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The Supreme Court's Inadequate Recusal Policy

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U.S. Supreme Court justices can use concurring opinions to clarify, amplify, or even distance themselves from the majority opinion of the Court. Sometimes, the simple fact of concurrence, without any explanation, can tell us a great deal—perhaps more than intended—about a justice's outlook and approach to the law. That is what happened when Justice Amy Coney Barrett joined Chief Justice Roberts's 6-3 majority opinion in *Americans for Prosperity Foundation v. Bonta*, a case in which she should have recused herself.

The Americans for Prosperity Foundation (AFPF) brought the lawsuit to challenge a California law requiring charitable organizations to disclose the identities of their major donors to the state attorney general's office. Organizations across the political spectrum, including the Cato Institute, the ACLU, and the NAACP, joined the litigation as *amici curiae*. It was the lead plaintiff, however, that created the conflict of interest for Justice Barrett. The AFPF happens to be the nonprofit arm of Americans for Prosperity, a Koch-financed advocacy organization that had publicly committed over $1 million to securing Barrett's confirmation.

Americans for Prosperity went all in for Justice Barrett, "launching a significant national ad campaign" on her behalf, focused on "eleven key states." Its "grassroots activists" made or sent over 750,000 telephone calls and letters to senators urging her confirmation. Although the seven-figure operation was officially conducted on behalf of the parent organization, rather than the foundation, there is no doubt that the two are virtual alter egos, essentially separated by nothing more than tax status. They operate out of the same office suite in Arlington, Virginia, where both outfits receive contributions. Two of the nonprofit foundation's three board members are also officers of Americans for Prosperity.

We know that Justice Barrett was well aware of Americans for Prosperity's lobbying on her behalf, because she was alerted to it by Sen. Sheldon Whitehouse (D-RI), Sen. Richard Blumenthal (D-CT), and Rep. Hank Johnson (D-GA). In a letter to Justice Barrett, dated April 16, 2021, the three Democrats called on her to recuse herself from the *AFPF* case, which had recently been accepted by the Supreme Court.

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Detailing Americans for Prosperity's efforts to secure Justice Barrett's confirmation, the letter accurately pointed out that the federal recusal statute, 28 U.S.C. § 455(a), provides that a

Supreme Court justice is disqualified in any proceeding in which her "impartiality might reasonably be questioned." The test under the statute, as articulated by SCOTUS in *Liljeberg v. Health Services* (1988), is an objective one. It does not require evidence of actual bias, but only a showing of circumstances in which the judge's or justice's "impartiality could reasonably be doubted."

There is also a relatively recent Supreme Court case on point, holding that extensive campaign contributions can raise sufficiently disqualifying doubts about a justice's impartiality. In *Caperton v. A.T. Massey Coal Co.* (2009), the Court found that a justice of the West Virginia Supreme Court should have recused himself in a case involving a major campaign contributor, stating that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence" in placing the justice on the bench.

If there is any distinction between the *AFPF* and *Caperton* cases, Justice Barrett did not make it. Unlike her mentor, the late Justice Antonin Scalia—who wrote an extensive opinion explaining his 2004 non-recusal in the controversial duck-hunting case—Justice Barrett did not respond at all to the letter from Sen. Whitehouse and his colleagues. She participated vigorously in the oral argument of the *AFPF* case, and fully joined the majority opinion in favor of *AFPF* without ever acknowledging the significant question about her impartiality.

It has been the Supreme Court's "historic practice" to leave recusal questions to the determination of each individual justice, rather than submit them to the full court. The unfortunate consequence of that approach is fully evident in this instance, where Justice Barrett has seemingly disregarded both a federal statute and a previous SCOTUS decision.

There is no mechanism to force a justice to adhere to the Court's own prior rulings in their ethical conduct, or to hold them accountable for failing to do so. Self-regulation, in other words, does not work. In fact, it creates an essential imbalance, as those justices who conscientiously follow recusal practices take themselves out of cases, while those with no such concerns do not.

Justice Barrett's recusal in the *AFPF* case would not have set an expansive precedent. Justices Brett Kavanaugh and Neil Gorsuch were also the beneficiaries of lobbying by Citizens for Prosperity, but the *AFPF* case had not yet been pending before SCOTUS during the confirmation campaigning—as it was for Justice Barrett—and thus there was no basis for their disqualification.

In our highly polarized era, we must look to the courts more than ever for neutrality, independence, and objectivity. A justice who sufficiently valued the appearance of impartiality would not have participated in *Americans for Prosperity Foundation v. Bonta*.