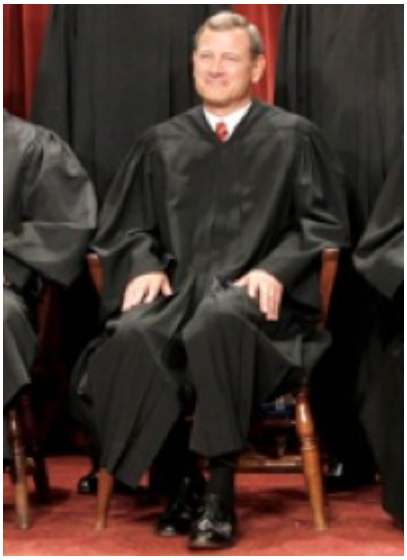
Written by **Joe Wolverton, II, J.D.** on January 5, 2012

Chief Justice Roberts Reports on ObamaCare Recusal Controversy



Recusal is the process by which a judge abstains from participating in a hearing due to a conflict of interest. According to applicable federal law (United States Code Title 28, Section 455), a "judge shall recuse [himself] in any case in which the judge's impartiality might reasonably be questioned."

Roberts's comment comes at an apropos time as in its next term the Supreme Court is scheduled to hear oral arguments in two very high-profile cases: one challenging the legality of Arizona's immigration statute (S.B. 1070), the other seeks to determine the constitutionality of ObamaCare.

Justice Kagan has already announced that she will recuse herself from considering the Arizona immigration case. While serving as the Solicitor General in the Obama administration, Kagan was personally involved in many of the actions taken by the White House and the Department of Justice in the legal proceedings they initiated against Arizona after enactment of S.B. 1070.

There are some who argue that Justice Elena Kagan should recuse herself from the ObamaCare matter, as well, and for precisely the same reason — her previous position as Solicitor General and the intimacy with issues related to legal strategy afforded by that office.

Others make similar claims regarding the question of the impartiality of Justice Clarence Thomas, given his wife's work with various groups actively opposing the Patient Protection and Affordable Care Act — ObamaCare.

Politico reports that during testimony given at her confirmation hearings, Justice Kagan indicated that she was "not involved in the administration's legal strategies for the law."

Some members of Congress have expressed dismay that the nation's "court of last resort" has adopted a more liberal involuntary recusal policy than lower federal courts.

Chief Justice Roberts addressed these disparities in his report:

> Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455. They may consider recusal in response to a request from a party in a pending case, or on their own initiative. They may also examine precedent and scholarly publications, seek advice from the Court's Legal Office, consult colleagues, and even seek counsel from the Committee on Codes of Conduct. There is only one major difference in the recusal process: There is no higher court to review a Justice's decision not to recuse in a particular case. This is a consequence of the Constitution's command that there be only "one supreme Court." The Justices serve on the Nation's court of last resort.

> As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.
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> 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.

Justice Roberts's assessment of the unique circumstance of a judge on the Supreme Court is accurate. As he stated, there is no judge on another bench that can pinch hit for a recused Supreme Court justice.

In November 2011, the U.S. Supreme Court approved a petition to hear arguments in cases challenging the constitutionality of ObamaCare.

The court granted certiorari (a petition submitted requesting that the court hear an appeal from a lower appeals court) in three of the several cases currently filed against the U.S. government. The announcement by the court indicates that the justices have set aside five and one-half hours to hear oral arguments from the parties.

Oral arguments will likely begin in March, with a decision handed down before the court recesses at the end of the spring term in late June.

The court divided the allotted time into the following partitions: First, the justices will hear two hours of argument on the issue of whether in enacting the individual mandate of the Patient Protection and Affordable Care Act, Congress exceeded the authority granted to it by Article I of the Constitution. Next, the court will hear one hour of argument on the issue of whether the suits challenging ObamaCare should be barred by the Anti-Injunction Act.

The third issue to be heard by the court is whether the individual mandate provision can be severed from the rest of the law. This is a critical issue as it is that particular provision in the act that has attracted the most attention and has generated the most controversy — including the controversies that will soon be heard by the highest court in the land.

The final aspect of ObamaCare to be decided by the Supreme Court is the expansion of the Medicaid program. The court has blocked one hour of oral argument on the following question: "Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program…?"

As the identical issues have been raised in more than one complaint, the court has consolidated the cases of *National Federation of Independent Business v. Sebelius* and *Florida v. Department of Health and Human Services*. The third case that will be under review is the case of the *Department of Health and Human Services v. Florida, et al*.

Each of these cases comes to the Supreme Court on appeal from a decision handed down by the United States Court of Appeals for the Eleventh Circuit (based in Atlanta, Georgia), which held in August that the unconstitutionality of the individual mandate does not affect the rest of the law. That is to say, the individual mandate may be removed, leaving the other provisions of ObamaCare intact.

Justice Roberts concludes the section of his report dedicated to recusal by expressing his lofty regard for the ability of his colleagues to dispassionately weigh all the factors relevant to the recusal question. Roberts says: "I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law."

Photo of John Roberts: AP Images