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## Recusals and the Court

Justice Elena Kagan's seat was empty when the second case of the new term of the Supreme Court was called for oral argument on Monday. Because of her previous job as President Obama's solicitor general, she has, so far, recused herself from 25 of 51 cases accepted.

She is making the right choice. But the court's voluntary system of recusal isn't enough to protect its impartiality and credibility. The justices decide on their own when their "impartiality might reasonably be questioned." There is no review, no requirement for explanation and no code of discipline as a check.

With a financial conflict, justices must follow the same rule as other federal judges: If they own a single share of a company's stock, even if it is in a blind trust, they cannot sit on a case that would affect the company. But where other judges are subject to appeal, the decision to sit out is left to the justice without review.

There are, of course, a variety of potential conflicts, including a former professional relationship with an attorney or even personal knowledge about a dispute or bias about a party. Three weeks after the Supreme Court agreed to hear a case about former Vice President Dick Cheney's refusal to disclose the records of his secretive energy task force, Justice Antonin Scalia decided to go duck hunting with Mr. Cheney in Louisiana and accepted a ride to the outing on the vice president's plane.

Legal ethicists widely argued that he should not take part in the case. When the Sierra Club, an environmental group, filed a motion asking Justice Scalia to disqualify himself (it had filed the records request that led to the lawsuit), the justice rejected it with an extraordinary opinion: "If it is reasonable to think that a Supreme Court justice can be bought so cheap," he scoffed, "the nation is in deeper trouble than I had imagined."

The court confronted the issue of judges and potential bias in a 2009 ruling in the case of *Caperton v. A.T. Massey Coal Company*. The court, in a slim 5-to-4 vote, found that the chief justice of the West Virginia Supreme Court should have recused himself in a case involving the coal mining company, which was a major contributor to his election campaign. Writing for the majority, Justice Anthony Kennedy argued that the contributions had created a “serious risk of actual bias” and the chief justice’s failure to recuse himself had violated the other side’s right to due process.

Chief Justice John Roberts Jr., writing the dissent, was unpersuaded. “All judges take an oath to uphold the Constitution and apply the law impartially,” he wrote, “and we trust that they will live up to this promise.”

Senator Patrick Leahy, the chairman of the Judiciary Committee, is preparing a bill that would address one part of the problem, the potential for a 4-to-4 deadlock if a justice recuses from a case. It would empower the justices to appoint a retired justice to fill in when a majority agree on who should get the assignment. That might be a start, although we suspect that the temptation to game the system would be enormous. What liberal justice would step aside if there were a strong chance that a conservative fill-in would be found — or vice versa?

More important, it fails to address the heart of the matter: how the appearance-of-impartiality standard should be applied and enforced. One possible reform would be to require a justice to explain, in a public statement and in detail, any decision to recuse or not. It would be even better to set up a formal review process. A group of other justices — serving in rotation or randomly chosen — could review each decision about recusal and, when necessary, have the power to overrule it.

Justices have life tenure to assure their independence and impartiality. They should not be the sole judge of whether they are meeting that standard.