

I am honored to offer this resolution to recognize their service and sacrifice and acknowledge today's United States Marine Corps as an excellent opportunity for advancement of persons of all races due to the service and example of the original Montford Point Marines.

SUPREME COURT RECUSAL PROCESS IN NEED OF TRANSPARENCY AND ACCOUNTABILITY

HON. LOUISE McINTOSH SLAUGHTER

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 7, 2011

Ms. SLAUGHTER. Mr. Speaker, I rise today to express my concern that justices of the Supreme Court are not required to explain their decisions to recuse—or not recuse themselves in a particular case before the Court, and that those decisions are final and unreviewable. Recusal decisions, left to each individual justice to make on his or her own and with no opportunity for review, require that each justice be a judge in their own case.

Questions of impartiality erode the integrity of the Court and threaten to undermine public trust in our judicial system. The recusal process for Supreme Court justices must be reformed to provide an open and reviewable process.

A SUPREME COURT JUSTICE'S RECUSAL DECISIONS SHOULD BE TRANSPARENT AND REVIEWABLE

(By the Alliance for Justice)

The recusal process for Supreme Court justices needs transparency and accountability. Although there is a statute governing recusal—28 U.S.C. §455—that applies to Supreme Court justices, the statute does not require individual justices to explain their recusal decisions, and those decisions are final and unreviewable. This system violates the basic maxim that no one should be a judge in his own case. It also ignores the fact that the standard to be applied in recusal cases is the appearance of bias, which by necessity depends on the views of others, and not the justice's own views of his or her impartiality. Exacerbating this lack of accountability is a lack of transparency, as justices are not required to issue a written opinion explaining a recusal decision.

That's why over 100 law professors recently sent a letter calling on Congress to hold hearings and implement legislation to increase the transparency and accountability of recusal decisions.

A recent Supreme Court case, *Caperton v. A.T. Massey Coal, Inc.* provides an object lesson in the hazards of a self-policing judiciary, in which individual judges determine whether or not their impartiality can reasonably be questioned. In *Caperton*, West Virginia Justice Brent D. Benjamin received substantial campaign contributions made directly or indirectly from the president of a company with an outstanding \$50 million judgment against it on appeal before the judge. Justice Benjamin denied three motions to recuse himself, and then voted in the 3-2 majority to reverse the judgment against the company. A public opinion poll indicated that 67% of West Virginians doubted Justice Benjamin would be fair and impartial.

The Supreme Court reversed Justice Benjamin's decisions not to recuse himself on the basis that the risk of actual bias was so high that it violated petitioners' constitutional due process rights. It did not matter

what Justice Benjamin thought of his own potential for bias, the key was whether the appearance of impartiality was compromised, the Court held. The Court emphasized the need for an objective test to evaluate whether an interest rises to such a degree that the average judge might become biased, rather than relying on a judge's self-evaluation of actual bias. "The difficulties of inquiring into actual bias and the fact that the inquiry is often a private one, simply underscore the need for objective rules," the Court added. The Court held that the need for an independent inquiry is particularly important "where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias."

The opacity and lack of accountability of the recusal process erodes public confidence in the integrity of the Court and the sense that justice is being administered fairly. For example:

In 2003, a prominent legal ethicist argued that Justice Breyer should have recused from Pharmaceutical Research and Manufacturers of America v. Walsh, in which an association of drug manufacturers, including three in which Justice Breyer held stock, brought suit challenging the constitutionality of state regulations aimed at keeping drug costs down for consumers. Justice Breyer chose not to recuse himself, despite his potential financial conflict of interest.

In 2004, just weeks after the Supreme Court granted certiorari in a public records case brought by the Sierra Club against then-Vice President Dick Cheney, Justice Scalia went duck hunting with Cheney and accepted a free ride on the Vice President's plane. Despite widespread public criticism questioning his appearance of bias in the case, Justice Scalia refused to recuse himself. In a memorandum opinion denying the Sierra Club's motion to recuse, Justice Scalia wrote that he "would have been pleased to demonstrate [his] integrity" by disqualifying himself from the case, but nonetheless decided there was no basis for recusal. He then cast his vote in support of Vice President Cheney's position.

This year, the advocacy organization Common Cause filed a petition with the Department of Justice, requesting that it file a Rule 60(b) motion seeking the invalidation of last year's Citizens United v. FEC ruling on the basis that Justices Scalia and Thomas should have recused themselves. The petition alleged the impartiality of both justices could reasonably be questioned under 18 U.S.C. §455(a) due to their alleged attendance at a closed-door retreat hosted by Koch Industries, a politically active corporation that supported and has benefited from Citizen United's dismantling of campaign finance laws. Common Cause also alleges that Justice Thomas had an obligation to recuse himself under 18 U.S.C. §455(b), due to a financial conflict of interest created by his wife's employment at a conservative political organization that stood to benefit from unrestricted corporate donations made possible by Citizens United.

Also this year, Representative Anthony Weiner (D-NY) and 73 other members of the House of Representatives have asked Justice Thomas to recuse himself from any upcoming review of the Affordable Care Act due to his wife's ties to organizations lobbying to repeal the Act. Rep. Weiner asserts that IRS records show that between 2003 and 2007, Virginia ("Ginni") Thomas was paid \$686,589 by the conservative Heritage Foundation, which at the time opposed health care reform. He adds that in 2009, Ms. Thomas became the CEO of a nonprofit, Liberty Central, which also opposed health care reform, and that earlier this year, Ms. Thomas announced that she had formed a lobbying firm, "Lib-

erty Consulting," to advance various Tea Party legislative initiatives, including the repeal or nullification of the Affordable Care Act. Rep. Weiner alleges that these connections give rise to an appearance of partiality, and a potential financial conflict of interest that require Justice Thomas to recuse himself, if the Affordable Care Act reaches the Court. While a judge's spouse is not prohibited from engaging in political activities, Judicial Conference Advisory Opinions interpreting the Code of Conduct make clear that a spouse's political activities may increase the likelihood that a judge must recuse from a particular case.

These examples highlight the need for transparency and review of recusal issues that arise for Supreme Court justices. The impartiality of specific justices, and thereby the integrity of the Court, has come under question because the recusal statute fails to provide an open and reviewable process. This needs to change, either through Congressional legislation, or by the Court itself adopting new recusal policies.

REAFFIRMING COMMITMENT TO NEGOTIATED SETTLEMENT OF ISRAELI-PALESTINIAN CONFLICT

SPEECH OF

HON. GEORGE MILLER

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 6, 2011

Mr. GEORGE MILLER of California. Madam Speaker, the effort to establish a lasting peace in the Middle East does not lend itself to a simple up or down vote on a resolution in Congress, and so I rise to offer my thoughts on the resolution before us today.

While I voted in favor of H. Res. 268, because it reinforces the importance of direct talks for a two-state solution, I was disappointed with the resolution regarding the Israeli-Palestinian conflict that was brought to the floor today. The fact is that this resolution was made possible because of the absence of a viable peace process.

I am disappointed with the resolution not so much because of the general contents of the resolution, but because this resolution does not treat the issue with the serious and careful consideration that it deserves. It is simply one in a series of votes in the House that fail to address the entirety of the conflict and take instead political shots at one side of the conflict.

Israel is and has always been a close friend and ally of the United States, and rightfully so. We share many goals and values, including a strong commitment to a vibrant democracy and diverse economy. Too often, however, Congress uses resolutions regarding the Middle East as referenda on whether or not a particular Member supports or does not support Israel, even though such support is not in question. That is unfortunate and does a disservice to the effort to establish peace between Israel and the Palestinians.

The Obama Administration, like its predecessors, has been working to keep the two parties at the table and to try to ensure that they can make the necessary compromises to ensure that type of lasting peace. Here in Congress, we should be supporting these important efforts, rather than playing political games, given the real-life consequences that this conflict is having on millions of people's lives and on our own country's security interests.