibition.<sup>239</sup> Numerous abortion and affirmative action cases were brought to the Court, and we have no idea how Justice Kennedy (or any other Justice) voted on the certiorari questions in any of them.<sup>240</sup> When the Court decided to hear the cases, knowing whether Kennedy was one of the four (or more) votes in favor of hearing the case might have been extremely relevant information to the parties and to the public.<sup>241</sup> Lawyers litigate these important cases in the lower courts with an eye towards the swing Justices on the Court and write the briefs that are filed in the Supreme Court in the same way. Knowing which Justices wanted to hear a case that has been granted, and which did not, might provide valuable information for the lawyers and the parties.

The public should also be able to trace the Justices' certiorari votes over time to better hold these public officials accountable for their important governmental decisions. At the moment, the public can make statements about the Court as an institution and the cases it decides to hear, but we have no way of assessing the work of each individual Justice when it comes to their certiorari votes. That is contrary to how democracies and representative governments are supposed to work.

Are there valid reasons why the Justices' votes on the certiorari issue should be secret? What plausible justifications could there be

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238. Erwin Chemerinsky, Op-Ed, *With Kennedy as Swing Vote, High Court Could Veer Right*, NAT'L LAW JOURNAL (Oct. 5, 2015), <http://www.nationallawjournal.com/id=1202738849712/OpEd-With-Kennedy-as-Swing-Vote-High-Court-Could-Veer-Right?slreturn=20151110165057>.

239. *Id.*

240. *See* Segall, *supra* note 5.

241. *Id.*

for prohibiting the public from knowing this information? The author of this article has asked many experts this question, and the answer seems only to be, “well it has always been that way.”<sup>242</sup> That, of course, is not a good reason.

Some might argue that, if the certiorari votes are disclosed, the public might mistake a vote to hear or not to hear a case as a strong indicator of that Justices’ views on the merits of that case. But even if that is likely to happen, the cure is more information about the process, not secret votes. As a general rule, the government is not allowed to hide relevant, truthful information from the American people simply because the information might be misinterpreted.<sup>243</sup> In addition, disclosing the votes after the case is decided (not ideal but better) would solve that problem.<sup>244</sup>

This aspect of the Court’s decision making, that they do not reveal which Justices vote to hear a granted case, symbolizes the entire problem this article tries to capture: there should be (and usually is) a strong presumption in our democratic society that government processes be open and transparent.<sup>245</sup> When it comes to Congress and the president, there are strict disclosure requirements, including open-records laws and televised proceedings, and when the elected branches want to keep secrets, we place the burden of proof on them to demonstrate the need for that secrecy.<sup>246</sup> But with the Supreme Court, there seems to be an assumption of secrecy and anonymity. This presumption should be changed. The Justices perform an immensely important public duty that affects all Americans when they decide which cases to hear. Why should they cast this vote in secrecy with no accountability?

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242. Justice Stevens gave a talk at Georgia State College of Law in 2014 and said he had never considered in thirty-five years why the certiorari votes are secret but it was probably because “it has always been that way.” John Paul Stevens, Henry J. Miller Lecture, Question and Answer Session (Apr. 16, 2014) (audio on file with Georgia State Law Library).

243. See Segall, *supra* note 5.

244. I thank Akhil Amar for that idea.

245. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 15, 4685 (Jan. 21, 2009).

246. See, e.g., Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 477 (1997).

Another troubling aspect of the certiorari process is the influential role the Justices' law clerks play in the decisions. The certiorari pool, originally the idea of Justice Lewis F. Powell, was developed in 1972, and divides all of the petitions for certiorari equally between the nine Justices.<sup>247</sup> Rather than having nine clerks, one from each chamber, review a certiorari petition and write a memorandum with a recommendation, "one clerk prepares a [single] memorandum that is then circulated to all of the Justices participating in the pool."<sup>248</sup> Today all but Justice Alito participate in the pool.<sup>249</sup> With the help of these memos, the Justices decide which cases will be discussed in conference, and therefore, which may eventually be heard.<sup>250</sup> The certiorari pool gives the clerks tremendous influence, transforming them from helpers and staffers to "active decision maker[s]."<sup>251</sup>

Scholars have debated whether the certiorari pool process leads the Justices to grant fewer petitions than before the pool began, because young law clerks might be reluctant to suggest to their bosses that cases be heard.<sup>252</sup> There is no question that the Court grants fewer petitions than it used to, but other factors may be at work. One of the problems with making any kind of general statement about the role of law clerks in the process is that we know little about their involvement other than the general scheme outlined here. We do not know how much deference the Justices give the certiorari memos, how each Justice uses the memos, or how often the Justices disregard or accept the recommendations in the memos. And, of course, the

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247. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 953 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)).

248. *Id.* at 972.

249. Adam Liptak, *A Second Justice Opt[s] Out of a Longtime Custom: The 'Cert. Pool'*, N. Y. TIMES (Sept. 25, 2008), [http://www.nytimes.com/2008/09/26/washington/26memo.html?\\_r=0](http://www.nytimes.com/2008/09/26/washington/26memo.html?_r=0).

250. *See id.*

251. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 23 (2006).

252. *See Stras*, *supra* note 247, at 969–72. For example, Edward Lazars, a clerk for Justice Blackmun, recounted the anecdote that he "doubt[ed] the Court granted any cert[iorari] petitions because of something clerks did and, if some clerks did manage to bury a few cases along the way, the same issues, assuming they were worth the Court's time, were sure to resurface." *Id.* at 969–70.

Justices do not reveal who votes for or against granting the petition in any given case.<sup>253</sup>

Given all of these uncertainties, all we can say is that the process through which the Court decides which cases to hear and which cases not to hear is opaque, non-transparent, and largely secret. The only real sources of information are the very few tales told by former law clerks and the occasional dissent from the Court's denial of a petition. Given the importance of a decision whether or not the Justices will vote to hear a case, their votes, at least on the cases where they grant the petition, ought to be public and the Court should be forthcoming on the precise roles their law clerks play in the process.

#### V. THE JUSTICES' OFFICIAL RECORDS

It would seem obvious that any papers and other materials which are generated by persons on the public payroll . . . doing the government's business, should belong to the government . . . It would seem further that any memoranda, tapes, and drafts generated in the production of such documents or other materials for the same reasons should also be the property of the United States. In short, if the government paid the cost of production of the papers or other materials they should belong to the government.

Federal Judge J. Skelly Wright<sup>254</sup>

Partly because of the many ways that Supreme Court Justices are inaccessible during their official years on the Court, seeing their official papers is often the only way we can truly understand a Justice's career and evaluate how she served the public. Our historical accounts of the Court are often greatly enriched when a Justice's personal files are released to the public after they are no

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253. See Segall, *supra* note 5.

254. SUSAN LOW BLOCH, VICKI C. JACKSON & THOMAS G. KRATTENMAKER, *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 1044 (2d ed. 2008).

longer on the bench. Unfortunately, the Justices more often than not deprive the American public of that information for generations, and sometimes forever.

For example, shortly before the 1986–1987 Supreme Court term began, Justice Byron White, who had been on the Supreme Court for twenty-five years, came to work on the weekend and, with the help of law clerks, destroyed many of his official files.<sup>255</sup> According to his biographer, they bought a shredding machine for that specific purpose.<sup>256</sup> Several of the files lost to history were labeled “*Miranda v. Arizona*” the landmark Supreme Court case where the Justices ruled that criminal defendants have “the right to remain silent.”<sup>257</sup> One of his law clerks at the time reportedly remarked “I couldn’t believe how much history was going down the chute.”<sup>258</sup>

Supreme Court Justices are government employees who make public decisions and are paid out of taxpayer funds. Yet, the Justices are under no legal obligation to maintain their records and files, compiled sometimes over many decades, for historical study and national record keeping.<sup>259</sup> Whereas the president’s official papers are subject to detailed recording and safekeeping requirements pursuant to the Presidential Records Act,<sup>260</sup> the Justices each have their own idiosyncratic policies regarding their official documents.<sup>261</sup> The result is that many important and official papers are often lost to history for extended and unnecessary periods of time and sometimes, as was the case with Justice White’s papers, forever.<sup>262</sup> This is one more example of how the Justices are less transparent than other governmental officials, even the President of the United States.

The Court retains records kept for every case including the transcripts and audio recordings of the oral arguments and the

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255. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 95 (1999).

256. *Id.*

257. *Id.*

258. *Id.*

259. Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1678 (2013).

260. Presidential Records Act of 1978, 44 U.S.C. §§ 2201–07 (2012). This act mandates that all presidential records received and created after January 20, 1981, are to be preserved. *Id.*

261. Watts, *supra* note 259, at 1678.

262. *Id.* at 1685.



briefs.<sup>263</sup> But each Justice also compiles personal notes, draft opinions, memoranda, and communications with other Justices and their law clerks which are of vital historical and public significance but for which there are no official rules.<sup>264</sup> In a comprehensive law review article, Professor Kathryn Watts detailed the history leading to the current state of affairs where the Justices have complete control over these records, and she proposed a few solutions to remedy the problem.<sup>265</sup> I owe a great debt to Professor Watts for much of the information contained in this Part.<sup>266</sup>

#### A. *The Justices' Practices*

In 1993, shortly after Justice Thurgood Marshall's papers were promptly released to the country only two years after his retirement (a rare occurrence), Congress held hearings to discuss whether there should be uniform procedures governing the maintenance and release of the papers of Supreme Court Justices.<sup>267</sup> The hearing was prompted at least in part by several interesting and noteworthy bombshells in Marshall's papers, such as the fact that the Court was once extremely close to reversing *Roe v. Wade*, and the concern that the untimely release of the papers could jeopardize the workings of the Court.<sup>268</sup> After much study, however, Congress ended up taking no action leaving in place the current hodgepodge of procedures used by different Justices depending on their own personal predilections.<sup>269</sup>

Justice Marshall made his papers public quickly and expeditiously, but he is certainly the exception. For example, Justice Sandra Day O'Connor gave her papers to the Library of Congress upon the

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263. *Id.* at 1674.

264. *Id.* at 1674–75.

265. *See generally id.*

266. Professor Watts covers the papers of both lower court judges and the justices in her fine paper. This Chapter only discusses the papers of the latter.

267. Watts, *supra* note 259, at 1670–71.

268. *Id.* at 1968.

269. *Id.* at 1690–91. Historically, the justices of the nineteenth century took little care to preserve their papers. This attitude may have been sparked to some extent by the great Chief Justice John Marshall who believed Court secrecy was of vital importance and left no personal records or papers behind him when he died. *Id.* at 1678, 1681.

conditions that they remain sealed until her death and that individual case files must remain closed “during the service of any justice who participated in the case.”<sup>270</sup> Given that she served with Justice Clarence Thomas,<sup>271</sup> who may well serve twenty to thirty more years, this means that valuable historical information might be sealed for at least a generation. Moreover, for much of her tenure on the Court, Justice O’Connor played the role of swing Justice.<sup>272</sup> In areas like affirmative action, abortion, campaign finance reform, and the separation of church and state, she wrote key concurring decisions dictating the results in those cases.<sup>273</sup> She also often negotiated and bargained with other Justices to change their minds in these most controversial areas of constitutional law.<sup>274</sup> There is little possibility of having an accurate historical understanding of the relationships of the Justices during the twenty-six years she served on the bench without access to her papers. This failure makes it much more difficult for Court watchers and historians to have a satisfactory understanding of the many years where Justice O’Connor was a key player on the Supreme Court.

Justice Felix Frankfurter once observed that, to understand the United States Supreme Court, it is necessary to know the “private rehearsals . . . behind the impenetrable draperies of judicial secrecy.”<sup>275</sup> What a shame that Justice William Brennan, who served on the Supreme Court for thirty-four years, and was the liberal wing’s leader for most of that time, gave a single biographer exclusive access to his papers for almost twenty years.<sup>276</sup> There is no plausible reason one person should be allowed exclusive access to the public papers of one of the most long-serving and influential Supreme Court Justices in our history.

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270. *Id.* at 1682 n.92.

271. Julie Graves Krishnaswami, *Reflecting on Sandra Day O’Connor’s Jurisprudence Relating to Race and Education*, 57 CATH. U.L. REV. 1099, 1110 n.20 (2008).

272. *Id.* at 1137.

273. *Id.*

274. *See id.*

275. BLOCH, *supra* note 254, at 1041.

276. Watts, *supra* note 259, at 1683.

Numerous other Justices have been equally protective of their papers. Justice Souter's papers are sealed for fifty years.<sup>277</sup> Chief Justice Warren E. Burger's papers were donated by his son to the College of William and Mary in 1996, but they cannot be opened until 2026.<sup>278</sup> Given the Chief's administrative responsibilities, and in light of how forcefully he often exercised those duties, we can only assume there is a treasure trove of interesting and enlightening information in those files that has little to do with the decision of actual cases. What a shame that court commentators, scholars, and reporters have been locked out of those papers.

We do not know what kinds of policies concerning their records and papers the current Justices will leave behind (recently deceased Justice Scalia apparently left behind no preferences about what to do with his papers so his family will have to decide), but if history and prior practice are our guides, it is more than likely that many of them will adopt secretive rules for these vital historical materials. Moreover, under the current regime, the Justices may destroy any and all of their personal papers, memoranda, and e-mails. Something needs to be done to protect these valuable governmental records.

### B. *The Presidential Records Act*

Enacted in the wake of the Watergate controversy, the Presidential Records Act (PRA) establishes that the official papers of the president (and the vice-president) belong to the people of the United States, not the men or women who happen to hold the offices of the president and the vice-president.<sup>279</sup> The law requires the archivist of the United States to take custody of the president's papers after he leaves office.<sup>280</sup> The president may destroy records with no "administrative, historical, informational, or evidentiary value, if . . . [he] obtains the views, in writing, of the Archivist concerning

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277. Tony Mauro, *Souter Blocks Access to his Papers for Fifty Years*, NAT'L L. J. (Aug. 26, 2009), <http://www.nationallawjournal.com/id=1202433393342/Souter-blocks-access-to-his-papers-for-50-years>.

278. Watts, *supra* note 259, at 1684.

279. *Id.* at 1669, 1673; 44 U.S.C. § 2202 (2012).

280. 44 U.S.C. § 2203(f)(1) (2012).

the proposed disposal of such Presidential records.”<sup>281</sup> The PRA also requires the president to take all practical steps to segregate personal records from official presidential materials.<sup>282</sup> As far as public access is concerned, the PRA allows for public viewing of the presidential records through the Freedom of Information Act (FOIA) beginning five years after the president leaves office.<sup>283</sup>

Mindful that the president’s documents may be politically sensitive or contain information that could damages the interests of the United States if improperly released, the PRA does not require disclosure of all presidential materials.<sup>284</sup> Excluded for a period of twelve years from the required disclosure are materials that contain (1) sensitive foreign policy information, (2) personnel information relating to federal appointments, (3) information required by other statutes to remain secret (such as classified materials), (4) trade secrets or private commercial information, (5) confidential communications between the president and his advisers, and (6) private personal information the disclosure of which would constitute an unwarranted invasion of personal privacy.<sup>285</sup>

The PRA is not a perfect statute and has led to litigation over its access and disclosure policies.<sup>286</sup> In addition, President Bush delayed the release of many of President Reagan’s materials through a controversial Executive Order that President Obama repealed after taking Office.<sup>287</sup> The point, however, is that Congress made a good faith effort to force the Executive Branch to take reasonable efforts to preserve its official records and also made clear that those records belonged to the public, not to the president. Congress should undertake a similar project with regard to the Supreme Court of the

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281. *Id.* at § 2203(c).

282. *Id.* at § 2201(3).

283. *Id.* at § 2204(b)(2).

284. *Id.* at § 2204(a).

285. *Id.*

286. *See, e.g.,* Am. Historical Ass’n v. Nat’l Archives & Records Admin., 516 F. Supp. 2d 90, 99 (D.D.C. 2007) (arguing that “that access to materials may be delayed for an unlimited period of time after the expiration of the 12-year restriction period while a former president and the incumbent president ‘review’ materials proposed for release”).

287. Exec. Order No. 13489, 74 Fed Reg. 4669 (Jan. 21, 2009).

United States because the Justices do not seem to want to make their own rules regarding their official records.

Some may argue that there are differences between the president and the Supreme Court that make disclosure of the Justices' records harder to justify than disclosure of presidential materials. Most significantly, perhaps, the Justices are supposed to speak only through their written opinions while the president acts publicly much of the time.<sup>288</sup> This difference, however, does not lead to the conclusion that the Justices' papers should belong to them rather than the public; at most it suggests that the law should treat the Justices' papers differently. That the Justices hold their offices for life might suggest the need for greater, not lesser, scrutiny of their official records after they leave office given that they do not need public approval to keep their jobs.

In any event, as with presidential papers, the official records of the Justices are created, maintained, and used by governmental officials performing public tasks and therefore should belong to the public.<sup>289</sup> As Judge Carl McGowan of the United States Court of Appeals for the District of Columbia Circuit once remarked as to his papers: "I can't see any reason why . . . law clerks' memoranda to me, my memoranda to them, my memoranda to other judges on the case, draft opinions, and notes . . . all that kind of thing . . . what's in that file . . . are [not] the property of the United States Government . . . ." <sup>290</sup>

### C. *The Solution*

In her comprehensive article on the need for legislation governing the disposition of the papers of the Justices, Professor Watts suggests that Congress legislatively decree that the papers of the Justices are public property, but then work with the Judicial Office of the United

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288. Watts, *supra* note 259, at 1692 n.168.

289. *Id.* at 1692.

290. *Id.* at 1692-93.

States Courts to draft a statute governing the details of how those documents should be kept and then disclosed.<sup>291</sup>

There are undoubtedly sensitive issues dealing with the details of any mandatory record-keeping and disclosure rules. These issues suggest the Justices themselves have significant input in the process. The law would have to provide for rules governing “what papers should be kept, where they should be deposited, and when they should be released,” among other complicated questions.<sup>292</sup> Including the administrative arm of the Supreme Court in the drafting process could alleviate separation of powers concerns potentially arising from legislative efforts that dictate to the Justices how they must treat their official papers.<sup>293</sup> Therefore, it would be critical (though not absolutely necessary) to have the Justices agree to these official rules and including them in the process from the beginning would be the best way to achieve that goal.

The societal benefits flowing from the required disclosure of the Justices’ papers are easy to see. The increased transparency resulting from such disclosure would help students of the Court study the historical practices of the Justices, would allow for greater insights into the inner workings of the Court and the relationships among the Justices, would provide the public much better access to its highest Court, and would allow for greater evaluation of the Court’s work, which might translate into more meaningful public involvement in future confirmations.

There are potential objections, however, to transferring the Court’s papers from the Justices to the public. Professor Watts lists four such objections in her article (1) possible “chilling effects,” (2) financial expense, (3) threats to judicial independence and the separation of powers, and (4) lack of federal regulation as to the Congress’s own papers and records.<sup>294</sup> Although these objections should be addressed in any regulatory scheme dealing with the Justices’ records, they do not justify a failure to ensure public access to those records.

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291. *Id.* at 1719.

292. *Id.* at 1716.

293. *Id.* at 1691.

294. Watts, *supra* note 259, at 1726.

### 1. *Chilling Effects*

If Congress requires the Justices to maintain their official records for eventual public disclosure, would that have the effect of chilling how the Justices communicate to their staff, clerks, and other Justices, as well as their maintenance of internal notes and reflections? Predicting the future is always difficult, but it is unlikely that the Justices would dramatically alter practices for several reasons.

First, under the current system in which the Justices have complete say over their own records, it is always a possibility that communications between chambers will someday be made public by one or more of the Justices.<sup>295</sup> This possibility, however, has not seemed to affect inter-office memoranda.<sup>296</sup> After all, Justice Marshall made his papers public two years after his death and the materials contained much information about the Justices sitting at the time; those disclosures, though controversial, did not cause the Justices to significantly change their practices.<sup>297</sup>

Second, even as to those completely internal official notes, communications with law clerks, and draft opinions, the Justices have strong incentives to continue to create a written record of what happens inside their chambers. They may want to affect how history deals with their judicial records and they may want to make sure there is a strong written record in case of law clerk disclosures or other leaks to the media.<sup>298</sup> Moreover, writing internal memoranda and draft decisions are such integral methods of the decision-making process of the Justices that it is hard to conceive that they would dramatically alter them because of the possibility of ultimate disclosure after they have left the bench.

Third, the experience under the Presidential Records Act does not support the idea of a strong chilling effect.<sup>299</sup> There is little or no evidence that forced disclosure has altered the way the Executive

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295. *Id.* at 1728.

296. *Id.* at 1727–28.

297. *See id.* at 1683, 1685.

298. *Id.* at 1728.

299. *Id.* at 1728–29.

Branch conducts most of its business.<sup>300</sup> In any event, such speculations should not get in the way of requiring much needed transparency. If there indeed are unforeseen chilling effects, they can be addressed through administrative rules and further legislative action.

## 2. *Financial Costs*

There is no doubt that there would be enormous expenses associated with preserving, sorting, and ensuring public access to the Justices' papers. Even if those records were eventually stored in private facilities such as colleges and libraries that were willing to house them, there would still be great cost to the taxpayer. Can a price tag really be placed, however, on the historical value these materials would provide to the American people?

The Supreme Court is currently the least transparent of the three branches of the federal government.<sup>301</sup> The Justices almost never appear on television in their official capacities, they rarely talk about their work in a meaningful manner off the bench, and there are no requirements that any of their pre-decisional records or files be maintained for posterity. The only way we will ever have reasonable insight into how the Justices interact with each other and their law clerks is through their personal papers. And, without that information, there is no plausible way to truly and fully evaluate the role the individual Justices play in our political system.

## 3. *Congress's Failure to Regulate Itself*

Although Congress has declared the president's papers to be public property and enacted legislation covering their maintenance and release for public inspection, not surprisingly, Congress has not taken the same step with respect to its own papers.<sup>302</sup> Professor Watts raises the issue of whether Congress would look self-serving if it required

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300. Watts, *supra* note 259, at 1728–29.

301. *Id.* at 1669, 1703, 1733.

302. *Id.* at 1733.



disclosure of the Court's papers, as well as the president's, while refusing to saddle its own members with similar rules.<sup>303</sup>

This objection is easily answered. First, much of Congress's work is already in the public eye. It holds public hearings, its proceedings are often televised, and there is a long and detailed legislative history for many of the laws Congress enacts.<sup>304</sup> Thus, Congress is far and away already more transparent than the Supreme Court.

Second, Congress does require that all the records of each congressional committee be transferred to the National Archives for preservation.<sup>305</sup>

Third, and most importantly, Congress *should* address the issue of who owns the records of each individual member and enact rules governing public access to those materials. If requiring the Justices to grant access were to generate public pressure for Congress to pass similar rules for itself would be a positive development.

#### 4. *Separation of Powers*

Some may argue that Congress does not possess the power to force the Justices to make their papers public and that any rules regarding the Judicial Branch's papers must come from the Justices themselves. This argument would be based on the traditional justifications for a robust separation of powers doctrine. In order to better preserve liberty, the founding fathers intended that each branch of government be independent and strong enough to guard against encroachments of the other two branches.<sup>306</sup> As James Madison said, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>307</sup> On this issue, Madison and Jefferson agreed, as reflected in this letter from the latter to the former:

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303. *Id.* at 1732–33.

304. *Id.* at 1733.

305. *Id.*

306. THE FEDERALIST PAPERS: NO. 47, at 271 (James Madison) (Kathleen M. Sullivan ed., 2009).

307. *Id.*

The principle of the Constitution is that of a separation of Legislative, Executive and Judiciary functions, except in cases specified. If this principle be not expressed in direct terms, it is clearly the spirit of the Constitution, and it ought to be so commented and acted on by every friend of free government.<sup>308</sup>

The question is whether Congress requiring the Supreme Court to maintain its official papers for later public inspection would contradict the separations of powers principles upon which our government is based. Interestingly, President Nixon made these very arguments to the Supreme Court when he challenged the constitutionality of the Presidential Recordings and Materials Preservation Act,<sup>309</sup> a law passed prior to the PRA designed to deal exclusively with the papers of Richard Nixon.<sup>310</sup> The law directed the General Services Administration (GSA) to take custody of over 42 million pages of documents and 880 tape recordings generated by the Nixon Administration to ensure they would be available for public inspection.<sup>311</sup> President Nixon fought the law making numerous constitutional challenges including that the law violated the separation of powers.<sup>312</sup> He claimed that Congress could not delegate to the Administrator of General Services, someone who worked inside the Executive Branch, the final authority over the papers and recordings because such a delegation constituted “an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch.”<sup>313</sup> Nixon argued that the law also interfered with presidential privilege.<sup>314</sup>

The Supreme Court rejected Nixon’s argument for three reasons. First, the Court observed that President Ford signed the law,

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308. 1 THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA: A COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 194 (John P. Foley ed. 1900).

309. *See generally* Nixon v. Gen. Servs., 433 U.S. 425 (1977).

310. *Id.* at 431.

311. *Id.* at 430.

312. *Id.* at 439.

313. *Id.* at 440.

314. *Id.* at 339–40.

President Carter's Justice Department defended the law in federal court, and thus there was presidential approval of the law's constitutionality.<sup>315</sup> Second, the Court said that the separation of powers was helped, not harmed, by the law's placement of responsibility over the president's papers and recordings in an officer inside the Executive Branch because "it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function."<sup>316</sup> Third, the Court said that Nixon's view of separation of powers was overly formalistic and rigid to the extent that he argued that the three branches of government had to be totally separate from each other in order for each branch to properly fulfill its assigned duties.<sup>317</sup> The more appropriate test, the Court said, was "whether the Act . . . prevents the Executive Branch from accomplishing its constitutionally assigned functions."<sup>318</sup> Because the materials were kept inside the Executive Branch, and because the president was able to assert numerous privileges to their public disclosure if he deemed it necessary to the interests of the United States, the Court rejected Nixon's claims that the law violated the separation of powers.<sup>319</sup>

The Court's decision in *Nixon* supports the idea that requiring the Justices to allow access to their official records would not violate the separation of powers as long as Congress required the Justices themselves or the Judicial Office of the United States Courts to play a prominent role in the maintenance, collection, and eventual display of the records. As Professor Watts suggests, the appropriate course would be for Congress to declare, as it did with the president's records, that the official files of the Justices are public, not private property, but then require either the Justices themselves or the Judicial Office to promulgate rules and regulations governing how those files are kept, what privileges the justices may assert, and how

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315. *Nixon*, 433 U.S. at 441.

316. *Id.* at 444.

317. *Id.* at 443.

318. *Id.* at 442.

319. *Id.* at 444-45.

long they should be kept secret until the public is allowed access.<sup>320</sup> If Congress were to proceed in that manner, the law would not threaten the separation of powers and would not interfere with the Court's constitutionally assigned duties.<sup>321</sup>

Under current law, Supreme Court justices may destroy their official files for any and all reasons and may limit access to those materials to a privileged few for any period of time.<sup>322</sup> As noted earlier, Chief Justice Burger, for example, retired almost thirty years ago and his records have still not been made public.<sup>323</sup> There are many reasonable ways to go about ensuring the public has reasonable access to the Justices' papers, but allowing each justice to make any and all (or no) rules governing that access makes no sense and greatly lessens the transparency of our highest Court.

I am not suggesting that each and every paper and e-mail a justice writes is necessarily a matter of public concern or that these records should be made available immediately after a justice resigns or dies in office. There are legitimate concerns involving the confidentiality of these records such as whether other sitting Justices may be adversely affected by the disclosure of their communications with the retired or deceased justice.<sup>324</sup> But there should be a legally required method of insuring the public access to the non-privileged records of the Justices after a reasonable period of time. In a perfect world, the Justices themselves would create such a system but there is absolutely no indication that they are willing to do so. Therefore, as it did with the president's papers, Congress should work with the justices and the administrative arm of the Court and enact a law allowing the American people to have access to the official records of the Court generated in the course of the Justices' taxpayer-paid official duties.

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320. Watts, *supra* note 259, at 1714, 1719.

321. *Id.* at 1734.

322. *Id.* at 1731.

323. *Id.* at 1684.

324. *See id.* at 1668.

## CONCLUSION

The Supreme Court of the United States makes decisions which significantly affect the lives of all Americans. Whether states may prohibit abortions, whether cities may ban hand-guns, whether Congress may enact meaningful campaign finance reform, and whether thousands of colleges and universities may employ affirmative action, are just a very few of the important issues the Court has resolved over the last few years.<sup>325</sup> How the Justices use their power of judicial review to alter, lessen, or grant the American people rights and responsibilities is not likely to change in the foreseeable future, but we should be able to observe the Court more clearly and hold it more accountable. It is well past time to shine a brighter light on the nine most important judges in the United States.

The easiest transparency problem to solve is the Justices' lack of visibility while they perform their official and public functions. Supreme Court oral arguments and decision days, already open to the public, should be available for the world to see and in real time. For present day citizenship moments, historical study and pride, and pure democratic accountability, the Court needs to join the majority of American states and numerous other countries, such as Canada and the United Kingdom, and allow television cameras in their courtroom. Our next generation of lawyers, public servants, and citizens deserve nothing less. There is no good reason that the video of dramatic moments in American history, such as Justice Anthony Kennedy's announcement in 2015 that millions of gays and lesbians across the United States have the constitutional right to marry, should be lost forever.

Supreme Court Justices are the only federal judges in the country not bound by a code of ethics.<sup>326</sup> Each individual Justice has the final say over whether she will recuse herself over a potential or actual

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325. See generally *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

326. Smith, *supra* note 2.

conflict of interest.<sup>327</sup> The Justices should be bound by the same ethics and recusal constraints that all other judges must abide by. If anything, the Justices should be more, not less, transparent than lower court federal judges.

Every year, lawyers file more than 7,500 petitions for certiorari and only 70–80 are accepted by the Justices.<sup>328</sup> Many of those requests raise serious legal issues and significant time, energy, and money are poured into the briefs. Yet, there is no official record of which Justices voted to hear which cases, and there is no formal way to understand a Justices' certiorari votes over time.<sup>329</sup> When historians try to evaluate a Justices' thirty years on the bench, how the Justice voted on which cases to hear is vitally important. There is no legitimate reason why we should be denied this true and relevant information about important governmental choices.

For many of the reasons discussed in this article, Supreme Court Justices are far removed from the people they are supposed to serve. Even after the Justices retire or die, this lack of transparency continues to an alarming degree.<sup>330</sup> To cite just one of many examples, the official tax-payer funded official records of Chief Justice Burger, who left the Court in 1986, are *still* invisible to the American public, and will remain so for many more years.<sup>331</sup> We have a law declaring that the President's official records belong to the public and requiring the National Archives to organize them (take out all privileged material) and make them available to the people a reasonable time after a President leaves offices.<sup>332</sup> Congress should work with the Administrative Office of the Supreme Court, and the Justices themselves, and enact a similar open-records law so that we have a more accurate understanding of how our Supreme Court operates over time.

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327. Riffle, *supra* note 3.

328. Segall, *supra* note 5.

329. *See generally* Watts, *supra* note 259.

330. *Id.* at 1678.

331. *Id.* at 1684.

332. Presidential Records Act of 1978, 44 U.S.C. §§ 2201–07 (2012).

Most importantly, the Supreme Court ought to embrace the same democratic presumption of openness and transparency that we take for granted with the other branches of government. Unless national security, foreign policy sensitive materials, or private personnel matters are at issue, we expect the elected branches to open their doors and records to reasonable public inspection. When the elected branches want to keep records or proceedings secret, they bear the heavy burden of demonstrating the need for that secrecy. But when it comes to the Supreme Court, there appears to be an exactly opposite presumption. Whether it is the lack of cameras, the anonymity of the certiorari votes, the refusal of the Justices to abide by the same ethical and recusal rules as other judges, or the lack of any rules regarding their official papers, the story of the Supreme Court is one of secrecy and mythology instead of an accountability and transparency.