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# POLITICO

## Roberts to America: Trust us

By: [William Yeomans and Herman Schwartz](#)

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Chief Justice John Roberts's response in his year-end report to the increasing controversy over the ethics of Supreme Court justices served to drive home the need for the high court to adopt reforms immediately.

Roberts rejects calls that the justices should be subject to the basic code of ethics that governs all other federal judges and must provide some transparency to their recusal decisions. His argument seems based on the proposition that the justices are good people and able jurists — so they don't have to be officially bound by a code or explain decisions governing their conduct or recusal.

In Roberts's view, these good jurists should not have to explain how their decisions conform to the law. Yet the courts' fundamental legitimacy rests on the notion that judges apply the facts to the law impartially and explain what they have done in reasoned opinions for all to read. Roberts's position mocks that.

He acknowledges that justices are the only federal judges not bound by the Code of Conduct, but he notes that they do consult the code "in assessing their legal obligations." They also consult other sources for guidance, Roberts adds, including "judicial opinions, treatises, scholarly articles and disciplinary decisions" and may turn to the Supreme Court's legal office and the Judicial Conference's Committee on Codes of Conduct.

Kudos to the chief for explaining that. But the problem is we members of the bar and the American public at large, have no idea what or whom is consulted in any particular instance — and we have no explanation of the results of all of that consultation. Instead, we are supposed to trust that justices will get it right because, as Roberts says, they "are jurists of exceptional integrity and experience."

This may be true, but when, for example, justices decide legal matters, we insist they write opinions explaining their reasoning — precisely because able jurists can disagree and even get it wrong on occasion. Our check on the Supreme Court's power is the transparency provided by publicly announced opinions.

This same transparency is even more essential when justices apply the law to themselves. As evident in this term, when the court will consider politically charged issues like the constitutionality of the Affordable Care Act, the power of states to regulate immigration and Texas congressional redistricting, the court's processes must be transparent. Only then can we be certain that it's adhering to the rule of law and not the justices' political or policy interests.

Roberts's biggest problem is that it is not clear how some justices' conduct squares with the law. For example, we need a reasoned explanation — much as Justice Antonin Scalia attempted to explain his duck hunting boondoggle with then-Vice President Dick Cheney — of the propriety of the recent decision by Justices Clarence Thomas and Scalia to headline a fundraiser for The Federalist Society, where law firms bought tables for thousands of dollars. Some of these lawyers were participating in the health care litigation the court agreed that day to hear.

The Code of Conduct says that, with few exceptions “a judge should not personally participate in fundraising activities, solicit funds for any organization or use or permit the use of the prestige of judicial office for that purpose.” Yet Justice Samuel Alito headlined fundraisers for the conservative American Spectator magazine. Did he go through all the steps proscribed by the chief justice? If so, how did he conclude that this conduct, which seems at odds with the code, was ethical? Many other examples abound — though justices appear to feel no obligation to explain.

The chief justice’s resistance to accountability extends even to limitations on judicial participation legislatively imposed by Congress. Roberts discusses only the general requirement that “a judge shall recuse himself in any case in which the judge’s impartiality might reasonably be questioned.” He ignores specific provisions that apply to all federal judicial officials — including Supreme Court justices.

Yet ever since our nation’s earliest days, Congress — continuing recusal requirements set not only by English parliaments but as far back as the Code of Justinian — has required all judges, including Supreme Court justices, to withdraw from any case in which they have an interest or had early involvement with. This requirement has been extended to include a variety of fiduciary and other relationships.

The most important recent expansion of congressional control was in 1974, after then-Justice William H. Rehnquist insisted on participating in a controversial case challenging military surveillance of anti-Vietnam War public meetings. When Rehnquist served as assistant attorney general, he had told Congress that this challenge lacked merit and should be dismissed. As head of the Office of Legal Counsel, he had approved authorizing the surveillance.

Rehnquist’s participation produced a 5-4 decision upholding the surveillance. Congress promptly amended the law to bar any judicial officer, including a justice, who had taken a position on a case in prior employment.

It is generally assumed today that a justice may not sit on a case about which he or she had earlier expressed a view. Scalia, for example, recused himself from a case challenging the reference to God in the pledge of allegiance after he had expressed disdain for the plaintiff’s position in a speech.

Roberts’s discussion may also reflect the astonishing view in his annual report that legislative limitations on a justice’s activities are unconstitutional. He notes, for example, that “the court has never addressed whether Congress may impose [financial reporting requirements and limitations on the receipt of gifts and outside earned income] on the Supreme Court. The justices, nevertheless, comply with these provisions.” With respect to “the limits of Congress’s power to require recusal,” he comments that this power has “never been tested.”

But is there any serious doubt that Congress has the power to impose financial reporting requirements? These requirements are imposed on all senior members of the government, including members of Congress and executive branch officials. Surely, the public has a right to know if a justice or his or her spouse is receiving large sums of money or gifts from individuals or corporations with interests before the bench. And the disclosure requirements must be mandatory and enforced.

Indeed, Thomas’s recent actions drive the point home. After reporting his wife’s income for

many years, as required by law, Thomas suddenly stopped. His claim that he misunderstood the reporting form seems nonsensical. The form did not change. Rather, given that his wife was earning hundreds of thousands of dollars from The Heritage Foundation, he appears to have simply stopped reporting. Similarly though, he has reportedly accepted more gifts than any other justice, according to a 2004 article in The Los Angeles Times. Thomas has not reported a single gift since the article appeared.

Roberts also raises the key problem created when a justice recuses him or herself: There can be no substitute. This raises the possibility of an equally divided court. Apart from the rarity of such a division — in the 26 cases that Justice Elena Kagan recused herself from last term because of her solicitor general service, only two resulted in a divided court. Moreover, despite Roberts's concern, justices do recuse themselves voluntarily. They don't, however, explain why they won't hear a case and even refuse to explain why they won't give their reasons.

Courts obviously need secrecy for their deliberations and decision making. But there can be no harm in a justice explaining why he or she withdraws from a case or refuses to withdraw. Neither the Supreme Court nor Rehnquist or Scalia was in any way compromised by the explanations they offered for why they declined to withdraw from, respectively, the Vietnam War surveillance case and the duck hunting case.

The Supreme Court's fetish for secrecy denies the American people their right to know whether the justices are doing their job as they should. No public servant — not even a Supreme Court justice — is entitled to be that independent.

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