The Court’s Recusal Problem

Supreme Court justices have life tenure to assure their independence and impartiality. The court’s lack of a recusal policy leaves each justice to decide whether he or she is meeting that standard. That plainly violates the age-old legal principle: Nemo iudex in causa sua — no one should be a judge about his or her own case. It damages the justices’ credibility and the court’s authority.

The court is still not addressing the issue despite months of questions about possible cozy friendships, suspected political biases and family ties. Last week, Justice Antonin Scalia was asked to recuse himself from an upcoming case about alleged gender bias at Wal-Mart Stores because his son is co-chairman of the labor and employment practice at the law firm representing the company.

A bipartisan group of 107 law professors from 76 law schools have made their own proposal for how the court should solve its recusal problem. They argue that justices should follow the ethical code that applies to other federal judges. (Under the rule about avoiding the appearance of impropriety and not letting others “convey the impression that they are in a special position to influence the judge,” Justice Antonin Scalia would not have been able to go duck hunting with Vice President Dick Cheney in 2003 after the court agreed to hear a case involving Mr. Cheney.)

If a justice denies a motion to recuse, he or she should have to issue an opinion explaining why and that could be reviewed by some as yet unspecified group.

The professors’ proposal is a good start. Representatives Chris Murphy and Anthony Weiner are working on a bill based on it. It would be better for the justices to come up with their own similar proposal and adopt it — including a review process by a committee of justices to ensure accountability. That would not interfere with the court’s independence and would strengthen its credibility.

If the justices don’t act, Congress may have to require them to adopt a more transparent recusal process. That’s not our first choice. But the questions about the court’s impartiality are too serious to ignore.