1440 G St. N.W.
Washington, D.C., 20005

Hon. Neil M. Gorsuch
Associate Justice of the Supreme Court
Supreme Court of the United States
One First Street N.E.
Washington, D.C., 20543

December 7, 2017

Dear Justice Gorsuch:

This is Gabe Roth, executive director of Fix the Court, the nation's only nonpartisan organization that advocates for a more open and accountable federal judiciary.

I am writing today to request that you justify your reasoning, in light of current recusal statutes and ethics guidelines, for sitting on an upcoming OT17 case despite perceived partiality in it. (I am sending a similar letter to Justice Ginsburg requesting she also release a statement given her presumed bias in certain cases.)

You gave a talk on Sept. 28 at Trump International Hotel in Washington, D.C., to The Fund for American Studies. TFAS is an associate member of the State Policy Network, whose affiliates are litigating the nationwide effort to end compulsory union fees, including in *Janus v. AFSCME*, which the Supreme Court will hear early next year.

Notwithstanding how it looks for a justice to give a speech at a property whose namesake is a current high court litigant, I believe you should state your reasoning as to why you can legally sit on the *Janus* case given how such participation appears improper to those familiar with the above facts.

There is precedent, of course, for justices to explain why they believe they can hear a case even when recusal may appear to be the proper course of action. One of the best-known examples is Justice William Rehnquist's 1972 memorandum regarding *Laird v. Tatum*, in which he "determined that it would be appropriate […] to state the reasons which have led to [his] decision" to participate, despite having publicly discussed the central issue of the case – government spying on anti-war protesters – while working in the Justice Department the previous year.

The fact that such views were aired, he wrote, "cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification," and Rehnquist voted on the case.

Similarly, Justice Antonin Scalia released a statement regarding *Cheney v. U.S. District Court* in 2004, when his impartiality was questioned for having taken part in a hunting trip with the petitioner, Vice President Richard Cheney, a few months before the case was argued. Citing his earlier *sub judice* recusal in a case on the constitutionality of the words "under God" in the Pledge of Allegiance, Scalia wrote, "[R]ecusal is the course I must take – and will take – when, on the basis of established principles and practices, I have said or done something which requires that course."

Scalia added: "I believe, however, that established principles and practices do not require […] recusal in the [*Cheney*] case," and he participated in it.

Here, Fix the Court does not seek to file a recusal motion but simply requests that you release a brief statement explaining your reasoning behind sitting on the case referenced above.

At a time when faith in public officials is waning, being more direct about potential conflicts would do a lot of good to restore that trust. I am hopeful that this type of transparency becomes the rule in close cases – and not the exception.

Sincerely,

Gabe Roth
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