

# [***Supreme Court Justices Apply New Ethics Code Differently***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6BRY-3XT1-DY68-117W-00000-00&context=1516831)

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**Highlight:** Since the court adopted its first code of conduct, liberal justices have been explaining their recusal decisions, but conservatives justices have not.

**Body**

[*Supreme Court*](https://www.newsweek.com/topic/supreme-court?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) justices are divided along political lines over whether or not to explain their recusals, and legal experts are very concerned.

Liberal justices are giving full disclosure about these ethics code decisions, but their conservative colleagues are not, and so the court could be seen as acting politically, Professor Charles Geyh, of the Indiana University Maurer School of Law, told *Newswee*k.

"We have entered an era in which the Supreme Court's legitimacy is imperiled by the perception that the Court is not impartial—that it is motivated less by the rule of law than by its own political agenda," said the expert on judicial ethics.

The court adopted its first code of conduct in November, 2023, after fierce criticism and under pressure because of [*undisclosed gifts, and trips and other scandals*](https://www.newsweek.com/ethics-scandals-supreme-court-justice-spouses-1797768?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships). However, the policy was [*immediately met with criticism*](https://www.newsweek.com/supreme-court-ethics-code-backfires-immediately-1843356#:~:text=The%20U.S.%20Supreme%20Court%20announced,prompting%20criticism%20on%20social%20media.?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) as it did not impose any significant new requirements on the justices and lacked an enforcement mechanism.

In a statement announcing the new code, the court said it aimed to dispel the "misunderstanding" that the absence of explicit rules meant the justices "regard themselves as unrestricted by any ethics rules."

The split between the three members of the court's liberal wing and the six conservative justices bolsters criticism that the code is insufficient.

"Failure to disclose why a justice recuses maybe harm the public's perception of the court because it limits transparency and potentially undermines procedural fairness." Alex Badas, an expert on judicial ***politics*** and assistant professor of political science at University of Houston, told *Newsweek*.

"In many ways, the court is the least transparent government institution. Most of the deliberations are private, the justices rarely give interviews, and the court's opinions are dense and filled with legal jargon that is inaccessible to most.

"If the justices recuse without justification, it may further highlight that the court's working largely happen outside of the view of the public. The lack of transparency can limit accountability."

Geyh added that the court should be concerned about its "perceived legitimacy" because "public respect for the court and continued compliance with its orders depends on it."

Earlier this month, [*the court declined to take up a case*](https://www.newsweek.com/supreme-court-refuses-take-amy-coney-barrett-case-1885574?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) that led to an influential 2019 decision on campus sexual assault from a three-judge panel of the 7th U.S. Circuit Court of Appeals that included Justice [*Amy Coney Barrett*](https://www.newsweek.com/topic/amy-coney-barrett?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships).

A brief order denying a petition for a writ of certiorari—a review of a lower court decision by the Supreme Court—said Barrett had taken no part in the decision, without elaborating further.

While it is routine for justices to sit out cases they heard on a lower court, the lack of explanation about Barrett's recusal is evidence of the apparent political divide right from when the court first released its ethical guidelines, according to Badas.

**The code**

[*The code*](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) calls for justices to recuse when they have financial, professional or personal conflicts. It says recusal is only needed when "the justice's impartiality might reasonably be questioned, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the justice could fairly discharge his or her duties." However, it adds that the "rule of necessity may override the rule of disqualification."

Justices are not required to explain their recusal decisions, but the high court's liberal wing has been doing so since November, Badas added. There have been a total of 37 recusals since the high court issued the statement about its code of conduct on November 13, he said.

"Twenty-eight of the recusals are from justices appointed by [*Republican*](https://www.newsweek.com/topic/republican?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) presidents," he said. "In none of the 28 recusals did the justice cite a specific reason for their recusal. Nine of the recusals are from justices appointed by Democratic presidents. In all 9 of these recusals, the justices cited a specific reason for their recusal."

Badas pointed to a list of orders in pending cases issued by the court on March 18 as a "great example" of this trend. Justice [*Samuel Alito*](https://www.newsweek.com/topic/samuel-alito?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships), a member of the court's conservative wing, "recused from the consideration of two petitions," he said. "In neither case does the order list cite a specific reason for his recusal."

In contrast, Justice [*Elena Kagan*](https://www.newsweek.com/topic/elena-kagan?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships), one of three liberal justices, recused from the consideration of one petition and "her recusal lists specific provisions of the Code of Conduct for Justices of the Supreme Court to explain why she recused herself in this case."

The Supreme Court had also issued a set of orders on the day it released its statement regarding the code of conduct.

"In that set of orders, Justice Kagan recused and cited a specific provision of the Code of Conduct," Badas said. "This shows that the trend of [*Democrats*](https://www.newsweek.com/topic/democrats?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) citing the Code of Conduct to explain their recusals started at the release of the statement."

In another example, he pointed to an order list from January where [*all six conservative justices recused themselves*](https://www.newsweek.com/every-conservative-supreme-court-justice-skips-decision-rare-move-texas-1858711#:~:text=Every%20conservative%20justice%20on%20the,whether%20to%20hear%20MacTruong%20v.?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) from a case, *MacTruong v. Abbott et al*, without providing any explanation or reference to the Code of Conduct.

The court's announcement about its code of ethics in November was met with criticism, with one advocacy group saying it "reads a lot more like a friendly suggestion than a binding, enforceable guideline."

**A solution?**

Sen. Sheldon Whitehouse, a Democrat, has proposed a court ethics code that would require that justices provide more information about potential conflicts of interest and require them to explain their recusal decisions to the public. It would also seek to improve transparency around gifts received by justices and allow for complaints and investigation by judges on lower courts.

Whitehouse's Supreme Court Ethics, Recusal and Transparency Act cleared the [*Senate*](https://www.newsweek.com/topic/senate?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) Judiciary Committee without any Republican support, but the Democrat-backed bill has little chance of approval by a Republican-controlled House and closely-divided Senate.

Geyh pointed to the Supreme Court's ruling *Caperton v. Massey Coal Company* to explain why there "may be an ideological alignment to best disqualification practices."

In that case, the court ruled that "a party's due process right to an impartial judge required the disqualification of a state Supreme Court justice under circumstances in which his participation would give rise to a probability of bias," he said.

Conservative justices dissented, arguing that judges "are entitled to a presumption of impartiality" and that enabling litigants to seek the disqualification of judges "would undermine public confidence in the courts by calling judicial impartiality into question more frequently."

**Presumption of impartiality**

Geyh added: "Commentary accompanying the Court's new code of conduct are consistent with the sentiments expressed by the dissenters in *Caperton*: The Court has added a 'presumption of impartiality' to the code, resurrected a 'duty to sit,' and added that the duty to disqualify can be trumped by the 'rule of necessity'—all to the end of making the (problematic) point that the need to avoid tie votes on the Court justifies its justices in being subject to less frequent disqualification than lower court judges."

National organizations such as the Brennan Center for Justice "have studied the problems" and "have recommended that judges offer reasoned explanations for their disqualification decisions," Geyh said.

"But the old school approach (which takes the presumption of impartiality as seriously as a heart attack) is to keep explanations to a minimum."

The high court, he said, "needs to be mindful that ​the 'presumption of impartiality' is not so strong as to permit justices to preside when a skeptical public entertains reasonable doubts about their impartiality in a given case.

"And when a justice decides against disqualification after being requested to do so, offering a reasoned explanation for their decision can go a long way toward overcoming the perception that the justice was acting arbitrarily."

Badas added that justices not providing an explanation for their recusal may spark speculation about why.

If the public "think that the court is treating everyone fairly and following standard procedures, they will approve of the court," he said. "When people begin to question the court's procedural fairness, they start to evaluate the court more negatively. Without a clear indication of why a Justice is recusing in a way, it is harder to evaluate the extent to which that recusal is justified and standard procedure."

[*Link to Image*](https://d.newsweek.com/en/full/2374766/supreme-court-justices-apply-ethics-code-differently.jpg)

**Graphic**

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