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THE PRACTICAL IMPLICATIONS OF RECUSAL OF SUPREME COURT JUSTICES: A RESPONSE TO PROFESSOR SWISHER

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In his recent *Maryland Law Review* article,¹ Professor Keith Swisher examines the problems of contemporary judicial recusal theory and offers valuable insight on how to solve those problems. His doctrinal analysis covers all American judges, state and federal. Here, I will examine the practical aspects of a discrete sub issue, the recusal of United States Supreme Court Justices. A Justice's constitutional duty to decide cases is a barrier to recusal in cases where the Justice sees no conflict, but where the public might reasonably perceive a disqualifying conflict. Because a four-to-four deadlock results in affirmance of the judgment below, the act of recusal is effectively a vote to affirm. Building on recent articles advocating for designation of retired Justices to sit in place of recused Justices,² I will suggest how to improve such proposals and examine some collateral benefits of such designation.

I. IMPLICATIONS OF RECUSAL ON THE AFFORDABLE CARE ACT (“ACA”) MANDATE

During Justice Kagan's first year on the bench, when she recused herself from one-third of the Court's cases, the Court affirmed only two cases based on an equally divided vote.³ Given that four-to-four splits occur, on average, less than once per term, even supporters of

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1. Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. 219 (2012).

2. 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 (2011); Rebekah Saidman-Krauss, Comment, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench*, 116 PENN. ST. L. REV. 253 (2011).

3. McElroy & Dorf, *supra* note 2, at 94.

legislation to replace recused Justices questioned in 2011 whether such deadlocks presented a “substantial problem.”⁴ But now, when one considers the story of the ACA decision in retrospect, the problem comes into focus.

Justices Thomas and Kagan rejected calls for their recusal from the ACA cases.⁵ I accept the judgment of both Justices in rejecting those calls.⁶ But, in an ideal world, both would have recused themselves to avoid even the appearance of a conflict. Dual recusal probably would not have affected the result, but it would have further distanced the ACA decision from any “politicians in robes” narrative.⁷

Under our current regime, however, Justices Thomas and Kagan, once they determined they could decide the case impartially, had the constitutional obligation to sit. The judicial power is “vested in one [S]upreme Court.”⁸ Because neither Justice could control whether the other would recuse, recusal by either Justice threatened to deadlock the Court and abnegate the Court’s constitutional obligation to exercise its judicial power. The U.S. Court of Appeals for the Eleventh Circuit had struck down the individual mandate,⁹ the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Sixth Circuit had affirmed the individual mandate,¹⁰ and the U.S. Court of Appeals for the Fourth Circuit had ruled that the Anti-Injunction Act required a multi-year delay in adjudicating the question.¹¹ A four-to-four split was not a viable constitutional option.

As it turns out, a recusal by Justice Thomas likely would not have changed the decision, except to eliminate his single-paragraph sepa-

4. *See id.* at 94–96 (considering whether the Leahy bill, which proposed the substitution of retired Justices for recused Justices, would be effective in addressing concerns about four-to-four splits).

5. John Gibeaut, *Sitting This One Out: Health Care Case Again Raises Recusal Controversy*, 98 A.B.A. J., Mar. 2012, at 18.

6. Both Justice Thomas and Justice Kagan participated in the Court’s decision in the ACA cases. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

7. *See* A. Christopher Bryant, *Constitutional Forbearance*, 46 U. RICH. L. REV. 695, 702 (2012) (discussing how a judge’s actions may demonstrate her commitments); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195, 211 (2011) (arguing that knowledgeable people may be less likely to perceive judges as “politicians in robes”).

8. U.S. CONST. art. III, § 1.

9. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011), *affirmed in part, reversed in part by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566.

10. *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (2012); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 534 (6th Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566.

11. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 397–98 (4th Cir. 2011).

rate dissent.¹² But a recusal by Justice Kagan would have presented a different story. We now know that the Court originally voted five-to-four in conference to strike down the mandate, but that Chief Justice Roberts later decided to affirm the mandate as an exercise of the taxing power.¹³

Had Justice Kagan recused herself, the vote in conference would have been five-to-three to strike down the mandate. Because a change in vote by the Chief Justice would have deadlocked the Court, leaving the circuits split, it seems unlikely that he would have changed his vote at all. Most likely the ACA would have fallen. The ACA decision demonstrates that a Justice's Article III obligation is too weighty for a Justice to recuse unless an actual, not merely perceived, disqualifying interest exists.

II. PROPOSALS TO ALLOW RETIRED JUSTICES TO SIT

But what if Justice Kagan knew that retired Justice John Paul Stevens could have taken her place? She could have cured the perceived conflict without fear of violating her Article III duties or of changing the result.

At the time of his retirement, Justice Stevens expressed his regret that he could not thereafter sit by designation on the Supreme Court. In response, Senator Patrick Leahy introduced a bill that would permit such designation.¹⁴ Such a proposal likely would be constitutional, given the wide range of control that Congress has over the composition of the Court and over the conduct of the Court's business.¹⁵

But the ACA decision reveals practical flaws in that proposal. Senator Leahy's proposal was to permit designation where a "majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice."¹⁶ It is unclear whether, under that proposal, Justice Kagan would have been authorized to vote on that designation.¹⁷ Such a circumstance would have raised the specter of a vote by

12. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2677 (Thomas, J., dissenting).

13. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

14. Saidman-Krauss, *supra* note 2, at 253.

15. See McElroy & Dorf, *supra* note 2, at 107–12 (discussing the constitutionality of the Leahy bill); Saidman-Krauss, *supra* note 2, at 268–78 (same).

16. McElroy & Dorf, *supra* note 2, at 83 n.4.

17. See *id.* at 103 n.91 (noting that the Leahy bill lacked clarity as to whether the recused Justice would have a vote in designating a retired Justice).

proxy.¹⁸ But if Justice Kagan was recused from the vote on the designee, the Court may well have deadlocked on choosing the replacement Justice, meaning that no Justice would have taken her place.¹⁹

Other potential designation schemes are problematic. If the Chief Justice were to choose the designee, he could wield disproportionate influence.²⁰ Two law professors, in proposing a random lottery system, have conceded disincentives where the Justice sees too high a risk of designation of an ideological foe.²¹ The commentary on the Leahy proposal demonstrates that any case-by-case selection of retired Justices is likely too problematic to succeed as a practical matter.

III. THE BENEFITS OF A TERM-BY-TERM APPROACH

A term-by-term approach would significantly reduce these practical problems. By the Court's September conference, each Justice could draft a prioritized list identifying any retired Justices who can take his or her place in the event of recusal. For instance, Justice Kagan might designate Justice Stevens first, with Justice Souter her second choice if Justice Stevens is recused or unavailable, and with Justice O'Connor her third choice. The iconoclastic Justice Thomas, by contrast, might list none of his retired colleagues, meaning that (as now) only eight Justices would sit in the event of his recusal. If a Justice's list changed from one year to the next, the changes would apply only to cases first docketed thereafter.

This proposal should minimize the risk that a Justice, by recusing himself or herself from a case, would influence the result. Rather, each Justice would, on a global basis not tethered to any individual case, be identifying which (if any) retired Justices sufficiently share his or her judicial philosophy to serve as a replacement. We thereby would minimize the degree to which recusals influence the outcome of a case, one way or the other.

Given the logistical problems inherent in swapping Justices in and out during certiorari conferences,²² retired Justices should not

18. See Saidman-Krauss, *supra* note 2, at 281 (arguing that if a recused Justice could vote on her replacement, she "would likely hand-pick the retiree most likely to vote in alignment with how [she] would have voted [on the outcome of the case]," and therefore "be essentially voting by proxy").

19. McElroy & Dorf, *supra* note 2, at 103.

20. Saidman-Krauss, *supra* note 2, at 281-82.

21. McElroy & Dorf, *supra* note 2, at 101, 103.

22. See, e.g., *id.* at 99 & n.77, 101-02 & n.83 (arguing that a Justice would have to recuse herself "before she knows whether four of her colleagues will vote to grant certiorari,"

participate in certiorari votes. But because a Justice's recusal from a certiorari vote is effectively a vote to deny certiorari under the present regime,²³ the number of votes required to grant certiorari should be reduced from four to three in any case where a Justice is recused. Given that Congress sets the quorum rules for the Court and legislates the scope of the Court's appellate jurisdiction,²⁴ such a proposal should not violate the separation of powers, even though the Court has traditionally set the rules for minimum certiorari thresholds.²⁵

This proposal is not perfect. If certiorari seems inevitable for a major case at the time of the Court's September conference, a Justice could rewrite his or her list to influence the result. But it is better than the present system, where the very act of recusal is effectively a vote to affirm the judgment below. Term-by-term designation presents the best means of diluting the influence of recusal upon the result in a given case.

IV. COLLATERAL BENEFITS OF DESIGNATING RETIRED JUSTICES

The primary goal of designation should be to encourage Justices to recuse themselves in cases where the public reasonably could perceive a conflict. But there are at least four collateral benefits.

First, such a rule could encourage Justices to retire when they no longer feel at the top of their game but are not ready to say goodbye to the Court entirely. Right now, many Democrats are exasperated that Justice Ruth Bader Ginsburg has yet to announce her retirement while Democrats hold both the presidency and the Senate.²⁶ And it was not so long ago that Republicans harbored similar frustration over Chief Justice William Rehnquist's inability—*notwithstanding* failing health and his professed desire to allow a Republican president to replace him—to bring himself to retire under a Republican president

and that, under the Leahy proposal, four Justices voting to grant certiorari "could push for a particular retired Justice to sit in, and . . . would effectively win the case before it is even argued"); *see also* Steven Lubet, *Disqualifications of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 658 (1995) (noting that when a Justice is recused prior to the certiorari conference, "the right of the petitioner to *apparent impartiality* may be secured, but only at the cost of *actual disadvantage* when it comes to obtaining Supreme Court review").

23. *See* Lubet, *supra* note 22, at 662 ("In certiorari, only 'Yes' votes count. Without four positive votes, a petition will not be granted. An abstention, therefore, is indistinguishable from a 'No.'" (footnote omitted)).

24. 28 U.S.C. §§ 1, 1253–1260 (2006).

25. Lubet, *supra* 22, at 662 n.26.

26. Jonathan Bernstein, *Ruth Bader Ginsburg Must Go*, SALON (Mar. 30, 2013, 9:00 AM), http://www.salon.com/2013/03/30/ruth_bader_ginsburg_must_go/.

and Republican Senate.²⁷ If a Republican is elected in 2016, many Republicans would want Justices Scalia and Kennedy to hand their retirement announcements to the new President at the inauguration. The ability to continue to sit by designation could provide a valuable carrot to a Justice considering retirement. There is also a stick. All three retired Justices are to the left of the Court's present center, giving members of the present majority an incentive to retire under the next Republican president to move the pool of retired Justices rightward.

Second, a designation scheme cures a significant hole in Article III—the absence of a provision for incapacitated Justices. President Kennedy's 1963 assassination prompted ratification of the Twenty-Fifth Amendment, under which the Vice President serves as Acting President while the President is "unable to discharge the powers and duties of his office."²⁸ But there remains no such provision for a Justice unable to discharge the powers of office. If a Justice were in a persistent vegetative state, Congress perhaps might take the drastic step of impeaching and removing the Justice on the theory that "no behavior" means the Justice is no longer exhibiting "good behavior."²⁹ But if any possibility existed that a Justice might return to health, removal of a Justice with lifetime tenure could present serious constitutional questions. Indeed, if a Justice needs time away to address a major health problem or to deal with a major life event (such as the death of a spouse) that could interfere with his or her judgment, the Justice should be able to take a temporary leave of absence without fear of interrupting the Court's business.

Third, designation could eliminate a disincentive for Presidents to nominate solicitors general to the Supreme Court. Only five Justices, including Justice Kagan, have joined the bench with experience as Solicitor General, an office created in 1870.³⁰ Thus, notwithstanding the exceptional experience and qualifications of the typical Solicitor General, it is surprisingly rare that the so-called "Tenth Justice"

27. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 277–78 (2008).

28. U.S. CONST. amend. XXV; see also John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 *FORDHAM L. REV.* 173, 178 (1965) ("The tragic death of President Kennedy on November 22, 1963, revived the question of presidential inability.").

29. U.S. CONST. art. III, § 1.

30. SUSAN NAVARRO SMELCER & KENNETH R. THOMAS, *CONG. RESEARCH SERV.*, R41299, *FROM SOLICITOR GENERAL TO SUPREME COURT NOMINEE: RESPONSIBILITIES, HISTORY, AND THE NOMINATION OF ELENA KAGAN* 8–14 (2010). Failed 1987 nominee Robert Bork served as Solicitor General in the 1970s. Al Kamen & Matt Schudel, *Iconic Conservative Judge and Lightning Rod*, *WASH. POST*, Dec. 20, 2012, at A1.

becomes the ninth Justice.³¹ To nominate an incumbent Solicitor General to the Supreme Court, a President must prefer the Solicitor General so strongly over all other potential nominees that the President is willing to see that future Justice recuse himself or herself from a large number of cases during the first year on the job.³² If, however, a new Justice could submit a list of replacement Justices, a President may be much more willing to nominate his or her Solicitor General.

Finally, if recusal of a Justice will not jeopardize the Court's Article III obligation to decide cases, Supreme Court nominees will have one fewer excuse to avoid giving meaningful answers during confirmation hearings. In 1995, then-Professor Elena Kagan lamented the post-Bork decline of substantive questioning of nominees: "When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public."³³ In 2010, then-nominee Elena Kagan proved her mastery of the non-answer, refusing to comment on cases that might come before the Court.³⁴ Designation of retired Justices will not alone usher in an era of substantive hearings, but it should at least theoretically aid in opening the confirmation dialogue.

V. CONCLUSION

Recusal of Supreme Court Justices calls not just for doctrinal reform, but also for a workable scheme for Justices to recuse themselves without jeopardizing the Court's Article III obligation to decide cases. If we want Justices to recuse themselves in cases where they see no actual conflict, but where the public reasonably could perceive a conflict, we need to provide a mechanism for ensuring that designation is unlikely to change the result. A term-by-term model for each Justice

31. SMELCER & THOMAS, *supra* note 30, at 2, 4–7.

32. It is not as clear why so few former Solicitors General become Justices. Quite possibly, even the slightest taste of lucrative private practice as a former Solicitor General disinclines him or her from the judiciary. Justice Scalia recently remarked that he never would have been a Justice if President Reagan had nominated him, rather than Rex Lee, to become Solicitor General in 1981. Gaëtan Gerville-Réache, *Justice Scalia at the AJEI Summit in New Orleans*, APP. ISSUES, Feb. 2013, at 2, available at http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf.

33. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995) (book review).

34. See Keith J. Bybee, *Will the Real Elena Kagan Please Stand up? Conflicting Public Images in the Supreme Court Confirmation Process*, 1 WAKE FOREST J.L. & POL'Y 137, 152 (2011) (describing the evasiveness of Kagan's answers during her confirmation hearings).

to select his or her replacement accomplishes this goal while largely avoiding the unseemliness of a Justice directly picking his or her replacement on a case-by-case basis.