

THE FEDERAL JUDICIARY IN THE 21ST CENTURY:  
IDEAS FOR PROMOTING ETHICS,  
ACCOUNTABILITY, AND TRANSPARENCY

---

HEARING  
BEFORE THE  
SUBCOMMITTEE COURTS,  
INTELLECTUAL PROPERTY,  
AND THE INTERNET  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SIXTEENTH CONGRESS  
FIRST SESSION

---

JUNE 21, 2019

---

**Serial No. 116-29**

---

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

---

U.S. GOVERNMENT PUBLISHING OFFICE

37-378

WASHINGTON : 2022

COMMITTEE ON THE JUDICIARY

JERROLD NADLER, New York, *Chair*  
MARY GAY SCANLON, Pennsylvania, *Vice-Chair*

ZOE LOFGREN, California  
SHEILA JACKSON LEE, Texas  
STEVE COHEN, Tennessee  
HENRY C. "HANK" JOHNSON, JR., Georgia  
THEODORE E. DEUTCH, Florida  
KAREN BASS, California  
CEDRIC L. RICHMOND, Louisiana  
HAKEEM S. JEFFRIES, New York  
DAVID N. CICILLINE, Rhode Island  
ERIC SWALWELL, California  
TED LIEU, California  
JAMIE RASKIN, Maryland  
PRAMILA JAYAPAL, Washington  
VAL BUTLER DEMINGS, Florida  
J. LUIS CORREA, California  
SYLVIA R. GARCIA, Texas  
JOE NEGUSE, Colorado  
LUCY MCBATH, Georgia  
GREG STANTON, Arizona  
MADELEINE DEAN, Pennsylvania  
DEBBIE MUCARSEL-POWELL, Florida  
VERONICA ESCOBAR, Texas

DOUG COLLINS, Georgia,  
*Ranking Member*  
F. JAMES SENSENBRENNER, JR. Wisconsin  
STEVE CHABOT, Ohio  
LOUIE GOHMERT, Texas  
JIM JORDAN, Ohio  
KEN BUCK, Colorado  
JOHN RATCLIFFE, Texas  
MARTHA ROBY, Alabama  
MATT GAETZ, Florida  
MIKE JOHNSON, Louisiana  
ANDY BIGGS, Arizona  
TOM McCLINTOCK, California  
DEBBIE LESKO, Arizona  
GUY RESCHENTHALER, Pennsylvania  
BEN CLINE, Virginia  
KELLY ARMSTRONG, North Dakota  
W. GREGORY STEUBE, Florida

PERRY APELBAUM, *Majority Staff Director & Chief Counsel*  
BRENDAN BELAIR, *Minority Staff Director*

---

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE  
INTERNET

HENRY C. "HANK" JOHNSON, JR., Georgia, *Chair*  
LOU CORREA, California, *Vice-Chair*

THEODORE E. DEUTCH, Florida  
CEDRIC RICHMOND, Louisiana  
HAKEEM JEFFRIES, New York  
TED LIEU, California  
GREG STANTON, Arizona  
ZOE LOFGREN, California  
STEVE COHEN, Tennessee  
KAREN BASS, California  
ERIC SWALWELL, California

MARTHA ROBY, Alabama, *Ranking Member*  
STEVE CHABOT, Ohio  
JIM JORDAN, Ohio  
JOHN RADCLIFF, Texas  
MATT GAETZ, Florida  
MIKE JOHNSON, Louisiana  
ANDY BIGGS, Arizona  
GUY RESCHENTHALER, Pennsylvania  
BEN CLINE, Virginia

JAMIE SIMPSON, *Chief Counsel*  
THOMAS STOLL, *Minority Chief Counsel*

## CONTENTS

JUNE 21, 2019

### OPENING STATEMENTS

	Page
The Honorable Henry C. "Hank" Johnson, Jr., a Representative in the Congress from the State of Georgia, and Chairman, Subcommittee on Courts, Intellectual Property, and the Internet .....	1
The Honorable Martha Roby, a Representative in the Congress from the State of Alabama, and Ranking Member, Subcommittee on Courts, Intellectual Property, and the Internet .....	3
The Honorable Jerrold Nadler, a Representative in the Congress from the State of New York, and Chairman, Committee on the Judiciary .....	11
The Honorable Doug Collins, a Representative in the Congress from the State of Georgia, and Ranking Member, Committee on the Judiciary .....	18

### WITNESSES

Professor Amanda Frost, Professor of Law, American University Washington College of Law	
Oral testimony .....	26
Prepared Statement .....	28
Mr. Gabe Roth, Executive Director, Fix the Court	
Oral Testimony .....	37
Prepared Statement .....	39
Mr. Russell Wheeler, Visiting Fellow, The Brookings Institution	
Oral Testimony .....	46
Prepared Statement .....	48
Professor Charles Gardner Geyh, John F. Kimberling Professor of Law, Indiana University Maurer School of Law	
Oral Testimony .....	52
Prepared Statement .....	54

### LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

A letter from James C. Duff, Secretary of the Judicial Conference of the United States from the Honorable Martha Roby, a Representative in the Congress from the State of Alabama, and Ranking Member, Subcommittee on Courts, Intellectual Property, and the Internet .....	82
--	----

### APPENDIX

Questions to witnesses for the record from the Honorable Henry C. "Hank" Johnson, Jr., a Representative in the Congress from the State of Georgia, and Chairman, Subcommittee on Courts, Intellectual Property, and the Internet .....	92
Response to questions for the record from Professor Amanda Frost, Professor of Law, American University Washington College of Law .....	95
Response to questions for the record from Mr. Gabe Roth, Executive Director, Fix the Court .....	98
Response to questions for the record from Mr. Russell Wheeler, Visiting Fellow, The Brookings Institution .....	102
Response to questions for the record from Professor Charles Gardner Geyh, John F. Kimberling Professor of Law, Indiana University Maurer School of Law .....	104

IV

	Page
Remarks for the record of Chief Justice William H. Rehnquist, American Law Institute Annual Meeting, May 15, 2000 from Mr. Gabe Roth, Executive Director, Fix the Court .....	113
A 2011 Year-End Report on the Federal Judiciary for the record from Mr. Russell Wheeler, Visiting Fellow, The Brookings Institution .....	116
A white paper for the record from Professor Amanda Frost, Professor of Law, American University Washington College of Law entitled, “Judicial Ethics and Supreme Court Exceptionalism” .....	132
An article for the record from Professor Amanda Frost, Professor of Law, American University Washington College of Law entitled, “Keeping Up Appearances A Process-Oriented Approach to Judicial Recusal” .....	183
An article for the record from Mr. Russell Wheeler, Visiting Fellow, The Brookings Institution entitled, “A Primer on Regulating Federal Judicial Ethics” .....	246

**THE FEDERAL JUDICIARY IN THE  
21ST CENTURY: IDEAS FOR PROMOTING  
ETHICS, ACCOUNTABILITY, AND  
TRANSPARENCY**

---

**JUNE 21, 2019**

HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE  
INTERNET  
COMMITTEE ON THE JUDICIARY  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 9:03 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry C. "Hank" Johnson, Jr. [Chairman] presiding.

Present: Representatives Johnson, Nadler, Correa, Cohen, Deutch, Bass, Stanton, Roby, Collins, Chabot, Jordan, Johnson of Louisiana, Biggs, Reschenthaler, and Cline.

Staff Present: Rosalind Jackson, Professional Staff Member, Courts, Intellectual Property, and the Internet; Danielle Johnson, Counsel, Courts, Intellectual Property, and the Internet; Jamie Simpson, Chief Counsel, Courts, Intellectual Property, and the Internet; Matthew Robinson, Counsel, Courts, Intellectual Property, and the Internet; Daniel Ashworth, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

Mr. JOHNSON of Georgia. The Subcommittee will come to order. Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time.

We welcome everyone to this morning's hearing on "The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency." I will now recognize myself for an opening statement.

Good morning and welcome. Today we begin the first in a series of hearings on the state of the Federal judiciary in the 21st century. In this hearing we will investigate ideas for promoting ethics, accountability, and transparency in the Federal courts.

We focus on these ideas in our first hearing on the judiciary because they flow from two foundational principles of due process. First, that no one can be a judge in his own case. Second, to quote former Supreme Court Justice Felix Frankfurter, quote, "Justice must satisfy the appearance of justice," end quote. Justice must satisfy the appearance of justice.

Both rules embody the understanding that the Constitution's implicit promise of equal justice under law depends on at least two things: that our courts must be fair, independent, and impartial; and that we must also believe that our courts are fair, independent, and impartial.

Justice must satisfy the appearance of justice. It might take a second, but we intuitively understand that. It means that, as the Supreme Court recently explained, quote, "both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus the rule of law itself," end quote.

I think that is why people are so surprised when they learn that the Supreme Court isn't bound by a code of ethics, unlike nearly every other court in America. It just doesn't fit with their understanding of what it means to be a judge, let alone a justice of the United States Supreme Court. And that is why it is so concerning when a justice does something prohibited by the code of ethics they don't follow and that every other judge does.

That is why I was proud to introduce H.R. 1075, the Supreme Court Ethics Act, which would require a code of ethics for the Supreme Court.

I was also heartened to learn from Justice Elena Kagan's recent testimony that the Supreme Court may also be discussing whether to adopt a code of ethics on its own. This would be a welcome development, and I hope that this hearing and the show of support for my bill will encourage this discussion to continue in earnest.

I would like to turn to the second principle framing today's hearing, that no one can be a judge of their own case. Everyone understands this. That is why people find it so troubling that, when a potential conflict of interest arises, each justice decides for him or herself whether or not to be recused from a case without anyone else reviewing their decision.

The same basic concern arises when people learn that if they think a lower court judge is too biased to fairly decide their case, that same judge is the one who decides whether he or she needs to step aside.

The fact that judges don't normally explain these decisions doesn't make things any better.

I think it is clear that these problems aren't resolved if we think a judge or justice made the right decision or even when we reflect on the competence and integrity of each and every judge. We are talking about the rule of law, and that means rules and laws, not outcomes or individuals.

And that brings us to you. This is a distinguished panel, and I very much look forward to hearing your ideas on how Congress and this Subcommittee can help the courts solve these problems.

I also want to hear any concerns you might have, and I am especially interested in your thoughts on the constitutional principles at play when Congress establishes rules for judicial conduct and procedure. I hope you will be willing to work with us as we move forward from this hearing.

Thank you, and I look forward to your testimony.

And it is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentlewoman from Alabama, Mrs. Roby, for her opening statement.

Mrs. ROBY. Thank you, Chairman Johnson.

And thank you to all of our distinguished witnesses for coming to testify today.

I have seen firsthand the importance of the judiciary, and I am proud to be Ranking Member of this Subcommittee to help ensure our courts have the structure, tools, and resources to make sure they operate efficiently and effectively.

People all across the United States turn to the Federal court system to settle disputes and adjudicate cases in a fair and impartial manner. Our courts deal with intricate issues and complex law to reach a decision based on the merits of the case, and it is important that the public have trust in these judicial decisions.

Today's hearing is titled "The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency." Specifically, we are going to be discussing at this hearing a code of conduct for the Supreme Court justices, posting judge and justices' financial disclosures online, and the posting of recusal notices and a reason for the recusal online.

Congress should constantly be considering how we can work with the Federal judiciary for greater transparency and efficiency, and I am interested in hearing from our witnesses this morning.

However, I have concerns with the possible negative consequences from these proposals. Current proposals would require the Judicial Conference to create a code of conduct for Federal judges and justices. This is both questionable and repetitive. Federal judges are currently already covered by the Judicial Conference's Code of Conduct, and the Judicial Conference does not oversee the Supreme Court. It seems strange that we would have lower court judges creating a code of conduct for the highest court in the land.

There are also concerns that requiring a code of conduct for the Supreme Court would be unconstitutional. I also understand that Chief Justice Roberts is working on a code of conduct for the Supreme Court justices and would like to learn more about the progress that has been made in that effort.

There have been concerns raised with posting judges' financial disclosures online. With the high profile and sometimes contentious decisions that judges must make, there are unique safety and security concerns. I am from Alabama, and I remember quite vividly when Judge Robert Vance, serving on the 11th Circuit Court of Appeals, was assassinated.

These security concerns are not hypothetical, and they are very real. Judges face dangers from disgruntled former defendants and plaintiffs, and we should act cautiously when making more personal information available that could be used to threaten the safety of judges and their loved ones.

Disclosures of recusal explanations or a list of judges' recusals also raises concerns. Judges may recuse themselves from cases for a variety of reasons, many of which may be personal, and disclosure could be used by future litigants to gain an advantage.

There is no requirement that Members of Congress explain why they abstained from voting, and I think many of my colleagues would be opposed to such a requirement. We should fully examine what impact such a requirement might have.

In closing, while we should always look at ways to ensure that the courts are transparent, efficient, and effective when adjudicating cases, I have deep concerns with these proposed changes. I would caution that we should be sure to robustly scrutinize any legislative proposals for possible negative consequences and long-term implications for our judicial system.

I want to again thank our witnesses for their time, particularly on an early Friday fly-out morning, for being here.

So thank you very much, Mr. Chairman, and I yield back.

[The statement of Mrs. Roby follows:]

**Statement of Ranking Member  
Martha Roby  
Hearing on “The Federal Judiciary in the 21st Century: Ideas for  
Promoting Ethics, Accountability, and Transparency”  
House Judiciary Committee  
Subcommittee on the Courts, IP, and the Internet  
Friday, June 21, 2019**

---

**Thank you, Chairman Johnson, and thank you to  
all our distinguished witnesses for coming to testify  
today.**

**I have seen firsthand the importance of the  
Judiciary and I am proud to be Ranking Member of  
this Subcommittee to help ensure our courts have the  
structure, tools, and resources to make sure that they  
operate efficiently and effectively.**

**People all across the United States turn to the  
federal court system to settle disputes and adjudicate  
cases in a fair and impartial manner. Our courts deal  
with intricate issues and complex law to reach a**

**decision based on the merits of the case and it is important that the public have trust in these judicial decisions.**

**Today's hearing is titled "The Federal Judiciary in the 21<sup>st</sup> Century: Ideas for Promoting Ethics, Accountability, and Transparency." Specifically, we are going to be discussing at this hearing a code of conduct for Supreme Court Justices, posting judge and justices financial disclosures online, and the posting of recusal notices and a reason for the recusal online.**

**Congress should constantly be considering how we can make the Federal Judiciary more transparent and efficient, and I am interested in hearing from our expert witnesses this morning. However, I have**

**concerns with possible negative consequences from these proposals.**

**Current proposals would require the Judicial Conference to create a code of conduct for federal judges and justices. This is both questionable and repetitive. Federal judges are currently already covered by the Judicial Conference's Code of Conduct and the Judicial Conference does not oversee the Supreme Court. It seems strange that we would have lower court judges creating a code of conduct for the highest court in the land. There are also concerns that requiring a code of conduct for the Supreme Court would be unconstitutional. I also understand that Chief Justice Roberts is working on a code of conduct for Supreme Court Justices and**

would like to learn more about the progress that has been made in that effort.

There have been concerns raised with posting judge's financial disclosures online. With the high profile and sometimes contentious decisions that judges must make, there are unique safety and security concerns. I am from Alabama and remember when Judge Robert Vance, serving on the Eleventh Circuit Court of Appeals was assassinated by a mail bomb. These security concerns are not hypothetical, they are very real. Judges face dangers from disgruntled former defendants and plaintiffs, we should act cautiously when making more personal information available that could be used to threaten the safety of Judges or their loved ones.

**Disclosures of recusal explanations or a list of a judge's recusals also raises concerns. Judges may recuse themselves from cases for a variety of reasons, many of which may be personal, and disclosure could be used by future litigants to gain an advantage. There is no requirement that Members of Congress explain why they abstained from voting and I think many of my colleagues would be opposed to such a requirement. We should fully examine what impact such a requirement may have.**

**In closing, while we should always look at ways to ensure the courts are transparent, efficient, and effective when adjudicating cases, I have deep concerns with these proposed changes. I would caution that we should be sure to robustly scrutinize any legislative proposals for possible negative**

**consequences and long-term implications for our  
judicial system.**

**I want to again thank our witnesses for being with  
us today, especially early morning on a Friday. Thank  
you very much Mr. Chairman, I yield back.**

Mr. JOHNSON of Georgia. Thank you, Congresswoman.

I am now pleased to recognize the Chairman of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chairman NADLER. Thank you, Mr. Chairman, for holding this important hearing today.

The Federal judiciary is the pillar of our Nation's government, an institution nearly synonymous with upholding the rule of law. When Congress as a co-equal branch conducts oversight of the courts with hearings such as this one, it is with the following goal in mind: to promote and protect this vital institution in order to safeguard judicial independence and maintain public confidence in our courts.

Our Federal judiciary is the envy of the world, and Congress has an interest in ensuring that this hard-earned reputation is maintained. Today's hearing is part of that process. As the hearing title suggests, we are considering what is appropriate for a judiciary in the 21st century.

Now that we are squarely situated in the Information Age, in which we are accustomed to accessing practically any information with a click of a button, we should ask whether there needs to be greater transparency with respect to information regarding the Federal judiciary. For example, should we require the judges' financial disclosure forms, which could indicate potential conflicts of interest, be more easily accessible? And what sort of public disclosure should be made when a judge chooses not to recuse him or herself from a case? These questions go to the heart of ensuring that the public's trust in the judiciary remain strong.

Similarly, a key question for today's hearing is what, if anything, can Congress and the courts do to reinforce the judiciary's commitment to ethical conduct. What can we do to ensure that every judge's and every court's decisions regarding ethics and recusal are transparently made and procedurally fair? What can we do to make sure those decisions are understandable and accessible to the public?

On this front, I am glad to say there seems to be some bipartisan commitment to further action. Last Congress, the Judiciary Committee passed by voice vote the Judiciary ROOM Act, which included a provision requiring the Judicial Conference to develop a code of conduct that would apply to all Federal judges, including justices of the Supreme Court.

This Congress, two bills, H.R. 1, the For The People Act, and H.R. 1057, the Supreme Court Ethics Act of 2019 introduced by my colleague, Chairman Johnson, include an identical provision.

The ROOM Act also included a provision requiring the Supreme Court to post a short online explanation when a justice recuses her or himself from a case. I am interested to hear the views of our witnesses on that provision.

And I hope a future hearing will examine proposals to increase public access to the courts, such as the Electronic Courts Records Reform Act, which Ranking Member Collins has introduced, or legislation to make court proceedings publicly accessible by live or same-day audio or video along the lines of the Eyes on the Court Act, which I have introduced in prior years.

While I am interested in seeing what can be done to strengthen the courts, make no mistake that I respect the difficult and important job that all Federal judges and justices perform every day. Reckless, stained attacks on the integrity and legitimacy of individual justices and judges have become all too common. Physical threats against Federal judges and other court officers have dramatically increased as well. We cannot ignore these realities.

As both branches consider how to ensure that the judicial branch keeps pace with our evolving standards for transparency and accountability in a modern democracy, we must be mindful of the safety of our judges and the women and men who assist the courts in fulfilling their responsibilities.

Historically, our two branches have worked together to try to arrive at an appropriate approach to the difficult issue of balancing transparency and other concerns such as safety. I hope we can continue that dialogue in light of the changing times.

To that end, I look forward to hearing from all of our distinguished witnesses on these important topics.

Thank you again, Mr. Chairman. I yield back the balance of my time.

[The statement of Chairman Nadler follows:]

**Statement of the Honorable Jerrold Nadler, Chairman of the House  
Judiciary Committee, for the Hearing on the “The Federal  
Judiciary in the 21st Century: Ideas for Promoting Ethics,  
Accountability, and Transparency” Before the Subcommittee on  
Courts, Intellectual Property and the Internet**

**Friday, June 21, 2019, at 9:00 a.m.  
2141 Rayburn House Office Building**

Thank you, Mr. Chairman, for holding this important hearing today. The federal judiciary is a pillar of our nation’s government; an institution nearly synonymous with upholding the rule of law. When Congress, as a co-equal branch, conducts oversight of the courts with hearings such as this one, it is with the following goal in mind: to promote and protect this vital institution in order to safeguard judicial independence and maintain public confidence in our courts. Our federal judiciary is the envy of the world, and Congress has an interest in ensuring that this hard-earned reputation is maintained.

Today's hearing is part of that process. As the hearing title suggests, we are considering what is appropriate for a judiciary in the 21<sup>st</sup> century. Now that we are squarely situated in the information age—in which we are accustomed to accessing practically any information with the click of a button—we should ask whether there needs to be greater transparency with respect to information regarding the federal judiciary.

For example, should we require that judges' financial disclosure forms, which could indicate potential conflicts of interest, be more easily accessible? And what sort of public disclosure should be made when a judge chooses not to recuse him or herself from a case? These questions go to the heart of ensuring that the public's trust in the judiciary remains strong.

Similarly, a key question for today's hearing is what, if anything, can Congress and the courts do to reinforce the judiciary's commitment to ethical conduct? What can we do to ensure that every judge's and every court's decisions regarding ethics and recusal are transparently made and procedurally fair? What can we do to make sure those decisions are understandable and accessible to the public?

On this front, I am glad to say that there seems to be some bipartisan commitment toward further action. Last Congress, the Judiciary Committee passed by voice vote the Judiciary ROOM Act, which included a provision requiring the Judicial Conference to develop a code of conduct that would apply to all federal judges, including Supreme Court justices. This Congress, two bills, H.R. 1, the "For the People Act," and H.R. 1057, the "Supreme Court Ethics Act of 2019," introduced by my colleague Chairman Johnson, include an identical provision.

The ROOM Act also included a provision requiring the Supreme Court to post a short online explanation when a Justice recuses her- or himself from a case. I am interested to hear the views of our witnesses on that provision.

And I hope a future hearing will examine proposals to increase public access to the courts, such as the “Electronic Court Records Reform Act,” which Ranking Member Collins has introduced, or legislation to make court proceedings publicly accessible by live or same day audio or video along the lines of the “Eyes on the Courts Act,” which I have introduced in prior years.

While I am interested in seeing what can be done to strengthen the courts, make no mistake that I respect the difficult and important job that all federal judges and justices perform every day. Reckless, sustained attacks on the integrity and legitimacy of individual judges have become all too common. Physical threats against federal judges and other court officers have dramatically increased, as well.

We cannot ignore these realities. As both branches consider how to ensure that the judicial branch keeps pace with our evolving standards for transparency and accountability in a modern democracy, we must be mindful of the safety of our judges and the women and men who assist the courts in fulfilling their responsibilities.

Historically, our two branches have worked together to try to arrive at an appropriate approach to the difficult issue of balancing transparency and other concerns such as safety. I hope we can continue that dialogue in light of the changing times. To that end, I look forward to hearing from all of our distinguished witnesses on these important topics.

Thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you, Congressman Nadler.

I now recognize the distinguished Ranking Member of the Full Committee, the gentleman from Georgia, Representative Collins, for his opening statement.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate that. And also Ranking Member Roby.

I am glad we are holding this hearing. I think it is a great time. And I am glad to have the witnesses here on a Friday morning. What a way to start the weekend, you know. And I get a smile from most of you there.

But, again, this is a Subcommittee that is holding this hearing so Congress can promote ethics, accountability, and transparency in the Federal judiciary. The Federal judiciary serves a vital role in the United States by ensuring that all Americans have access to a fair and impartial system of justice.

The Federal judiciary has held itself to the highest standards of the legal profession, which has enabled it to serve as a pillar of our democracy. In doing so, it has built the level of institutional trust that is vital for it to continue in its role as arbiter in some of the most bitter disputes. In order to maintain that trust, courts must ensure that they are transparent and accountable to litigants and the American people.

While I generally support the idea that a Supreme Court should have its own code of conduct, I have some concerns with the proposals that have been put forward by the majority. Many of these concerns are specific to the function of the Supreme Court as the highest court in the land.

Difficult questions remain, such as, who would administer the code applicable to the Supreme Court? Having the Judicial Conference enforcing the code of conduct will mean lower court judges would be evaluating the conduct of justices.

Instead of imposing our will on the court, I would like to work with the Chief Justice to adopt a code of conduct that accounts for the unique realities of being a Supreme Court justice while maintaining appropriate public accountability.

While increased transparency and availability of judges' financial disclosure certainly would be an improvement for judicial transparency—the unique security concerns mostly were spoken of, but especially eloquently by our ranking member on this just a moment ago—it is a concern that Federal judges must be considered. Judges' lives are constantly at risk.

And for those of us who have worked in the court system, we see this more and more, not only from the prosecutor's standpoint, the defense standpoint, and the judges. And for those of us who have worked in the courts, that becomes a family. We know each other. We work with each other. And this has become more and more a concern, and I want to make sure that we consider that as we go forward.

While it is true Members of Congress' and the President's financial disclosure are posted online, Federal judges face different risk. Daily they work in close proximity to some of the most egregious offenders in our criminal justice system. The potential that financial disclosure would put a judge at risk—or their family—by a disgruntled litigant is very real and very concerning.

The public disclosure of a justice's recusal explanation also could have series unintended consequences, and it could result in the parties leveraging prior explanations to the benefit of a current client. Proposed recusal requirements raise similar constitutional concerns.

But that is why we are here. That is why Congress exists. That is why we have hearings. And this is something for us to bring to the table. And I am glad that you all are here, and I am glad that your statements have been—we will hear from those and the statements that have already been forwarded to us.

But I look forward to this work. I look forward to this committee's work. And I want to thank the chair not only of this subcommittee, but the ranking member of the subcommittee as well, put also the full committee chairman as well, and look forward to a wonderful hearing.

And I yield back.

[The statement of Mr. Collins follows:]

**Statement of Ranking Member Doug Collins**  
**Hearing on “The Federal Judiciary in the 21st Century: Ideas for**  
**Promoting Ethics, Accountability, and Transparency”**  
**House Judiciary Committee**  
**Subcommittee on Courts, IP, and the Internet**  
**Friday, June 21, 2019**

---

**Thank you, Chairman Johnson and Ranking Member Roby for holding this hearing, and thank you to all our distinguished witnesses for coming to testify today.**

**I commend this Subcommittee for holding this hearing to look at ways Congress can promote ethics, accountability, and transparency in the Federal Judiciary.**

**The Federal Judiciary serves a vital role in the United States by ensuring all Americans have access to a fair and impartial system of Justice.**

**The Federal Judiciary has held itself to the highest standards of the legal profession, which has enabled it to serve as a pillar of our Democracy.**

**In doing so, it has built a level of institutional trust that is vital for it to continue in its role as arbiter of the most bitter disputes. In order to maintain that trust, courts must ensure they are transparent and accountable to litigants and the American people.**

**While I generally support the idea that the Supreme Court should have its own Code of Conduct, I have some concerns with the proposals the majority has put forward. Many of these concerns are specific to the function of the Supreme Court as the highest court in the land.**

**Difficult questions remain, such as who would administer the Code applicable to the Supreme Court. Having the Judicial Conference enforcing the code of conduct would mean lower court judges would be evaluating the conduct of the Justices. Instead of imposing our will on the Court, I would like to work with the Chief Justice to adopt a Code of Conduct that accounts for the unique realities of being a Supreme Court Justice while maintaining appropriate public accountability.**

**While increased transparency and availability of judges' financial disclosures certainly would be a welcome improvement for judicial transparency, the unique security concerns of federal judges must be considered. Judges' lives are constantly at risk.**

**While it is true Members of Congress and the President's financial disclosures are posted online, federal judges face different risks. Daily, they work in close proximity to some of the most egregious offenders in our criminal justice system. The potential that a financial disclosure could put at risk a judge or their family by a disgruntled litigant is very concerning.**

**The public disclosure of Justices' recusal explanations also could have serious unintended consequences. It could result in parties leveraging prior explanations to benefit a current client.**

**Proposed recusal requirements raise similar Constitutional concerns.**

**In closing, I am thankful that we are holding this hearing and I am cautiously optimistic it will result in proposals to ensure transparency and accountability without unintended consequences.**

Mr. JOHNSON of Georgia. Thank you, Congressman Collins. I will now introduce today's witnesses.

Professor Amanda Frost is a Professor of Law at the American University Washington College of Law. She writes and teaches in the fields of constitutional law, immigration and citizenship law, Federal courts and jurisdiction, and judicial ethics. She has written numerous academic articles in such publications as the Duke Law Journal and the Northwestern Law Review. Her nonacademic work has been featured in publications such as the Atlantic and The New York Times.

Before entering academia, Professor Frost clerked for Judge A. Raymond Randolph on the U.S. Court of Appeals for the D.C. Circuit and was a staff attorney at Public Citizen. She has both her B.A. and J.D. from Harvard, and was a Fulbright Scholar.

Welcome.

Gabe Roth is the Executive Director of Fix the Court, a non-partisan organization solely focused on modernizing the Federal judiciary. Originally from Nashville, Tennessee, Mr. Roth began his career as a producer at the NBC affiliate in Jacksonville, Florida. He has a B.A. from Washington University in St. Louis and an M.S. in journalism from Northwestern University.

Welcome sir.

Russell R. Wheeler is a Visiting Fellow in the Brookings Institution's Governance Studies Program and President of the Governance Institute. He is also an Adjunct Professor at American University's Washington College of Law and is a Fellow of the University of Denver's Institute for the Advancement of the American Legal System. He is in his second term as a public member of the Administrative Conference of the United States.

Previously, he was the Deputy Director of the Federal Judicial Center, which he first joined in 1977. Before that, he also worked at the National Center for State Courts and the United States Supreme Court. He has written extensively on the United States courts, including on judicial ethics.

Mr. Wheeler has a Ph.D. in political science from the University of Chicago and a B.A. from the Augustana College in Illinois.

Welcome, sir.

Professor Charles Gardner Geyh is the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law in Bloomington, Indiana. His writings on judicial conduct, ethics, selection, independence, accountability, and administration include more than 70 books, book chapters, articles, reports, and other publications.

Prior to entering academia in 1991, he served as Counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice under Chairman Robert W. Kastenmeier. Professor Geyh has both his B.A. and J.D. from the University of Wisconsin.

Welcome, Professor. Welcome back home.

Now, we welcome all of our distinguished witnesses and thank them for participating in today's hearing. Before proceeding with testimony, I hereby remind each witness that all of your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18

U.S.C. section 1001, which may result in the imposition of a fine or imprisonment of up to 5 years or both.

Please note that each of your written statements will be entered into the record in its entirety. And accordingly, I ask that you summarize your testimony in 5 minutes.

To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

Professor Frost, you may begin.

**STATEMENTS OF PROFESSOR AMANDA FROST, PROFESSOR OF LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; MR. GABE ROTH, EXECUTIVE DIRECTOR, FIX THE COURT; MR. RUSSELL WHEELER, VISITING FELLOW, THE BROOKINGS INSTITUTION; AND PROFESSOR CHARLES GARDNER GEYH, JOHN F. KIMBERLING PROFESSOR OF LAW, INDIANA UNIVERSITY MAURER SCHOOL OF LAW**

**STATEMENT OF AMANDA FROST**

Ms. FROST. Thank you, Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee. My name is Amanda Frost, and I am a Professor of Law at American University Washington College of Law, where I teach and write in the areas of civil procedure, Federal courts, and judicial ethics.

One of this country's great strengths is its Federal courts, the politically insulated third branch of government that serves not only to check the other two branches of government, but also to decide legal questions affecting millions of Americans.

Although all Federal judges wield great authority, in particular, the nine justices on the U.S. Supreme Court are powerful because their decisions apply nationwide and in constitutional cases are irreversible.

For that reason, it is essential both that the judges on these courts are fair and impartial and that they be perceived by the public as being fair and impartial.

The purpose of the ethics and recusal laws we are here to discuss today is not only to protect litigants and society from potentially biased or conflicted decisions, but also to protect the judiciary itself from being tarnished by allegations of impropriety.

Protecting the court's reputation is particularly important today, when Gallup polls have shown that the public's confidence in the courts has declined over the last few decades.

There are two changes to existing ethics rules and laws that could help to improve the public's confidence in the courts, as well as the quality of the court's decisionmaking.

First, the Code of Conduct, which provides ethical guidelines for judges, currently does not apply to the nine justices on the U.S. Supreme Court. Likewise, the Judicial Conduct and Disability Act of 1980, which authorizes investigations into allegations of misconduct by judges and also authorizes sanctions in appropriate cases, also does not apply to the U.S. Supreme Court.

The omission of the Supreme Court justices from the ethical rules that govern the rest of the Federal judiciary undermines the

goal of these laws to protect the reputation of the third branch of government. Congress can and should change this.

Now, some people argue that there is no reason to expand these laws to apply to the justices because some justices have publicly stated that they follow the Code of Conduct. But voluntary compliance is not equivalent to a mandatory ethics standard either in the eyes of the public or, experience has shown, in the eyes of the justices themselves.

We do not have to look far to find many specific examples of conduct by justices that violate specific provisions of the Code. For instance, Justices Antonin Scalia and Clarence Thomas have spoken at fundraising events for the Federalist Society, which is in conflict with Canon 4C of the Code's provision stating that a judge, quote, "may not be a speaker, a guest of honor, or featured on the program of a fundraiser," end quote.

More recently, political statements by Justice Ruth Bader Ginsburg criticizing then candidate Donald Trump and overtly partisan statements by Justice Brett Kavanaugh during his confirmation hearings appeared to violate several of the canons, including Canon 5's prohibition against making statements regarding political candidates or engaging in political activity.

In short, we cannot rely on the justices to police themselves.

Second, Congress should amend the recusal statute, 28 U.S.C. Section 455, to require, at a minimum, that judges and justices provide an explanation for their decision to recuse or remain on a case when challenged.

In addition, Congress should put in place—or encourage judges to put in place—procedures to refer recusal requests to another judge on the court in at least some cases.

Both of these changes are well within Congress' constitutional authority. Congress has already enacted myriad pieces of legislation regarding ethics, recusal, and judicial administration, as is appropriate under the Necessary and Proper Clause of the Constitution.

As most justices themselves recognize, the judiciary's reputation is essential to its institutional legitimacy, that is to the public's respect for and willingness to abide by its decisions. The changes I have discussed would bolster the court's reputation and safeguard its integrity, and thus will strengthen and not diminish the third branch of government.

Thank you for your attention, and I look forward to your questions.

[The statement of Ms. Frost follows:]

United States House of Representatives, Committee on the Judiciary  
Subcommittee on the Courts, Intellectual Property and the Internet

*The Federal Judiciary in the 21st Century:  
Ethics, Accountability, and Transparency*

June 21, 2019

Amanda Frost  
Professor of Law, American University Washington College of Law

## INTRODUCTION

Thank you for inviting me to be a witness today to discuss ethics, accountability, and transparency in the federal judiciary.

I am a professor of law at American University Washington College of Law, where I teach Civil Procedure and Federal Courts. Over the past two decades, I have published numerous articles on laws and policies regarding judicial recusal and judicial ethics, as well as on the power of Congress to regulate the courts. I have testified on these and related issues before this subcommittee, as well as before the Senate Judiciary Committee, and I worked on some of these issues when I served as a fellow on the Senate Judiciary Committee in 2006. I have submitted two of my articles for the record in this hearing: *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 Kansas Law Review 531 (2005), and *Judicial Ethics and Supreme Court Exceptionalism*, 26 Georgetown Journal of Legal Ethics 443 (2013), both of which address the issues I will be testifying about today.

My testimony will begin with a brief overview of the existing laws governing the regulation of judicial ethics and recusal. I will then describe the ways in which these laws should be expanded and amended to better serve the purpose of protecting the legitimacy of the federal judiciary generally and the Supreme Court in particular. I will conclude by discussing Congress's constitutional authority to regulate judicial ethics and recusal rules for the lower federal courts and the U.S. Supreme Court.

### **I      OVERVIEW OF EXISTING RECUSAL AND ETHICS LEGISLATION GOVERNING THE FEDERAL JUDICIARY.**

Congress has long assumed the power to regulate judicial ethics and recusal, along with many other aspects of judicial administration.

#### **1. Recusal Laws**

In 1792, Congress passed the first statute requiring lower federal court judges to recuse themselves under certain circumstances.<sup>1</sup> Over the next two hundred years, Congress regularly modified and broadened recusal laws,<sup>2</sup> and in 1948, Congress expanded the law to apply to the justices on the U.S. Supreme Court.<sup>3</sup> That statute, 28 U.S.C. § 455, requires “[a]ny justice, judge, or magistrate judge of the United States” to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” In addition, that statute lists a number of specific circumstances mandating a judge’s disqualification, such as the judge or justice’s

<sup>1</sup> Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792).

<sup>2</sup> Section 144 of Title 28, which applies only to district court judges, requires the recusal of a judge who has a “personal bias or prejudice in the matter.” A third statute, Section 47 of Title 28, provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” Although this statute applies only to lower court judges, Supreme Court justices generally recuse themselves from cases they heard or decided when sitting on lower courts.

<sup>3</sup> 28 U.S.C. § 455.

participation in the case as a lawyer in private practice or government, pecuniary interest in the outcome, or a family connection to a lawyer or party to the case.

#### **2. The Ethics in Government Act of 1978**

The Ethics in Government Act of 1978 requires most high-level federal officials in all three branches of government to file annual reports in which they publicly disclose aspects of their finances, such as their outside income, the employment of their spouses and dependent children, investments, reimbursement for travel-related costs, gifts, and household liabilities.<sup>4</sup> Any person who “knowingly and willfully” falsifies such a report, or fails to file a report, is subject to civil and criminal penalties.<sup>5</sup> The Act applies to all federal judges, including Supreme Court justices.

#### **3. The Ethics Reform Act of 1989**

The Ethics Reform Act of 1989 places strict limits on outside earned income and gifts for all federal officials, including federal judges. Judges and justices are prohibited from outside employment with the exception of teaching, for which any compensation must be pre-approved by the Judicial Conference. In addition, they may not accept honoraria for an appearance, speech, or article, though reimbursement for travel expenses is permitted. The Act also bars judges and justices from receiving gifts from anyone whose “interests may be substantially affected by” the performance of their duties.<sup>6</sup>

#### **4. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980**

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 applies only to lower court judges, not the justices on the U.S. Supreme Court. The Act authorizes anyone to file a complaint alleging that a judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>7</sup> Complaints are reviewed by the Chief Judge of the Circuit, who may appoint a committee of district and circuit court judges to investigate further. If wrongdoing is found, the judge may be censured, barred from receiving new cases for a “time certain,” or asked to retire. In egregious cases, the matter may be referred to the House of Representatives with a recommendation to begin impeachment proceedings.<sup>8</sup>

#### **5. The Code of Conduct for United States Judges**

The Code of Conduct for United States Judges also applies only to lower federal court judges, and not the justices on the U.S. Supreme Court.<sup>9</sup>

---

<sup>4</sup> 5 U.S.C. app. 4, § 102 (2012).

<sup>5</sup> 5 U.S.C. app. 4, § 104(a).

<sup>6</sup> 5 U.S.C. § 7353(a)(2) (2011).

<sup>7</sup> 28 U.S.C. § 351(a) (2006).

<sup>8</sup> 28 U.S.C. § 355(b).

<sup>9</sup> Code of Conduct for United States Judges, available at [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf).

The Code is not a federal statute, but rather a set of ethical guidelines adopted by the Judicial Conference in 1973 to protect the “integrity and independence of the judiciary.”<sup>10</sup> The Judicial Conference has authorized its Committee on Codes of Conduct to issue advisory opinions about whether proposed future conduct violates the Code when requested by a judge.

Although the Code is intended to provide “guidance” to judges on ethical matters, its canons are not optional. Commentary to Canon 1 of the Code explains that it may “provide standards of conduct for application in proceedings under the Judicial Conduct and Disability Act of 1980,” although it also cautions that “[n]ot every violation of the Code should lead to disciplinary action.”<sup>11</sup>

## II. DEFICIENCIES OF EXISTING RECUSAL AND ETHICS LEGISLATION.

Existing laws governing judicial recusal and judicial ethics fall short of ensuring transparency and accountability in the federal judiciary in at least two respects.

**First**, neither the Code of Conduct nor the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 apply to the justices of the U.S. Supreme Court, leaving the nine justices at the top of the federal judiciary unaccountable to anyone but themselves when it comes to their ethical conduct.

**Second**, the primary recusal statute, 28 U.S.C. § 455, does not provide procedures to guide the litigants seeking to disqualify a judge or justice, or to the jurist who has been asked to recuse herself. The result is an ad hoc and arbitrary process that undermines the recusal statute’s goal of protecting the reputation of the federal judiciary.

### **1. The Supreme Court Should Be Subject to Ethical Rules Akin to Those That Apply to the Lower Courts.**

The Supreme Court is bound by neither the Code of Conduct, which lays out the ethical standards that guide the lower courts, nor the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which establishes the mechanism to investigate and sanction judges who violate the Code of Conduct or commit other transgressions.

The nine justices of the Supreme Court sit atop the federal judiciary, and they provide what is often the last word on the nation’s most pressing legal questions. Their decisions can affect the status of millions—from marital status to immigration status to employment status—and can impose significant financial costs on large sectors of the economy. In constitutional cases, their rulings are final absent constitutional amendment. In light of the scope of the justices’ power and their role at the head of the federal judiciary, it is anomalous that they alone are free from the ethical constraints that govern the rest of the federal judiciary.

Moreover, the justices’ exclusion from these ethics laws is harmful not just to the litigants and others affected by their decisions, but to the federal judiciary itself. Such laws are enacted to ensure that “justice satisfied the appearance of justice,” which in turn “promote[s]

---

<sup>10</sup> Code of Conduct for United States Judges at 2-3, Canon 1.

<sup>11</sup> Code of Conduct for United States Judges at 3, Canon 1 cmt.

public confidence in the integrity of the judicial process.”<sup>12</sup> When the justices on the nation’s highest court are free from ethical limits and oversight, that omission undermines the public’s faith in the federal courts.

Protecting the judiciary’s reputation is particularly important today, when the public’s confidence in the U.S. Supreme Court is “relatively low” as compared to the past.<sup>13</sup> As most justices themselves recognize, the judiciary’s reputation is essential to its institutional legitimacy—that is, to the public’s respect for willingness to abide by judicial decisionmaking. For that reasons, scholars of the federal court system suggest that the public’s perceptions of the judiciary’s independence and integrity is the primary source of its legitimacy, and ultimately its power.<sup>14</sup>

Some claim that because the nine Supreme Court justices are subject to a heightened level of public attention and scrutiny, they are more accountable than the less visible judges on the lower courts. Although the justices are in the public eye far more often than their counterparts on the lower courts, if anything that attention makes their lack of clear standards and accountability mechanisms more damaging to the reputation of the judiciary as a whole. Because the justices are not subject to these laws, complaints about their conduct are more likely to be hashed out in the press rather than among judicial colleagues. Furthermore, the public is likely to assume that because the Supreme Court justices have no code of conduct or disciplinary mechanism, the lower federal court judges are similarly unconstrained.<sup>15</sup>

Finally, some argue that the justices already follow the Code of Conduct, and so there is no need to alter the law to make it expressly apply to them. In his 2011 Year-End Report, Chief Justice John Roberts asserted that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations,” even though it does not apply to them,<sup>16</sup> and several justices have publicly stated that they follow the Code.<sup>17</sup>

Nonetheless, some of the justices’ extra-judicial activities and public commentary are inconsistent with the Code. For instance, Justices Antonin Scalia and Clarence Thomas were allegedly speakers at a fundraising event for the Federalist Society, which is at odds with Canon 4C’s provision stating that a judge “may not be a speaker, a guest of honor, or featured on the program” of a fundraiser.<sup>18</sup> Justice Ruth Bader Ginsburg has spoken at events sponsored by the

<sup>12</sup> *Liljeberg v. Health Servs. Acquisition Corp.*, 48 U.S. 847, 860 (1998) (citing S. Rep. No. 93-419, at 5 (1973)).

<sup>13</sup> Megan Brenan, “Confidence in Supreme Court Modest, but Steady,” *Gallup* (July 2, 2018), <https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx>.

<sup>14</sup> RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

<sup>15</sup> See generally Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 Kansas Law Review 531 (2005) (describing the publicity surrounding debates of Justice Antonin Scalia’s refusal to recuse himself from a case after a vacation with a government litigant).

<sup>16</sup> 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), at 4, available at <https://www.supremecourt.gov/publicinfo/year-end/2011/year-endreport.pdf>.

<sup>17</sup> Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules, Kennedy, Breyer Say*, 79 U.S. L. Wkly. 2389, 2389 (Apr. 19, 2011).

<sup>18</sup> See “A Question of Integrity: Politics, Ethics, and the Supreme Court,” ALLIANCE FOR JUSTICE, <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/federalist-society-fundraiser.pdf>; see also

National Organization for Women, and Justice Stephen Breyer has attended the Renaissance Weekend, an event closely associated with Bill and Hillary Clinton.<sup>19</sup> Attendance at either event could be viewed as violating Canon 5's requirement that judges "refrain from political activity."<sup>20</sup> More recently, political statements by Justice Ginsburg and then-Judge Brett Kavanaugh appeared to violate several of the Code's ethical canons.<sup>21</sup> Citing these activities, Members of Congress and numerous newspaper editorials and op-eds have called for the Justices to agree to be bound by the Code of Conduct or variations on it.<sup>22</sup>

## 2. Recusal Laws Laws Should be Amended to Include Procedures Guiding Litigants and Judges

Although 28 U.S.C. § 455 lists the circumstances under which federal judges must recuse themselves, it does not describe the procedures to be followed by litigants and judges. As a result, the process by which judges decide whether to recuse themselves ignores the systems typically employed to resolve disputes in a fair and impartial manner. As a general matter, the recusal process is not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation of the judge's decision. Most troubling, the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself with very limited opportunity for review, even though that judge has an obvious personal stake in the matter.<sup>23</sup>

---

Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, TAKING NOTE, (Nov. 10, 2011, 4:30 PM), <http://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice/>.

<sup>19</sup> Jeff Shesol, Op-Ed, *Should the Justices Keep their Opinions to Themselves?*, N.Y. TIMES, Jun. 28, 2011, at A23.

<sup>20</sup> See Editorial, *The Justices' Junkets*, Washington Post, Feb. 20, 2011, A14 (criticizing Justices Breyer, Ginsburg, and Sotomayor for taking foreign trips paid for by organizations with "liberal agendas")

<sup>21</sup> Editorial, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, Washington Post, Jul. 12, 2016 (criticizing Justice Ginsburg for negative comments about Donald Trump, the then presumptive Republican nominee for President, which violated Canon 5 of the Code of Ethics prohibiting judges from "publicly endorsing[ or oppos[ing] a candidate for public office"). Robert H. Tembeckjian, Op-Ed, *The Supreme Court Should Adopt an Ethics Code*, Washington Post, Feb. 5, 2019 (describing complaints that then-Judge Kavanaugh "displayed partisan bias" during his confirmation hearings).

<sup>22</sup> See Letter from Richard Durbin, et al., U.S. Senators, to John Roberts, Chief Justice of the United States (Feb. 13, 2012), available at <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/letter-to-supreme-court-2-13-12.pdf>. See also Robert H. Tembeckjian, Op-Ed, *The Supreme Court Should Adopt an Ethics Code*, Washington Post, Feb. 5, 2019.

<sup>23</sup> Fong v. Am. Airlines, Inc., 431 F. Supp. 1334, 1335 (N.D. Cal. 1977) (noting that 28 U.S.C. § 455 "does not provide the procedure for its enforcement"). See generally Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 Kansas L. Rev. 531 (2005). See also John Leibsldorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. Rev. 237, 243 (1987) (noting that judges have more leeway to decide whether to recuse themselves than they have in other matters).

Another federal statute addressing judicial recusal, 28 U.S.C. § 144, provides a partial model for incorporating procedural mechanisms into recusal statutes. Section 144 states that a federal district court judge must recuse herself "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party," and then describes the timing and content of the affidavit. However, section 144 requires recusal only upon the more difficult showing of actual bias, rather than the appearance of bias standard in 28 U.S.C. § 455, and so it far less frequently cited as a basis for disqualification by litigants and judges. Furthermore, that statute applies *only* to judges on the district courts. FEDERAL JUDICIAL CENTER, RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 AND 144, 48-49 (2002).

The absence of prescribed procedures exacerbates the difficulties inherent in seeking a judge's disqualification. Lawyers reasonably hesitate to make such motions, fearing they might anger the judge before whom they may have to appear in that case and in future cases.<sup>24</sup> Furthermore, parties often lack the factual information necessary to ask for recusal because judges are generally not required to disclose information about their relationships to the parties, the lawyers, or their stake in the outcome of the case.<sup>25</sup> Judges typically decide for themselves whether they have a conflict of interest that requires recusal, and the statute provides no procedures for referring the matter to a different judge. Although a district court's refusal to recuse can be appealed, it will be reviewed under the deferential "abuse of discretion" standard—a standard that ignores the possibility that a judge's refusal to recuse herself may be affected, consciously or unconsciously, by the very bias that is claimed as the basis for recusal. Finally, because judges rarely issue explanations for their choice to recuse or remain on the case, there is no body of decisions to guide judges going forward as there is for most other areas of the law.

The problem is particularly acute when it comes to the U.S. Supreme Court, where the stakes are highest for the litigants and the nation. The justices regularly decide whether to recuse themselves without explanation, leaving the public to guess why they have stepped aside in a particular case, and making it impossible to determine whether they are being principled and consistent when doing so. Even more problematic, the Supreme Court's practice is to allow each justice to decide for him or herself whether to recuse, and there is no system in place for the full Court to review that decision if the Justice refuses to step aside.

Congress could address these problems by amending recusal statutes to provide procedural rules for seeking and obtaining recusals. Potential amendments include: 1) requiring judges to disclose potential conflicts even when they think they do not rise to a level that requires recusal; 2) mandating hearings on such motions; 3) referring motions to a different judge on their court for a final decision; and 4) requiring judges to issue reasoned explanations for their decision.

Other federal statutes and rules of procedure include many such procedural details. For example, Federal Rule of Civil Procedure 65 requires that before a federal judge issues a preliminary injunction, she must hold a hearing and then "state the reasons why" she granted the injunction. Likewise, the federal rules outline in detail the procedures governing the resolution of discovery disputes.<sup>26</sup> The recusal statute should be amended to include similar procedural rules to guide litigants and judges through the sensitive process of seeking and obtaining a judge's recusal.

---

<sup>24</sup> Such fears are not unfounded. In the past, judges have stated they find such motions "offensive" and claim that they "impugn [the judge's] integrity." *Hook v. McDade*, 89 F.3d 350, 353 (7<sup>th</sup> Cir. 1996).

<sup>25</sup> However, the Eleventh Circuit has stated that judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11<sup>th</sup> Cir. 1995).

<sup>26</sup> Federal Rules of Civil Procedure 26 & 37.

### III. CONGRESS HAS THE AUTHORITY TO REGULATE JUDICIAL ETHICS AND RECUSAL

Congress has broad constitutional authority to regulate the federal judiciary's ethical and recusal practices, just as it has exercised control over other vital aspects of judicial administration, such as the federal courts' size and structure, quorum requirements, oath of office, and the dates of the Supreme Court's sessions. To be sure, Congress's authority is constrained by constitutional principles such as separation of powers, and by the need to ensure judicial independence. But as long as Congress does not use its power over ethics or recusal to control the outcomes of cases or to influence the judiciary's decisions in specific issue areas, it has not transgressed these constitutional boundaries.

The text of Article III of the Constitution, which establishes the federal court system, is remarkably brief. It requires only that there be "one Supreme Court," and leaves it to Congress' discretion whether to establish lower federal courts. Article III of the Constitution does not state how many justices should occupy the Supreme Court, what number of justices constitutes a quorum, how often the Supreme Court should meet, the number of votes required to decide a case, its funding or the number of its staff. As Northwestern University Law Professor James Pfander has observed, Article III of the Constitution "leaves Congress in charge of many of the details" necessary to implement federal judicial power, and "Article I confirms this perception of congressional primacy by empowering Congress to make laws necessary and proper for carrying into execution the powers vested in the judicial branch."<sup>27</sup>

Accordingly, Congress has had no choice but to set rules governing the operations of the federal courts, including the U.S. Supreme Court. For example, today Congress has set the number of Supreme Court justices at nine, but in the past that number has been as low as five and as high as ten. By legislation, Congress has declared that the Supreme Court does not have a quorum if fewer than six justices are available to hear a case.<sup>28</sup> And Congress has set the start of the Supreme Court's term "on the first Monday in October of each year."<sup>29</sup> Nor should we forget that for over 100 years, Congress required that the justices of the Supreme Court "ride circuit," traveling to hear cases over wide regions of the United States—an onerous and sometimes dangerous task.<sup>30</sup>

Ethics legislation is not *sui generis*, but rather one category of legislation within a broader field of judicial administration—a field in which Congress has always played a major role. Federal statute requires all newly confirmed justices to "solemnly swear" that they will "administer justice without respect to persons, and do equal right to the poor and to the rich" and "faithfully and impartially discharge and perform all the duties incumbent upon them before taking their place on the Court."<sup>31</sup> The oath is intended to promote fair and impartial judicial

---

<sup>27</sup> JAMES E. PFANDER, ONE SUPREME COURT 2 (2009).

<sup>28</sup> 28 U.S.C. § 1.

<sup>29</sup> 28 U.S.C. § 2.

<sup>30</sup> *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting a constitutional challenge to a law obligating Supreme Court justices to sit as circuit judges); WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 55 (1995) (describing circuit riding as a "physical arduous task that [the justices] found irksome").

<sup>31</sup> 28 U.S.C. § 453.

decision-making—the same goal fostered by laws requiring recusal and establishing ethical limits on the justices' extrajudicial conduct.

As these examples illustrate, Congress has ample constitutional authority under the Constitution's Necessary and Proper Clause to enact legislation governing recusal standards and judicial ethics for both judges on the lower federal courts and justices on the U.S. Supreme Court. Moreover, Congress has a constitutional obligation to protect the legitimacy of the courts. Legislation regulating judicial recusals and judicial ethics will ultimately serve to protect, not undermine, the role of the federal courts in our system of government.

#### CONCLUSION

Unlike Congress and the President, federal judges cannot rely on periodic elections to provide them with the legitimacy to make decisions for the nation. Instead, the federal judiciary's position as a co-equal branch of the federal government rests upon the public's perception of federal judges as nonpartisan, fair, and impartial decisionmakers—perceptions that are jeopardized when federal judges violate ethical rules or sit on cases in which they have an actual or perceived conflict of interest. In a time of heightened suspicion of all governmental institutions, including the courts, Congress should amend judicial ethics and recusal laws to bolster the legitimacy of the third branch of government.

Mr. JOHNSON of Georgia. Thank you. And you came in right at 5 minutes. Thank you.

Mr. Roth, you may begin, sir.

#### STATEMENT OF GABE ROTH

Mr. ROTH. Chairman Johnson, Ranking Member Roby, and members of the Subcommittee, thank you for the invitation to testify today.

My name is Gabe Roth, and I am the Executive Director of Fix the Court, a national nonpartisan organization that advocates for greater transparency and accountability in our Federal courts.

I want to be clear from the start: None of the measures we are calling for today on ethics recusals and disclosures would require a significant change in the way the courts conduct themselves.

The Supreme Court already says it holds itself to a high ethical standard. Here we are merely asking that they write those standards down so that we can see and understand them.

Every Federal judge and justice already fills out a financial disclosure report each year, which eventually is made available to the public. We are merely asking that they make them public on the internet. And all judges and justices recuse themselves from petitions and cases when appropriate and for particular reasons. All we are asking is for them to share with us the general category of conflict that caused them to conclude that a recusal was necessary.

Look, it is the summer, and we are not trying to assign the judiciary a lot of additional work. We just want them to show their work, the work they say they are already doing to ensure they are meeting the high ethical standards that the public wants to hold them to.

Now, on to the proposals. First on whether the Supreme Court should have a formal binding code of conduct.

Now, do I believe that a SCOTUS ethics code would stop a judge or justice from speaking publicly about a Presidential candidate or accepting gifts from a well-known political donor? Would it make a judge or justice reconsider appearing at an annual fundraiser for a partisan organization or sitting on a case involving a publishing company who has just paid her a hefty book advance?

Maybe. That is as good as I can give you. Maybe. But that is simply better than trusting that these ethically murky practices that are not covered by the recusal statute will suddenly stop occurring each year.

I present these examples not to single out any individual justice, but to demonstrate that although the high court's opinions may be final, its members are not infallible.

This mortality is readily acknowledged by other courts and by other branches of government. The top courts in nearly every U.S. State follow an ethics code that is modeled off the Judicial Conference's. Similarly, the courts of last resort in nearly every modern democracy have a formal conduct code.

Congress, as you well know, has an Office of Ethics, two Ethics Committees, and a Code of Official Conduct. The executive branch has an Office of Government Ethics and standards of ethical conduct for branch employees. It follows that the Supreme Court should at least have an ethics code.

Second on whether annual financial disclosures should be posted online. So, again, Congress and the executive branch already permit a version of their disclosures to be posted online so we know it can be done.

When it comes to the disclosures of justices and judges, it should not be left to Fix the Court to act as the middleman, first obtaining the .tiff files from the disclosure office, then converting them to .pdf files, and finally posting them online, as we did last week. Primary sources should be posted by the primary source.

Current disclosure regulations state that members of the public who wish to obtain a disclosure must check a box on their request form promising they won't use the information for any commercial purpose or to obtain a lien against a judge. But there is no reason that that checkbox couldn't be placed online.

When the ideas for disclosures are brought up, the Judicial Conference inevitably cites privacy concerns as the reason for opposition. I share these concerns. I am happy that SCOTUS is doing a top-down security review and that the fiscal year 2020 budget has an additional \$34 million for the Marshals Service to protect the judiciary.

But I also believe we can find a way to balance privacy with the public's reasonable desire to know within a reasonable amount of time whether its judges and justices are trying to hide something, like junkets or gifts, from their 330 million constituents.

Finally on why judges and justices recusal explanation should be made public. The exercise of appending a few words to a recusal notice would not only improve institutional accountability, it would also assist the justices to think more about their conflicts of interest.

Since we were founded 4 years ago, Fix the Court has identified several missed recusals from the justices, instances in which Justices Scalia, Breyer, Alito, Sotomayor, and Chief Justice Roberts probably should have, according to the recusal statutes, disqualified themselves from hearing a case but did not.

The Supreme Court used to list recusal explanations but stopped this practice in 1904 for reasons I can't figure out. This practice should be resumed in a more direct manner by asking each judge or justice simply to refer back to the language of the recusal statute when announcing his or her recusal, that it was triggered by something like one's finances, 28 U.S.C. 455(b)(4). Pretty simple.

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee, thank you again for the opportunity to testify. I have been honored to work with Members of the Subcommittee and the full Judiciary Committee over the past few years on proposals that would build a more open and accountable judiciary, and I look forward to answering any questions that you may have.

[The statement of Mr. Roth follows:]

Testimony of Gabe Roth  
Executive Director, Fix the Court

“The Federal Judiciary in the 21st Century:  
Ideas for Promoting Ethics, Accountability, and Transparency”

Hearing before the U.S. House of Representatives Committee on the Judiciary,  
Subcommittee on Courts, Intellectual Property and the Internet

June 21, 2019

Testimony of Gabe Roth,  
Executive Director, Fix the Court

“The Federal Judiciary in the 21st Century:  
Ideas for Promoting Ethics, Accountability, and Transparency”

Hearing before the U.S. House of Representatives Committee on the Judiciary,  
Subcommittee on Courts, Intellectual Property and the Internet

June 21, 2019

Chairman Johnson, Ranking Member Roby and members of the subcommittee:

Thank you for the invitation to testify today. My name is Gabe Roth, and I am executive director of Fix the Court, a national nonpartisan organization that advocates for greater transparency and accountability in our federal courts.

With Profs. Amanda Frost and Charles Geyh having discussed the constitutionality of pro-transparency reforms in the judiciary, and the history and wisdom of these proposals, I will spend my time on why these reforms are necessary today in helping the public better understand the work of our federal courts and fully trust the impartiality of its judges and justices.

The Supreme Court and lower courts often point to ways in which they have improved their public engagement efforts in recent years, from permitting online filing<sup>1</sup> to presiding over mock cases in their courtrooms with high school students<sup>2</sup>. These are admirable efforts. But they do not absolve the judiciary for refusing to adopt pro-transparency, bipartisan reforms that would restore faith in our courts at a time that faith has declined precipitously. Now on to the proposals at hand—

*First, on whether the Supreme Court should have a formal, binding code of conduct and whether Congress should compel the justices to adopt one:*

Profs. Frost and Geyh in their testimony today have described the history of the Judicial Conference’s Code of Conduct for U.S. Judges, why the justices of the Supreme Court do not believe it applies to them and how Congress could, by statute, compel the justices to draft their own ethics code. I agree with their views and believe that the justices should welcome the opportunity to demonstrate their commitment to ethics. This does, however, raise a question I have often heard: is a Supreme Court Code of Conduct a solution in search of a problem?

I believe the answer is “no,” and it is an easy “no.” The impartiality of our judiciary should be beyond reproach, so having a basic ethics code for its members to follow is a natural outgrowth of that common value — one that should be no less rigorously applied to our nation’s highest court.

---

<sup>1</sup> “Electronic Filing,” Supreme Court of the United States, Nov. 13, 2017.  
<https://www.supremecourt.gov/filingandrules/electronicfiling.aspx>

<sup>2</sup> “Landmark Free Speech Case Opens Students’ Eyes to Role of Appellate Courts,” U.S. Courts, Apr. 18, 2019.  
<https://www.uscourts.gov/news/2019/04/18/landmark-free-speech-case-opens-students-eyes-role-appellate-courts>

It is not a coincidence that the top courts in nearly every U.S. state follow an ethics code that's modeled off the Judicial Conference's. The Supreme Court of Georgia, for example, has replicated the federal code's five canons almost verbatim<sup>3</sup>, albeit combining canons one and two. The justices on the Supreme Court of Alabama abide by a seven-canon code<sup>4</sup>, which takes the five canons of the federal code and adds two more, encouraging judges to engage in extrajudicial activities that promote justice and counseling them to file annual financial disclosure reports. Similarly, the courts of last resort in nearly every modern democracy have formal conduct codes<sup>5</sup>.

Yes, there are recusal statutes that assert a judge or justice shall not sit on a case in which he or she has a financial interest or one in which a family member is taking part. But there arise gray areas during the course of performing one's duties as a judge or justice that are not directly covered by the recusal statute but that would be considered by a conduct code. This would include a judge or justice speaking publicly about a presidential candidate<sup>6</sup> or accepting gifts from a well-known political donor<sup>7</sup>. It would include a judge or justice appearing at an annual fundraiser for a partisan organization<sup>8</sup> or sitting on a case involving a publishing company<sup>9</sup> who has just paid her a hefty book advance.

I present these examples not to single out any individual member of the Supreme Court but to demonstrate that although the high court's opinions may be final, its members are not infallible. I am confident that most, if not all of the justices I just referred to would regret their actions in those

<sup>3</sup> Georgia Code of Judicial Conduct: "Canon 1 – Judges shall uphold the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety in all of their activities.

"Canon 2 – Judges shall perform the duties of judicial office impartially, competently, and diligently.

"Canon 3 – Judges shall regulate their extra-judicial activities to minimize the risk of conflict with their judicial duties.

"Canon 4 – Judges shall refrain from political activity inappropriate to their judicial office."

[https://www.gasupreme.us/wp-content/uploads/2015/06/georgia\\_code\\_judicial\\_conduct\\_revised\\_5-14-15.pdf](https://www.gasupreme.us/wp-content/uploads/2015/06/georgia_code_judicial_conduct_revised_5-14-15.pdf).

<sup>4</sup> Alabama Judicial System Canons of Judicial Ethics: "Canon 1. A judge should uphold the integrity and independence of the judiciary.

"Canon 2. A judge should avoid impropriety and the appearance of impropriety in all his activities.

"Canon 3. A judge should perform the duties of his office impartially and diligently.

"Canon 4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.

"Canon 5. A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.

"Canon 6. A judge should regularly file reports of his financial interests.

"Canon 7. A judge or a judicial candidate shall refrain from political activity inappropriate to judicial office."

<http://judicial.alabama.gov/library/RulesCanons>.

<sup>5</sup> "Ethics Codes in Foreign Courts," comprising summaries of ethics codes in the top courts in Australia, Canada, Estonia, Finland, France, Italy, Sweden and the U.K., <https://fixthecourt.com/wp-content/uploads/2019/06/Ethics-codes-in-foreign-courts.pdf>.

<sup>6</sup> "Justice Ruth Bader Ginsburg calls Trump a 'faker,' he says she should resign," CNN, July 13, 2016.

<https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html>.

<sup>7</sup> "Friendship of Justice and Magnate Puts Focus on Ethics," N.Y. Times, June 18, 2011,  
<https://www.nytimes.com/2011/06/19/us/politics/19thomas.html>.

<sup>8</sup> "Should Justices Keep Their Opinions to Themselves?" N.Y. Times, June 28, 2011,  
<https://www.nytimes.com/2011/06/29/opinion/29shesol.html>.

<sup>9</sup> Supreme Court of the United States, 12-965, *Greenspan v. Random House, Inc., et al.*, cert. denied, Apr. 15, 2013.

According to Justice Sotomayor's 2012 financial disclosure report, available at  
<https://s3.amazonaws.com/s3.documentcloud.org/documents/710470/sotomayor-2012-2012.pdf>, Random House paid her \$1.925 million in advances in the year before this case reached the Supreme Court docket.

instances; a congressional directive compelling the justices to draft and adopt a conduct code would give the nine guidance in navigating through the gray areas we know they will encounter. And there's a reason that the Republican-led H.R. 6755 in the last Congress and the Democratic-led H.R. 1 in this Congress both included the creation and adoption of a code of conduct for the Supreme Court: it's a nonideological solution that leaders in both parties see value in.

If Congress has an Office of Ethics, two ethics committees and a Code of Official Conduct<sup>10</sup>, and the executive branch has the Office of Government Ethics and Standards of Ethical Conduct for Branch Employees<sup>11</sup>, the Supreme Court should, at the least, have an ethics code.

*Second, on whether judges' and justices' annual financial disclosures should be posted online:*

Here we find another way in which the Supreme Court, and the judiciary as a whole, operates differently from the other branches – and without good reason. There is currently no requirement that judges' and justices' annual financial disclosure reports<sup>12</sup> be placed online. To the outside observer, the current protocol makes it seem as if the judiciary is hiding something. Though there have been legislative proposals to require judges and justices to provide greater detail in their reports, from the value of their reimbursed transportation, lodging and food to closing the various gift loopholes that exist in federal law, for now, I want to focus on how the courts are behind the times digitally, and how easily that can be fixed.

The reports, as you know, since you as members of Congress fill out similar reports yourselves, play a valuable role in ensuring the ethical conduct of judges and justices. They list investments, so we can determine if a jurist has a financial entanglement that should compel a recusal. They list gifts and travel, so we can determine if those funding such trappings have open cases and are looking to curry favor. They list outside income, which has a statutory limit.

Transparency advocates are asking for something simple: the Administrative Office of U.S. Courts should follow the lead of Congress and the executive branch and create a webpage to which all Article III reports are uploaded each spring. They should be downloadable, machine-readable and, importantly, maintain an appropriate level of privacy. It should not be left up to Fix the Court to obtain the .tiff files of the reports we receive each year, convert them to .pdf files and then post them online, as we just did last week. We are happy to do it, but this is far from ideal. After all, members of the judiciary already must fill out and file their reports digitally, so the public should obtain them the same way, without having my organization act as the middleman.

---

<sup>10</sup> House Committee on Ethics, "Code of Official Conduct," <https://ethics.house.gov/publication/code-official-conduct>.

<sup>11</sup> Office of Gov't Ethics, "Standards of Ethical Conduct for Employees of the Executive Branch" (eff. Jan. 1, 2017), [https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf).

<sup>12</sup> Soon after the post-Watergate Ethics in Government Act passed, several federal judges challenged the disclosure requirement in federal court, 79-2351, *Duplantier et al. v. U.S.* The judges lost in the Fifth Circuit (from the opinion: "At issue in this class action brought by federal judges is the complex legal question of whether an act of Congress the Ethics in Government Act of 1978 insofar as its provisions require federal judges annually to file personal financial statements available for public inspection, is violative of the Constitution of the United States. After carefully balancing the interests involved, we conclude that the Act is not unconstitutional."), and the Supreme Court denied *cert.*, meaning the lower court ruling stood, and the disclosure requirement has remained to this day.

Two years ago the AO's Committee on Financial Disclosure began placing the reports on thumb drives, which they now distribute to members of the press and public for free upon request. That is a marked improvement over paper releases and has demonstrated that progress is possible. But we are not there quite yet, as it still can take many weeks, and sometimes months, for the reports to be prepared and distributed by an overworked committee staff (and I will explain why that delay is problematic in the next section).

Those who work for the Committee of Financial Disclosure have said that the main obstacle to more prompt, digital responses is staffing, as the same few individuals in charge of overseeing judges' and justices' annual filings work with nominees to file their initial financial statements. Given the current number of judicial vacancies, coupled with the pace of confirmations and the number of judges eligible to take senior status, all of which are projected to continue for decades, a greater investment in committee staff, coupled with an amendment to the disclosure statutes, could hasten the ability to digitize and disseminate these reports to the public.

*Third, on why judges' and justices' recusal explanations should be made public:*

Each term, the Supreme Court receives about 7,000 petitions for review, and close to 99 percent are denied. Among those denials, which are listed in batches in Monday orders lists, the following phrase or a close variation appears about 200 times<sup>13</sup> per term, "Justice X took no part in the consideration or decision of this petition."

This phrase denotes that a justice has disqualified himself or herself from voting on whether to hear a case. If that case is granted, then the docket will note a recusal in the same way. But that is all the court will say – not "Justice Breyer took no part because his brother, a federal judge in California, heard an earlier version of the case," not "Justice Alito took no part because his sister, a partner at a multinational law firm, worked on a brief in the case," not "Chief Justice Roberts took no part due to his stock ownership."

The exercise of appending a few words to a recusal notice, as I described in the three examples above, would accomplish several things. It would assist the justices in thinking more about their potential conflicts of interest. Since Fix the Court was founded about four years ago, we have identified<sup>14</sup> several missed recusals from the justices – instances in which a justice should have, according to the federal recusal statute, disqualified himself or herself from hearing a case but did not: for example, Chief Justice Roberts, Justice Breyer and Justice Alito have missed recusals due to their stock ownership; Justice Kagan and Justice Kennedy have overlooked their involvement in earlier versions of high court cases; and Justice Sotomayor failed to recuse from a suit against her publisher.

Recusal explanations would let the public evaluate the reason for there being fewer than nine justices considering a petition. In October Term 2016, for example, Chief Justice Roberts recused

---

<sup>13</sup> "The Supreme Court's Unexplained OT17 Cert. -Stage Recusals Explained," Fix the Court, May 3, 2018, <https://fixthecourt.com/wp-content/uploads/2018/05/OT17-cert.-stage-recusals-chart.pdf>

<sup>14</sup> "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," Fix the Court, June 2, 2019, <https://fixthecourt.com/2019/06/recent-times-justice-failed-recuse-despite-clear-conflict-interest>.

from at least four Verizon petitions<sup>15</sup>, even though he sold his Verizon shares in June 2015<sup>16</sup>. That gave petitioners an unfortunate disadvantage, as it still takes four votes to grant a petition whether eight or nine justices are eligible to hear a case.

Finally, due to the timing of the release of the justices' disclosure reports, it is possible that a justice could recuse from a case and the public would be left in the dark for more than a year before learning the reason behind the disqualification. That's because, unlike top officials in the other branches, the justices are not beholden to the STOCK Act's requirement to report a securities transaction within 45 days. This information gap is not theoretical. In January 2016 Chief Justice Roberts sold his Microsoft shares in order to sit on a case<sup>17</sup>, but there was no official confirmation until his subsequent disclosure report was released in June 2017<sup>18</sup>.

You may be surprised to learn that the Supreme Court used to list recusal explanations<sup>19</sup>. In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, when a justice was not able to hear a case for any number of reasons – a prior vacancy, an illness and a delay due to riding circuit chief among them – the weekly orders list would state, and I will quote from a 1904 orders list<sup>20</sup> here, “Mr. Justice [Edward] White, not having been present at the argument, took no part in [the] decision” regarding, in this case, a Georgia waterworks contract. This one from 1889<sup>21</sup>: “Mr. Justice [David] Brewer, not having been a member of the court when this case was argued, took no part in [a] decision” involving elevated rail tracks and eminent domain.

The high court – and, truth be told, lower courts, whose judges face the same types of conflicts – should resume that practice in a nod to transparency. Since we know the judiciary tends not to make these types of improvements of their own volition, Congress could write a law requiring it to do so.

The measure could be structured so a disqualified jurist would refer back to the language of the recusal statute when announcing his or her recusal – e.g., that it was triggered by personal bias (28 U.S.C. §455(b)(1)), prior involvement in a case as an attorney or judge (§455(b)(2)), prior involvement as a government employee (§455(b)(3)), one's finances §455(b)(4) or one's family involvement §455(b)(5).

---

<sup>15</sup> “OT16 Supreme Court Cert.-Stage Recusals,” Fix the Court, July 18, 2017. <http://fixthecourt.com/wp-content/uploads/2017/07/SCOTUS-orders-OT16.pdf>.

<sup>16</sup> “Chief Justice Roberts 2015 Financial Disclosure Report.” <http://fixthecourt.com/wp-content/uploads/2016/06/Roberts-2015.pdf>.

<sup>17</sup> “Chief Justice Roberts sold \$250K in Microsoft stock,” Associated Press, Feb. 4, 2016, <https://www.detroitnews.com/story/news/nation/2016/02/04/supreme-court-justices-investments/79806880/>.

<sup>18</sup> “Chief Justice Roberts 2016 Financial Disclosure Report.” <http://fixthecourt.com/wp-content/uploads/2017/06/Roberts-2016-Financial-Disclosure-Report.pdf>.

<sup>19</sup> “FTC Calls on SCOTUS to Resume Century-Old Practice of Recusal Explanations,” Fix the Court, Apr. 27, 2017. <https://fixthecourt.com/2017/04/ftc-calls-on-scotus-to-resume-century-old-practice-of-recusal-explanations>.

<sup>20</sup> “1904 Supreme Court Orders,” [https://www.supremecourt.gov/pdfs/journals/scannedjournals/1904\\_journal.pdf](https://www.supremecourt.gov/pdfs/journals/scannedjournals/1904_journal.pdf).

<sup>21</sup> “1889 Supreme Court Orders,” [https://www.supremecourt.gov/pdfs/journals/scannedjournals/1889\\_journal.pdf](https://www.supremecourt.gov/pdfs/journals/scannedjournals/1889_journal.pdf).

In closing, I believe that Congress has an important role to play in building a more open and accountable third branch – whether by encouraging a new code of conduct, granting greater access to financial disclosures or compelling explanations for judicial disqualifications.

I have been honored to work with members of this subcommittee and the full Judiciary Committee over the past few years on proposals that would build a more open and honest judiciary. That has included work on the Judiciary ROOM Act in the last Congress, which passed the full committee by voice vote<sup>22</sup> and would have vastly improved transparency in the third branch, by requiring live audio and video in federal appellate courts; a formal code of conduct and recusal explanations for Supreme Court justices; and improved public access to court documents.

I am pleased that this and related efforts are continuing in this Congress, as both Chairman Nadler and Ranking Member Collins<sup>23</sup> spoke positively about instituting an ethics code for the Supreme Court during a hearing in January, and members in both parties have in previous Congresses, as well.

These nonpartisan, good-government reforms would fortify the public's faith in our courts at a time when such faith is not a given, and the judiciary's consideration of reform remains underwhelming. I appreciate the subcommittee's attention to these issues.

Chairman Johnson, Ranking Member Roby and members of the subcommittee, thank you again for the opportunity to testify. I look forward to answering any questions you may have.

---

<sup>22</sup> "H.R.6755 - Judiciary ROOM Act of 2018," Sept. 13, 2018. <https://www.congress.gov/bill/115th-congress/house-bill/6755/all-actions>.

<sup>23</sup> Chairman Jerrold Nadler: "The Supreme Court [is] the only court in the country currently not subject to any binding code of ethics," at 9:00. Ranking Member Doug Collins: "I do want to find one – I always like to try and maybe find one point of agreement that we can have on this. [...] Let's] explain a little bit more about the Supreme Court and encouraging them to put [an ethics code] together because that's something I think we can find agreement on," at 1:02:47, "Hearing on H.R. 1, For the People Act," Jan. 29, 2019. <https://www.youtube.com/watch?v=isb6ssJy2uY>.

Mr. JOHNSON of Georgia. Thank you, Mr. Roth. You came in a little bit earlier than Professor Frost did. Thank you.

Mr. Wheeler.

#### **STATEMENT OF RUSSELL WHEELER**

Mr. WHEELER. Thank you Mr. Chairman, Ranking Member Roby. I appreciate the chance to appear before you today.

I have laid out my positions in my statement, and I won't belabor those in any great detail here but refer you to the statement.

But in brief, I believe the Supreme Court should have a code of conduct if for no other reason than its own self-interest. But with deference, Mr. Chairman, I don't think it is a good idea to ask the Judicial Conference of the United States to develop a code for the court. That runs counter, I think, to the statutory governance structure for the Federal courts that Congress has created.

I have written and I believe that judges should explain their reason for recusal on the record, for transparency, for appellate purposes, and also to create a common law of recusal. But I do worry a bit about requiring such a statement in matters of nonfinancial conflicts, embarrassing details that judges might decide to eschew recusal rather than reveal those matters on the record. So I think any rule has to find an exception to protect judges in that circumstance.

I acknowledge that the Federal judiciary, where I worked for most of my career, is a bit transparency averse. I took note in my statement of the Judicial Conference's reluctance until several years ago to post online the so-called "Biden" reports, reports of cases that have been delayed, motions that have been delayed, and bench trials that have been delayed, identifying those judges by name. Those are now online, but it took a while for that to happen.

I do believe, however, in the area of financial disclosure forms that a little less transparency is desirable. And I think the judicial branch has hit the right balance in its decision to provide disclosure statements on a case-by-case basis appropriately redacted for the particular requester.

And finally, because Mr. Ashworth asked me to comment about it, about the question of blind trust, whether judges should be required to put their holdings into a blind trust, which I think is an idea well worth considering, but at the moment it runs into the statutory mandate that judges keep themselves informed about their personal and fiduciary financial interests. I don't think you can reconcile one with the other. So some statutory adjustment I think is in order.

Let me say more broadly, I came to this subject, as you indicated, Mr. Chairman, as deputy director of the Federal Judicial Center, particularly in support of the work of the so-called "Breyer Committee" that Chief Justice Rehnquist appointed, actually at the urging of the former chairman of the committee, Mr. Sensenbrenner, and that the Breyer Committee produced a revamped and more aggressive administration of the Judicial Conduct and Disability Act.

In that work, though, I became aware of the tensions involved in effecting effective judicial ethics policy. The code of conduct for U.S. judges tells judges, and I think quite properly so, that they should be subject to restrictions on their behavior that the ordinary citizen

would find burdensome and they should accept those restrictions willingly. I agree with that.

But I also think those restrictions can't be so obtrusive as to discourage qualified individuals from accepting appointment to the Federal bench or staying on the Federal judiciary.

And balancing these tensions, I suggest, is not easy. Some may think these are easy questions to resolve. I don't think they are easy questions to resolve given the importance of the values at stake, importance of judicial independence on the one hand, judicial accountability on the other, and other values that are in tension. So these tensions aren't easy to balance. I appreciate the subcommittee's effort to take them on and deal with them.

And I would be happy to try to answer any questions you may have. Thank you.

[The statement of Mr. Wheeler follows:]

## Statement of

Russell R. Wheeler<sup>1</sup>Visiting Fellow, The Brookings Institution  
President, The Governance Institute

on Federal Judicial Ethics, Transparency, and Accountability

Before the Subcommittee on Courts, Intellectual Property and the Internet  
Committee on the Judiciary, House of Representatives

June 21, 2019

Chairman Johnson, Ranking Member Roby, members of the Subcommittee: Thank you for this opportunity to testify at this oversight hearing federal judicial ethics regulation.

Since September 2005, I have been a Visiting Fellow in the Brookings Institution and president of the Governance Institute—a small, non-partisan, non-profit organization that analyzes interbranch relations.

From 1991 to 2005, I was Deputy Director of the Federal Judicial Center, the courts' research and education agency. While at the Center and for about a year after, I was, in essence, the part-time staff director for the "Breyer Committee" (after its chair, Justice Stephen Breyer), which Chief Justice William Rehnquist appointed in 2004 to assess the judicial branch's implementation of the Judicial Conduct and Disability Act. The committee reported to the Judicial Conference in September 2006<sup>1</sup> that chief circuit judges and judicial councils were largely implementing the Act as Congress intended, although it found problems with the disposition of some "high visibility" complaints.

Based on the report, the Conference's Judicial Conduct and Disability Committee developed new, mandatory, and more aggressive rules governing the processing of complaints.<sup>2</sup> Credit for the report and the rules goes in part to then-House Judiciary Committee Chairman, F. James Sensenbrenner, who called attention in early 2004 to what the Breyer Committee confirmed was an improper dismissal of a highly newsworthy judicial conduct complaint,<sup>3</sup> leading to the Breyer Committee's creation.<sup>4</sup>

J J J

Below I comment on some questions that the subcommittee is examining. As I stressed on Monday when I received the invitation to testify, I appear on behalf of neither the majority nor the minority. It is a pleasure to join Professors Frost and Geyh, colleagues who have made substantial contributions to sound federal judicial ethics policy.

<sup>1</sup> Ph.D., University of Chicago (1970); B.A., Augustana College (Ill.). This statement does not purport to represent the views of any institution with which I am affiliated. [r.wheeler@brookings.edu](mailto:r.wheeler@brookings.edu) 202-797-6288

<sup>2</sup> "Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice," (Sept. 2006), available at [http://www.fjc.gov/library/fjc\\_catalog.nsf/autoframepage!openform&url=/library/fjc\\_catalog.nsf/DPublicat ion!openform&parentunid=C6CA3DC8B22AC2D78525728B005C9BD3](http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublicat ion!openform&parentunid=C6CA3DC8B22AC2D78525728B005C9BD3)

<sup>3</sup> Available as amended at

[https://www.uscourts.gov/sites/default/files/judicial\\_conduct\\_and\\_disability\\_rules\\_effective\\_march\\_12\\_2019\\_0.pdf](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf)

<sup>4</sup> See report, *id* at note 1, at 73-75.

<sup>4</sup> *Id* at 131.

I frame my testimony having in mind the code of conduct admonition that judges will “be the subject of constant public scrutiny and [must] accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”<sup>5</sup> That sound advice, however, is not a license to regulate judges’ affairs so obtrusively as to deter responsible individuals from entering or remaining in judicial service.

The U.S. Supreme Court and Codes of Conduct

The United States Judicial Conference has published a “Code of Conduct for United States Judges”—that is, circuit, district, bankruptcy, and magistrate judges. It is not a disciplinary mechanism but rather a set of aspirational guidelines.

Supreme Court justices have repeatedly stated that they look to the Code for guidance. Nevertheless, a formal code of conduct for the Court would serve the same salutary purpose as does the Code of Conduct for U.S. Judges. It would affirm that formal conduct maxims are in place for the justices to consult and would help deter meritless criticism that they operate in an ethics-free environment.

Who should create the code? The best approach, I submit—and as Professor Geyh has proposed<sup>6</sup>—is for the Court itself to promulgate its own code of conduct, just as the Judicial Conference created the code for the courts in its administrative ambit. Chief Justice Roberts apparently is considering that approach.<sup>7</sup>

Various proposals, including H.R. 1057, would have the Judicial Conference fashion a code that would apply to all federal judges, including members of the Court. With deference, that runs counter to Congress’s 1939 decision to separate the administration of the bulk of the federal judiciary from the administration of the Court. To oversimplify, the courts of appeals and district courts administer themselves through the Judicial Conference and the circuit judicial councils. Likewise, the Supreme Court administers itself.<sup>8</sup> One reason that justices and judges in the 1930s endorsed that arrangement, and that Congress wrote it into law, was the sense that the justices are unfamiliar with the administrative dynamics of the so-called lower courts, and the judges of those courts, in turn, are unfamiliar with the Court’s administrative challenges. That is likely as true in the specific matter of ethics regulations as it is as to judicial administration generally. In short, at least in the federal judiciary, lower court judges should not be making administrative policy to govern the Supreme Court except in limited circumstances dictated by practical necessity.

Whether Congress should—or even could, constitutionally—require the Court to create its own ethics code is a difficult question. Chief Justice Roberts argued in his 2011 year-

<sup>5</sup> Code of Conduct for United States Judges, Commentary on /Canon 2A, available at [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_1\\_2\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_1_2_2019.pdf)

<sup>6</sup> Charles Geyh and Stephen Gillers, *The Supreme Court Needs a Code of Ethics*, POLITICO (Aug. 8, 2013), <http://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-95301.html>

<sup>7</sup> Tim Ryan, Chief Justice Roberts Weighs Ethics Code for High Court, Courthouse News Service, March 7, 2019, at <https://www.courthousenews.com/chief-justice-roberts-weighs-ethics-code-for-high-court/>

<sup>8</sup> See for an introductory explanation, Wheeler, *A New Judge’s Introduction to Federal Judicial Administration* (2003), available at <https://www.fjc.gov/sites/default/files/2012/06/NewJudge.pdf> See also Peter Fish, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 128, 138-42 (1973). See in particular, Title 28, United States Code, Sections 331, 332 and chapters 41, 42, and 45.

end report that because the Constitution creates the Supreme Court, Congress may lack the authority to regulate its ethics. At the least, he said, “[t]he Court has never addressed whether Congress may impose . . . [ethical] requirements on the . . . Court.”<sup>9</sup> On the other hand, Justice Breyer, during a Senate Judiciary Committee hearing, referred to rules on “what [income] you can take or can’t take, . . . the reporting requirements, and some of the general ethics requirements—can’t sit in [conflict-of-interest] cases —those are statutory, and I think they bind us, period.”<sup>10</sup> The way to avoid confronting the matter is for the Court, acting on its own volition, to create a code of conduct.

Requiring Publicly Available Reasons for Recusals

Section 455 of title 28 sets out waivable and non-waivable circumstances in which justices and judges must recuse themselves. Some have argued that Congress should oblige jurists to explain why they recuse themselves, or do not recuse themselves (in response to the relatively rare petitions seeking recusal).

Often the reason for a recusal is fairly obvious—for example, a Supreme Court case from the court on which a newly minted justice served. Recusals based on financial conflicts are usually straightforward. Some explanations clear the air. In 2004, Justice Scalia refused for some time to explain why he refused to recuse himself in litigation involving a vice-presidential task force. When he finally issued a memorandum of explanation,<sup>11</sup> the general reaction, as I recall, was to accept his explanation but ask what took so long.

These examples notwithstanding, requiring disclosure of reasons for all recusals may start judicial ethics regulation down a slippery slope. Some non-financial recusals could involve delicate personal matters involving judges, family members, and third parties, the airing of which would serve little public purpose. A mandate to explain such a recusal could lead judges to eschew recusal rather than air their dirty laundry or that of a family member or some third person. It would be difficult to fashion a rule that exempts such delicate situations from disclosure while still requiring disclosure of more mundane circumstances. Even requiring a simple statement that a recusal is for other than financial conflicts might, in some communities, give rise to speculation as to the real reason.

In any event, arguments over whether judges should explain recusal decisions—and how to police non-compliance—seem to me less important than whether and when recusal decisions should be made solely by the subject judge, subject only to appellate review when available. The movement in the states to take such decisions out of the hands of the judge whose recusal is at issue<sup>12</sup> may bear study of its pluses and minuses in the federal judicial context. Professor Frost has offered related suggestions on recusal processes.<sup>13</sup>

<sup>9</sup>. *2011 Year-End Report on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES (Dec. 31, 2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

<sup>10</sup>. *Considering the Role of Judges Under the Constitution of the United States: Hearing before the Senate Judiciary Committee*, 112th Congress (2011); see also Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. OF LEGAL ETHICS 443, 449-450 (2013).

<sup>11</sup> Memorandum from Justice Scalia on *Chaney v. U.S. District Court*, 541 U.S. 913 (2004).

<sup>12</sup> See, e.g., Russell Wheeler and Malia Reddick, *Judicial Recusal Procedures: A Report on the IAALS Convening* (2017), available at [https://iaals.du.edu/sites/default/files/documents/publications/judicial\\_recusal\\_procedures.pdf](https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf)

<sup>13</sup> Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531 (2005).

On-line Availability of Judges' and Justices' Financial Disclosure Forms

Judges file statutorily required disclosure forms in May to disclose finances during the previous calendar year. The forms are a partial vehicle at best for catching conflicts of interest because they do not necessarily reveal the current state of judges' finances. Financial disclosure is mainly a concession to the transparency that judges and other public officials accept for the privilege of public service.

So far the Judicial Conference has taken a moderate position on making financial disclosure forms public. It authorizes their release electronically, on a case-by-case basis, after redactions requested by the judge in question.

Whether the Administrative Office of the U.S. Courts should make all judges' financial disclosure forms routinely available on-line, as are those of legislative and executive office holders, is a different matter. For one thing, judges are likely to face threats from greater numbers of individuals—those who feel aggrieved by judicial proceedings and seek information with which to menace judges whom they hold responsible for their problems. General redactions of judges' forms are unlikely to account for individualized threats.

The judicial branch has on occasion been averse to transparency; for example, it resisted for too long putting on-line the so-called "Biden" or "Civil Justice Reform Act" reports<sup>14</sup> that identify individual judges' delayed motions and case dispositions.<sup>15</sup> That occasional aversion to transparency should not cloud an understandable reluctance to protect personal financial information from widespread, random dissemination.

Blind Trusts

As to requiring judges to establish blind trusts for their holdings, Congress has said that "[a] judge should inform himself [sic] about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and other minor children residing in his household."<sup>16</sup> Partly on this basis, the Judicial Conference's Code of Conduct Committee "has consistently advised that the use of a blind trust would be incompatible with a judge's duty to 'keep informed' about financial interests under Canon 3C(2),"<sup>17</sup> which essentially repeats the relevant provision of the Judicial Disqualification statute.

§ § §

Thank you for the opportunity to testify this morning. I will do my best to answer any questions you may have of me.

<sup>14</sup> "Enhancement of judicial information dissemination" o 28 U.S.C. § 476

<sup>15</sup> Available at <https://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report>

<sup>16</sup> See 28 U.S. C. §§ 455 (c)

<sup>17</sup> Codes of Conduct Committee, Advisory Opinion 110 ("Separately Managed Accounts," available at [https://jaals.du.edu/sites/default/files/documents/publications/judicial\\_recusal\\_procedures.pdf](https://jaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf)

Mr. JOHNSON of Georgia. Thank you. And you came well under 5 minutes. Thank you so much.  
Professor Geyh.

**STATEMENT OF CHARLES GARDNER GEYH**

Mr. GEYH. Thank you, Mr. Chairman. I feel as though I should not speak at all and win the contest for being the briefest.

It is a pleasure to appear before the Subcommittee I once served as counsel. And I really do look back with a fair amount of pride at the extent to which the Subcommittee worked together to produce bipartisan reform. And I really believe that the issues before the Subcommittee today are of the same sort that allows for that same opportunity, and I want to focus on that.

I mean, I am going to in some ways try to go off script, because I wanted to begin by talking about why it is important to have a code of conduct for the Supreme Court. But to a man and a woman on your side of the dais and here, I think there is a consensus that it is important. It is just a question of how do we get there from here.

And, again, I would agree, I think, with Mrs. Roby that ideally the solution is—the best bet is for the Supreme Court to adopt a code for itself. I think that is the optimal solution. However, the court—I mean, bear in mind, and I think it is a reason it is fair to be skeptical, because we now have 50 States, all of which have supreme courts that have adopted codes of conduct, the lower courts have all adopted their codes of conduct. The only court in the United States that hasn't gotten to it is the U.S. Supreme Court.

And so I think there is some value in keeping the pressure on. In other words, to work with them, to try to get them to promulgate their own code, but to recognize that at the back of it all the second best option, in my judgment, is for this body to pass legislation directing the Supreme Court to promulgate its own code of conduct.

Note that I do not favor the idea of having the Judicial Conference do it for the reasons that Mr. Wheeler and others have suggested. But I do think directing the court to do it would be a perfectly fine and sound idea.

The issue then is, would that be constitutional? Is there a concern with that? And I think the answer is, to me, clearly yes, that Article I, section 8 authorizes Congress to make all laws necessary and proper for carrying into execution all powers vested in the Government of the United States. And a plain reading of that provision, to me, authorizes Congress to establish a Supreme Court that is fit for duty.

And if you look back to the very first Congress, they did just that. In the Judiciary Act of 1789, it established a Supreme Court, determined its size, spelled out its duties, and included a special oath, a unique oath, for all judges to take to ensure that the Supreme and lower courts were comprised of judges who were committed to principles that defined our democracy since the beginning of Western civilization.

And I am quoting from the 1789 oath that Congress asked judges to swear to: "I do solemnly swear that I will administer justice

without respect to persons, and will do equal right to the poor and the rich, and will faithfully and impartially discharge and perform all the duties incumbent on me, according to the best of my abilities and understanding agreeable to the constitutions and laws of the United States, so help me God."

This is a code of conduct. This is a short code of conduct that justices are swearing to. And if Congress has the authority to require judges to take an oath to abide by core ethical precepts at that point, I don't see why they don't also have the power to ask the court to elaborate on the ethical precepts to which they are willing to abide.

The Judicial Conference, as I say, has expressed concerns about it doing that.

I am with you on that. I am on board with the notion that the Judicial Conference shouldn't be that body. Courts develop their own codes of conduct. The Supreme Court should develop one unique to it.

The second point that is of issue is financial disclosure. To me, the core problem begins with saying in this day and age making information available to the public means making it available online. It is the way we do business in the 21st century.

The Judicial Conference has objected to posting judges' financial disclosure statements on the web, citing privacy concerns, and I urge you to work with the Judicial Conference to resolve those.

And in that regard, I would ask one question. At this point, I can go onto the Judicial Conference, or the AO, and say: Give me reports on every one of the Federal judges. And in due course, I would get them with private information redacted. I can then post that onto the web.

So what I want to know is what privacy concern is associated with cutting out the middleman and them posting redacted information with all of the security and private information taken out and posted. To me, I think that is the issue. And I think there has got to be a way we can fix this.

Last point has to do with disqualification reform. I think judges have an obligation to provide reasons for the decisions they make. And when they decide to disqualify themselves from hearing a case that they are otherwise duty bound to hear, I think the public has a right to know why. And I think it is a little different than with abstaining as a legislator, because you are under no obligation, no ethical duty, to participate, to vote. The judges have an ethical obligation to participate unless disqualified.

I understand the Judicial Conference's concern, but I think my suggestion would be, one thing with a report that Mr. Wheeler was responsible for writing, one possibility is to go with a checkbox approach which requires judges to identify the statutory grounds for disqualification without going into the details, without elaborating on the privacy. I think, again, we can make this work.

Thank you.

[The statement of Mr. Geyh follows:]

TESTIMONY OF CHARLES G. GEYH

“THE FEDERAL JUDICIARY IN THE 21ST CENTURY: IDEAS FOR PROMOTING  
ETHICS, ACCOUNTABILITY, AND TRANSPARENCY”

HEARING BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE  
JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND  
THE INTERNET

JUNE 21, 2019

## TESTIMONY OF CHARLES G. GEYH

“THE FEDERAL JUDICIARY IN THE 21ST CENTURY: IDEAS FOR PROMOTING  
ETHICS, ACCOUNTABILITY, AND TRANSPARENCY”HEARING BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE  
JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND  
THE INTERNET

JUNE 21, 2019

My name is Charles G. Geyh (pronounced “Jay”). I am the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law at Bloomington. My writings on judicial conduct, ethics, selection, independence, accountability, and administration include more than eighty books, book chapters, articles, reports, and other publications. I am a coauthor of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 5th ed. 2013), and author of *Courting Peril: The Political Transformation of the American Judiciary* (Oxford University Press 2016); *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center 2010); and *When Courts & Congress Collide: The Struggle for Control of America’s Judicial System* (University of Michigan Press 2006). In addition, I have served as co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct. Prior to entering academia in 1991, I was counsel to the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Administration of Justice, under Chairman Robert W. Kastenmeier.

## INTRODUCTION

In anticipation of my testimony today, I have been asked for my views on three issues relevant to judicial ethics, accountability and transparency: 1) The constitutionality and wisdom of legislation directing the Judicial Conference of the United States to issue a Code of Conduct applicable to all justices and judges of the United States; 2) The need to amend the Ethics in Government Act to require that financial disclosure reports completed by judges pursuant to the Act be accessible to the public online; and 3) The desirability of amending the federal judicial disqualification statute to provide that justices, judges, and magistrate judges offer explanations for their recusal decisions that the clerk of the relevant court shall post to the applicable court’s website. As to the first

issue, in my view, it would be constitutional and wise for Congress to direct the Supreme Court to promulgate its own code of conduct, if the Court declines to take the initiative to promulgate such a Code on its own. I do not think it is wise for Congress to direct the Judicial Conference to issue a Code applicable to the Supreme Court, and I do not think it necessary for Congress to direct the Judicial Conference to issue a Code of Conduct applicable to the inferior courts. As to the second issue, I support legislation that would require judges' financial disclosure statements to be posted online. And as to the third issue, I support legislation requiring judges to explain their disqualification rulings, however briefly. With respect to this third issue, concerning disqualification procedure, I have an additional recommendation: that the disqualification statute be amended to require that disqualification determinations be made by a different judge than the judge whose disqualification is sought.

#### I. CODES OF JUDICIAL CONDUCT AND THE FEDERAL JUDICIARY

In 1922 the American Bar Association (ABA) established a Committee, then chaired by Chief Justice William Howard Taft, which promulgated Canons of Judicial Ethics that the ABA adopted in 1924<sup>1</sup>—a series of thirty-four hortatory pronouncements “intended to be nothing more than the American Bar Association’s suggestions for guidance of individual judges.”<sup>2</sup> In 1972, the ABA approved a “Model Code of Judicial Conduct,” comprised of seven broadly worded canons and a series of more specific provisions underlying each canon, specifying a judge’s ethical obligations in greater detail. The ABA substantially revised the Model Code in 1990 and again in 2007. Today, all fifty state judicial systems have promulgated codes of conduct applicable to their judges, based on one of the three ABA models.

For its part, the Judicial Conference of the United States adopted its Code of Conduct for U.S. Judges in 1973, based on the 1972 Model Code, and has modified its code several times in the years since. In addition, the Judicial Conference has authorized its Committee on Codes of Conduct to issue Ethics Advisory Opinions, 116 of which are available online.<sup>3</sup> The Committee on Codes of Conduct, also known as the “Dear Abby Committee,” offers confidential advice, upon request, to judges who have ethical questions or concerns.

The convention across the federal and state systems has been for high courts to regulate their own ethics by adopting codes of conduct on their own initiative. That convention is in keeping with a custom of respect for the autonomy and independence of the judiciary as a separate branch of government. With respect to the lower federal courts, I would urge the Judicial Conference to follow the lead of the vast majority of state court systems and update its code of conduct in light of the 2007 ABA Model. But on the whole, the Judicial Conference has done an effective job of promulgating, maintaining

---

<sup>1</sup> JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 181–83 (1974).

<sup>2</sup> Robert Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411.

<sup>3</sup> *Guide to Judiciary Policy*, Vol. 2B, Ch. 2: *Published Advisory Opinions* (2019), <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf>.

and explaining its Code, for which reason I regard legislation directing the Judicial Conference to issue a Code it has already issued as unnecessary and ill-advised.

Although the Judicial Conference is led by the Chief Justice of the United States, its jurisdiction is limited to the lower federal courts. Thus, the Code of Conduct for U.S. Judges applies to all federal judges except the justices on the Supreme Court of the United States.<sup>4</sup> And therein lies the problem. Given the Supreme Court's longstanding disinclination to adopt a code for itself, I would encourage this subcommittee to support legislation that calls upon the Supreme Court to promulgate its own Code of Conduct.

In the spirit of interbranch comity and in light of the judiciary's superior expertise in such matters, however, I do not recommend that Congress impose an ethics code of its own making on the Court. Nor do I recommend that the Judicial Conference of the United States be directed to issue a Code of Conduct for the Supreme Court. Associate justices of the Supreme Court have never been a part of, or regulated by, the Judicial Conference. Rather, the Judicial Conference is comprised of lower court judges (led by the Chief Justice). This counsels against directing the Judicial Conference to promulgate a code of conduct for the Supreme Court for two reasons. First, the Supreme Court of the United States is *sui generis*. Crafting a code of conduct requires an appreciation for the unique context in which the Court and its justices operate—an appreciation that the justices themselves are better positioned than judges of the Judicial Conference to understand and act upon<sup>5</sup>. Second, the associate justices of the Supreme Court supervise the judges of the lower courts who comprise the Judicial Conference, in two capacities: as justices exercising appellate review and as administrators assigned to oversee their designated circuits. Asking the supervised to regulate the ethics of their supervisors invites tension and mischief that can easily be avoided if the Supreme Court is directed to adopt a Code for itself—a measure that I regard as constitutional and wise.

#### *A. The Constitutionality of Legislation Regulating Supreme Court Ethics*

In his 2011 year-end report on the federal judiciary, Chief Justice Roberts opined that constitutional limits on congressional power to regulate the Supreme Court are largely untested.<sup>6</sup> That is absolutely true, but it is true in no small part because the Supreme Court has acquiesced to such power for generations and in some cases centuries, thereby establishing a longstanding convention in support of such regulation, which the Court has respected.

Article III, Section 1 of the U.S. Constitution declares that, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” In Article III, section 2, the

<sup>4</sup> For an analysis and discussion of the issue of applying the Code of Conduct for U.S. Judges to the Supreme Court, see James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF. LAW. 10 (2012).

<sup>5</sup> The Supreme Court would, of course, be free to capitalize on the expertise of the Judicial Conference by enlisting its guidance or adopting a Code modeled after the Code of Conduct for U.S. Judges.

<sup>6</sup> C.J. Roberts, *2011 Year-End Report on the Federal Judiciary*, SUPREME COURT 7 (Dec. 31, 2011, 6:00 PM), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

Constitution delegates to Congress the power to regulate the Supreme Court's appellate jurisdiction, and in Article I, Section 8, Clause 18 it authorizes Congress to make laws necessary and proper for "carrying into execution" all powers vested by the Constitution in the government of the United States.

A plain reading of these provisions authorizes Congress to take steps it deems necessary and proper to establish a Supreme Court that is fit for duty. The founding generation interpreted congressional power to organize and establish the Supreme Court quite broadly. Matters that the first Congress regulated in the Judiciary Act of 1789, included: the Supreme Court's size; where, when, and how often the Supreme Court was to meet; how many justices constituted a quorum; the duties of the justices themselves—including a duty to "ride circuit" and hear cases as roving trial judges; and the terms of a separate oath of office that judges and justices must take.

A closer look at the judicial oath of office underscores how legislation directing the Court to issue its own code of ethics falls squarely within the power of Congress to enact laws necessary and proper to establish the Supreme Court. The defining duties of a good judge—dating back to Socrates—have been "to hear courteously, to answer wisely, to consider soberly, and to decide impartially."<sup>7</sup> That the Supreme Court, which Congress was tasked to establish, should be comprised of judges who abide by the enduring principles that define a good judge is incontestable. Article VI of the U.S. Constitution declares that all public officials in the federal and state systems, including judges, "shall be bound by oath or affirmation, to support this Constitution," but that oath does not address the unique duties of judges on the Supreme and lower courts that the first Congress established. Accordingly, in the Judiciary Act of 1789, Congress imposed an additional oath on judicial officers, including the justices of the Supreme Court, which required them to swear as follows:

"I, \_\_\_\_\_, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God."

This oath, a substantially similar version of which remains in place today,<sup>8</sup> is a brief code of ethics, that binds judges to administer justice impartially, independently, and with integrity, dipping into the well of principles dating back to the origins of western democracy. Insofar as the necessary and proper clause authorized Congress to require that judges swear to abide by these core ethical precepts—authority that has never been questioned in over two centuries and counting—there would be nothing to bar Congress from amending the judicial oath of office (which it did as recently as 1990) to elaborate on the ethical principles that the justices must swear to follow. And if it is necessary and proper for Congress to regulate Supreme Court ethics in the oath

<sup>7</sup> FRANKLIN PIERCE ADAMS, FPA BOOK OF QUOTATIONS 466 (1952).

<sup>8</sup> 28 USC 453.

requirement, as ancillary to its power to establish the Supreme Court, it should be permissible for Congress to do so in freestanding legislation. One can view the federal disqualification statute, 28 U.S.C. 455, in just such a way: As an enactment, the terms of which Congress lifted from the ABA's Model Code of Judicial Conduct, and applied to the U.S. Supreme Court over half a century ago, to the end of "carrying into execution" a more impartial and forthright Supreme Court. Insofar as Congress has the authority to subject the Court to a code of Congress's making, I see no constitutional impediment to Congress, in the spirit of interbranch comity, deferring to the Court's expertise and directing it to promulgate a code for itself.

*B. The Wisdom of Legislation Regulating Supreme Court Ethics*

There are 25,000 judicial officers in the United States, all but nine of whom—the most visible and influential nine in the nation—are subject to a code of judicial conduct. No ethics rule prevents a Supreme Court justice from engaging in political activity, participating in ex parte communications, or joining a club that discriminates based on race, sex, religion, or national origin. Yet ethics rules for all other federal judges forbid these activities.

Judicial codes of conduct fortify the administration of justice. They tell judges their ethical responsibilities and articulate high standards of conduct to which they should aspire. They assure litigants that the judges before whom they appear are committed to fairness and impartiality. They require judges to conduct their personal and professional lives in a manner that will foster respect for the courts.

In his 2011 year-end report, the Chief Justice said that the Supreme Court did not need to adopt a code of conduct because the justices already "consult" the Code of Conduct for United States Judges, which governs other federal judges.<sup>9</sup> I have two concerns. First, it is unrealistic to think that judges will in fact consult a code they have not approved and agreed to follow, as reliably as one they have. In 2016, Justice Ruth Bader Ginsburg publicly criticized then presidential candidate Donald Trump, only to express regret for those remarks shortly thereafter, explaining that, "[j]udges should avoid commenting on a candidate for public office." Canon 5(A)(2) of the Code of Conduct provides that a judge should not "publicly endorse or oppose a candidate for public office." Had Justice Ginsburg consulted the Code before, rather than after this episode, perhaps the problem could have been avoided.

Second, there is an obvious difference between consulting a code that a justice remains free to disregard, and binding oneself to a code that a justice is committed to follow. Justices Thomas and Scalia were widely criticized for serving as featured speakers at Federalist Society events, given commentary accompanying Canon 4(C) of the Code of Conduct for U.S. Judges, which states that "[a] judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event." Insofar as the Code was

---

<sup>9</sup> C.J. Roberts, *2011 Year-End Report on the Federal Judiciary*, SUPREME COURT 5 (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

called to the attention of the justices involved, it was apparently disregarded—which the justices were free to do. There is an argument to make that Supreme Court justices should be permitted to speak at such events: the public's interest in what they have to say may offset the concern that they are lending the prestige of their offices to advance the interests of the organization that sells more tickets by hosting them. Indeed, the latest version of the ABA Model Code of Judicial Conduct allows judges to speak in such circumstances.<sup>10</sup> If the Supreme Court shares the ABA's view and had simply adopted a Code that followed the ABA Model on this point, it could have avoided the perception that its justices were behaving unethically.

Skeptics have argued that it would be an empty gesture for the Supreme Court to adopt a Code because there is no workable way to enforce compliance. But the pledge itself has value. Just as the public rightly expects judges to follow their oaths of office, it will also assume that a justice who vows to abide by ethics rules that the Court itself adopted will do so. Moreover, the Supreme Court depends on diffuse public support for its continued legitimacy. The notion that the justices would jeopardize the Court's legitimacy by acting unethically in defiance of their own code strikes me as unlikely in the extreme.

This is not a partisan issue. Judges appointed by presidents of both parties confront ethical dilemmas. Codes of judicial conduct proliferated in the Watergate era amid pervasive suspicion of government that has not dissipated in the ensuing forty years. It would be unfortunate if the only judges in the United States who see no need for a code of ethics were those on the nation's most powerful tribunal.

It would be optimal for the Supreme Court to “take the hint”—to recognize that public confidence in the Court would be enhanced if it bound itself to a Code of its own making, and to obviate the need for legislation by promulgating such a code as literally every other court system in the United States has done on its own initiative. In light of continued foot-dragging by the Supreme Court, however, legislation is both necessary and proper.

## II. FINANCIAL DISCLOSURE

The Ethics in Government Act includes judicial officers among those who must submit periodic financial disclosure reports, and defines “judicial officers” comprehensively to include justices and judges of the Supreme and lower courts.<sup>11</sup> The Act further provides that the “supervising ethics office in the...judicial branch...shall, within thirty days after any report is received under this title...furnish a copy of such

<sup>10</sup> ABA Model Code of Judicial Conduct, Rule 3.7(A)(4).

<sup>11</sup> 5 U.S.C. §101(a), (d). Judicial officers subject to disclosure requirements include: “the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands, Court of Appeals for the Federal Circuit, Court of International Trade, Tax Court, Court of Federal Claims, Court of Appeals for Veterans Claims, United States Court of Appeals for the Armed Forces, and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.” 5 U.S.C. §109(10).

report to any person requesting such inspection or copy.”<sup>12</sup> The Administrative Office of U.S. Courts enables members of the public to request financial disclosure reports by submitting a form that is available online.<sup>13</sup>

Financial disclosure statements are essential to preserving public confidence in the courts by reassuring the public that their judges are unencumbered by financial conflicts of interest that would call their integrity, impartiality, or independence into question. And they are essential to litigants and their lawyers, whose right to due process of law includes the right to an impartial judge whose judgment is not clouded by conflicts of interest. My concern is that we still do not have a system in place that grants the public ready, open, and free online access to those disclosure statements. For lawyers and litigants, the delays associated with requesting and then waiting on a response to requests for the financial disclosure statement of a given judge, can frustrate their ability to obtain timely information on potential conflicts in their cases. For the general public, having to go to the trouble and technical difficulty of filing specific on-line or hard-copy requests for financial disclosure statements on a judge-by-judge basis undermines transparency in an information age when ready access to such data should be a given.

The American Bar Association’s Model Code of Judicial Conduct addresses this problem by imposing annual reporting obligations on judges, and then requiring that: “Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves... and, when technically feasible, posted by the court or office personnel on the court’s website.”<sup>14</sup> With respect to the federal courts, there can be no doubt that the Administrative Office of U.S. Courts has the capability to post financial disclosure statements online, and should do so on its own initiative, or failing that, via congressional directive.

I am mindful of the concern that some have expressed over the years, about the threat that open disclosure can pose to judges and their families from disgruntled litigants who can access identifying information on disclosure reports. That problem, however, is best resolved by redaction rules that enable judges to excise private information, and not by complicating access to information that the public is legitimately entitled to receive.

### III. DISQUALIFICATION PROCEDURE

For centuries, impartiality has been a defining feature of the Anglo-American judge’s role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.

---

<sup>12</sup> 5 U.S.C. §105(b)(1).

<sup>13</sup> *Request for Examination of Report Filed by A Judicial Officer or Judicial Employee*, (Mar. 2017), <https://www.uscourts.gov/sites/default/files/ao010a.pdf>.

<sup>14</sup> ABA Model Code of Judicial Conduct, Rule 3.15(d).

#### *A. Providing Explanations for Disqualification Rulings*

Under federal (and state) law, when the requirements for disqualification are satisfied, judges must withdraw from the case on their own initiative or at the request of a party. In federal litigation, the norm in motions practice is for judges to explain their decisions, however briefly, but when it comes to disqualification decisions that is often not the case.<sup>15</sup> The draft Judicial Accountability, Transparency, and Accountability Act limits proposed reporting obligations to decision to disqualify (the draft Act employs the term “recusal,” which appears neither in the federal disqualification statute nor the Code of Conduct for U.S. judges), but I would urge such obligations to include explanations for rulings that deny requests to disqualify. An excellent report written by Russell Wheeler and Malia Reddick on behalf of the Institute for the Advancement of the Legal System concludes that it is important for judges to explain their disqualification rulings, for reasons worth quoting at length:

Judges should explain denied recusal motions in writing or orally on the record, even when the denial is because the motion is untimely or clearly frivolous or insufficient. Written explanations can be as brief as a few sentences—whatever is necessary to state the applicable standard and explain why the motion does not meet it—or in appropriate cases, why the standard requires a *sua sponte* recusal. Even a granted motion might include a one- or two-sentence clarification of the reason for the grant. While the explanation can be brief, it is not enough simply to invoke a technical legal term that a layperson would likely not understand.

Some jurisdictions have prepared forms or checklists with common reasons for the action taken on a recusal motion, which the judge can complete, annotate as necessary, and file as an explanation . . . . They can help ensure individual judges’ accountability to their oath of impartiality. Requiring a judge to write an opinion explaining a recusal denial may cause her to reconsider the denial if the opinion turns out to be what judges call “an opinion that won’t write”; what a judge may regard initially as an obvious conclusion may become less obvious when the judge cannot explain it in a reasoned opinion. In the same vein, formal explanations promote due process by demonstrating that judicial decisions are well reasoned rather than arbitrary. They promote transparency in the recusal process as a whole, and they provide guidance to other judges by establishing common law interpretations of vague or ambiguous recusal requirements. Such provisions might call for a written explanation even of a *sua sponte* recusal, although convening participants worried that requiring such explanations might discourage judges from recusing on their own initiative if the reason for the recusal could be embarrassing. If

---

<sup>15</sup> Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531, 589 (2005).

such information is in a motion, however, it is already in the open. The best way for judges to avoid having potentially dirty laundry exposed to public review is to recuse *sua sponte*; putting reasons on the record is valuable if only to refute the often factually strained allegations in the motion.

Explaining recusal rulings in writing facilitates appellate review of denied recusal motions. Written explanations also facilitate aggregate data collection on recusal activity. Finally, if a party (or anyone) files a disciplinary complaint regarding a failure to recuse (alleging, for example, that the denial stemmed from an improper motive), the subject judge's explanation for the denial as offered at the time can facilitate resolution of the complaint.

The ABA Judicial Disqualification Project's draft report notes the concern that such a requirement could cause judges to recuse unnecessarily out of an abundance of caution, leading to recusals based on the "lowest common denominator" and "setting 'precedent' that other judges will be pressured to follow." The report called the concerns "understandable" but "overstated" and argued they "do not counsel against encouraging" judges to explain their rulings. States may thus prefer to encourage—rather than require—such explanations. If so, the encouragement should be strong and forceful.<sup>16</sup>

A report of the Brennan Center for Justice reaches a similar conclusion.<sup>17</sup> In addition to these litigation-specific justifications, is a systemic one: Offering written explanations for decisions to disqualify (or not)—however brief—facilitates record keeping and enables systemic evaluation of when, how, and why disqualification rules are being applied, to the end of facilitating better informed oversight, and, when needed, reform.

To ease administrative burdens associated with explaining decisions to disqualify (or not) in routine cases, some jurisdictions provide their judges with disqualification templates to complete.<sup>18</sup> I do not regard such templates as a proxy for reasoned explanations in difficult matters, but in easy cases, where the reasons for disqualification or non-disqualification are obvious, it is a labor-saving option worthy of consideration.

#### *B. Ending Judicial Self-Evaluation in Disqualification Proceedings*

<sup>16</sup> RUSSELL WHEELER & MALIA REDDICK, *Judicial Disqualification Procedures: A Report on the IAALS Convening* 10 (June 2017), [https://iaals.du.edu/sites/default/files/documents/publications/judicial\\_recusal\\_procedures.pdf](https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf).

<sup>17</sup> Matthew Menendez and Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification* 11 (2016), [https://www.brennancenter.org/sites/default/files/publications/Judicial\\_Recusal\\_Reform.pdf](https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf).

<sup>18</sup> WHEELER & REDDICK, *supra* note 16, Appendix D. As written, this template offers one check box explaining decisions to disqualify: Because the judge's impartiality might reasonably be questioned. That might be satisfactory in state systems, where all more specific grounds for disqualification are subsumed within the "impartiality might reasonably be questioned" catch-all. See, e.g. ABA Model Code of Judicial Conduct, Rule 2.11. But in the federal system, where the catch-all in §455(a) is separated from the more specific grounds for disqualification in §455(b), additional check boxes would be necessary.

In the federal system, the norm is that disqualification motions are decided by the judge whose disqualification is sought.<sup>19</sup> While it may be a bit awkward to initiate the disqualification process by calling upon the party who seeks a judge's disqualification to raise the matter with that judge, it is a defensible approach. The target judge will be the most familiar with the facts giving rise to the motion, and can step aside without delay when circumstances warrant.

When, however, the judge is disinclined to step aside, asking that judge to resolve a contested disqualification motion becomes much more problematic. In effect, such an approach calls upon the judge to "grade his own paper"—to ask the judge who is accused of being too biased to decide the case, to decide whether he is too biased to decide the case. Unsurprisingly, two recent commentators observe that "the fact that judges in many jurisdictions decide on their own disqualification and recusal challenges . . . is one of the most heavily criticized features of U.S. disqualification law, and for good reason."<sup>20</sup> Another commentator adds:

The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system, which should rely on the presence of a neutral and detached judge to preside over all court proceedings.<sup>21</sup>

And yet another commentator echoes that "[t]he Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case."<sup>22</sup>

Over eighty percent of the public thinks that disqualification motions should be decided by a different judge.<sup>23</sup> The assumption underlying the public's view—that a judge is ill-positioned to assess the extent of her own bias (real or perceived)—is corroborated by empirical research. Recent empirical studies in cognitive psychology have demonstrated that judges, like lay people, are susceptible to cognitive biases in their decision-making.<sup>24</sup> Considerable research has been conducted in the field of

<sup>19</sup> *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992); *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). *Accord United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

<sup>20</sup> James Sample & David Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES' J. 17, 21 (2007).

<sup>21</sup> Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 561 (1994).

<sup>22</sup> Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 571 (2005).

<sup>23</sup> Press Release, Justice at Stake Campaign, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009) (on file with author). Is this on file with you?

<sup>24</sup> Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *Heuristics and Biases: The Psychology of Intuitive Judgment* 49, 49-50 (Thomas Gilovich et al., eds., 2002); Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001).

“heuristics”—rules of thumb or mental shortcuts people use to aid their decision-making that may enable efficient judgments in some settings, but in other settings may serve as forms of bias that result in systematic, erroneous judgments.<sup>25</sup> This research suggests that when an individual employs “heuristics” in his decision-making, he is unaware of those underlying biases.<sup>26</sup>

More generally, people typically rely on introspection to assess their own biases;<sup>27</sup> however, “because many biases work below the surface and leave no trace of their operation, an introspective search for evidence of bias often turns up empty.”<sup>28</sup> The individual thus takes his unfruitful search as proof that bias is not present and fails to correct for those biases.<sup>29</sup>

The peril of asking a person to assess the extent of her own bias is further exacerbated for judges by the judicial disqualification paradox, because the judge is being asked to assess whether she harbors a real or perceived bias that she has sworn to avoid. In short, the tradition of calling upon judges to be the final arbiters of challenges to their own impartiality should be abandoned.

A simple solution to the problem of calling upon a judge to evaluate her own qualification to sit is to assign the matter to a different judge. Such a procedure could be limited to courts of original jurisdiction (district judges, magistrates, bankruptcy judges), or extended to appellate courts. Illinois employs such a procedure with language that could be borrowed, with appropriate modifications to accommodate the vocabulary of section 455: “Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition.”<sup>30</sup> The Illinois statute adds that the judge whose disqualification is sought “need not testify but may submit an affidavit if the judge wishes” to assist the judge evaluating the disqualification petition.<sup>31</sup>

One possible objection to this proposal is a somewhat cynical one: That reassigning disqualification to a different judge is pointless, because judges will not second-guess the impartiality of their colleagues. This concern is overblown. The Judicial Conduct and Disability Act, which has been in place since 1980, calls upon judges within

<sup>25</sup> Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 49-50 (Thomas Gilovich et al., eds., 2002).

<sup>26</sup> Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1 (2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781 (2004); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002); Richard E. Nisbett et al., *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

<sup>27</sup> Emily Pronin et al., *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. OF EXPERIMENTAL SOC. PSYCHOL. 565, 565-67 (2007).

<sup>28</sup> Ehrlinger, *supra* note 8, at 10.

<sup>29</sup> Pronin, *supra* note 9, at 565-67.

<sup>30</sup> 735 Ill. Comp. Stat. 5/2-1001 (a)(3).

<sup>31</sup> *Id.*

a given circuit to discipline their own. If judges can be trusted to evaluate the misconduct of a colleague, then surely they can be trusted to assess whether, under the circumstances of a given case, a reasonable person might question the subject judge's impartiality to preside.

Mr. JOHNSON of Georgia. Thank you, Professor. Three out of four ain't bad.

Mr. GEYH. I did my best.

Mr. JOHNSON of Georgia. Well, I appreciate it. Thank you.

We will now proceed under the 5-minute rule with questions. I will begin by recognizing myself for 5 minutes.

Professors Frost and Geyh, it sounds like you are both quite confident that Congress has both the authority and the obligation to regulate the Federal Judiciary's ethics and recusal practices. Is that correct?

Ms. FROST. Yes.

Mr. GEYH. Yes.

Mr. JOHNSON of Georgia. What do you make of the Chief Justice's suggestion to the contrary?

Mr. GEYH. Could you explain? By that, you mean his suggestions to the contrary that the court—that the Congress doesn't have the authority?

Mr. JOHNSON of Georgia. Correct.

Mr. GEYH. I interpret what the Chief Justice has said as saying it is an open question. In other words, that we have never gotten not to this, not that they don't have the authority.

And to me you can read that two ways. One is as a warning, you know, don't go there because it may be unconstitutional.

The other is that our system works, because for 200 years—and the Chief Justice adds this—for 200 years we have a custom of abiding by these practices without exception.

And I think that custom is what explains why this has never been resolved. It is not that it is a problem. I mean, for 50 years, the disqualification statute has been in place, and no one has challenged it successfully or otherwise. I think that is what is going on.

Mr. JOHNSON of Georgia. All right. Thank you.

Professor.

Ms. FROST. And I will just add, I mean, Professor Geyh already said it very eloquently, and it is in both of our written testimony, that one of the ways in which we test to determine the constitutionality of Congress' action is to look at history, to look at what Congress has done. And that is part of constitutional analysis.

And we can see that since the very first Congress—and the actions of the first Congress are particularly informative when it comes to the constitutionality of congressional action—that from the very beginning Congress thought it the authority and took action to regulate the courts, both somewhat intrusive administrative provisions, like the size of the court, the quorum requirement, the dates of its sessions, and also matters relating directly to ethics, such as the oath which Professor Geyh just mentioned in his testimony. So I think the history shows it is permissible.

Mr. JOHNSON of Georgia. Thank you.

What message does it send that the Supreme Court has refused to adopt a code of ethics? And what are the long-term risks associated with the Court's refusal or failure to do so?

Ms. FROST. Well, the message it sends, obviously, is not a great one, because I don't think we want—part of what I care about here is not just the reality of impartial and fair justice but the public's

perception of the courts, which I think is somewhat at risk today, for many reasons beyond just the subjects of this hearing.

So I think it is unfortunate that the Court has so far been reluctant to adopt a code of conduct for itself. Hearings like this, I think, are very valuable in pushing, hopefully, the agenda of those nine justices to rethink that. And there have been some suggestions by the Court that it is now seriously considering adopting a code.

So I think the message it has sent thus far, it is unfortunate. But I am hoping that we are at a moment where it is maybe reconsidering that position and would adopt a code for itself.

Mr. JOHNSON of Georgia. Thank you.

We are in an era where the legitimacy of the courts is constantly questioned and the public's faith in the Supreme Court has eroded. Is the kind of legislation we are discussing here today appropriate in this environment, Mr. Wheeler? Is it appropriate that we are discussing this legislation?

Mr. WHEELER. By all means. That is what Congress is here for, as my colleagues have said. Congress has been regulating the Federal courts in various ways since the Founding. And I think it can only contribute to a better understanding of what the Federal courts are all about. I think that is a pretty obvious proposition.

Mr. JOHNSON of Georgia. Mr. Roth, do you believe that the implementation of a code of conduct for the Supreme Court would change the institution? And if so, how?

Mr. ROTH. I believe it would change the institution for the better. Faith in the courts is something being discussed more and more. And the idea—you know, it is something that people don't really realize. When you talk about the Supreme Court, you think about certain opinions, certain historic opinions, what they are doing now.

But when you tell them, oh, they don't have a binding code of conduct like the rest of the Federal judiciary, it makes people think, well, why is that? And it almost makes it seem like there is some fishy when there probably isn't. It is just that this is what every other court has done. And the Supreme Court is a court, so it should do it as well.

Mr. JOHNSON of Georgia. Thank you.

So as to not violate my own 5-minute rule, I am going to yield back the balance of my time and call upon the Ranking Member, Congresswoman Roby, for her questions.

Mrs. ROBY. I thank the Chairman.

And this is for all of you, and if you could just be brief, because we do only have 5 minutes.

Judges oversee cases with the most egregious offenders in our criminal justice system, and the U.S. Marshals Service just said that posting financial disclosures online would identify family, locations, and other information, making judges and justices vulnerable to attack.

So how can we appropriately mitigate the danger these disclosures might create?

Just go down the line, please.

Ms. FROST. I think, obviously, the safety of our judges is of paramount importance. I think redactions and working carefully with

judges and coming up with a list of structures and guidelines for those redactions would alleviate that problem.

Mr. ROTH. I tend to agree that you can't be an organization that advocates for transparency without being an organization that advocates for greater security. And I think those two things go hand in hand, both with the Supreme Court Police and with the U.S. Marshals Service, as a way to work together to ensure that the justices' safety remains paramount.

And given the fact that the Supreme Court has already said, in a case called Duplantier they didn't grant cert on, that financial disclosure reports are constitutional, and Chief Justice Rehnquist has said he is okay with them being posted online, I think we have an opportunity via Congress, as it hasn't happened by the U.S. courts themselves, to move that forward while balancing privacy.

Mr. WHEELER. I don't really have much to add to that. It is just a question of balance.

The Judicial Conference's current position is that it releases financial disclosure statements on a case-by-case basis. When it does, it releases them electronically free of charge. I think that is the proper policy.

But, again, this is one of those tough questions. If it were easy, we would have resolved it a long time ago. It is a difficult question. I acknowledge that. And it is important for Congress to work with the courts to come to a sensible solution.

Mrs. ROBY. And, Professor Geyh, before you answer, the Marshals Service has stated that public disclosure of all judges and justices would create a serious security risk. So in your testimony, I would ask you more specifically why should we not give deference to those security risks.

Mr. GEYH. We should give deference to security risks. My question is—I think it requires a followup question and a conversation. Because I think that if we accept that interest groups are currently requesting—and they are, they are requesting disclosure statements and then publishing them online, this is already happening, in other words—and to what extent posting it—cutting out the middleman is not going to affect that.

In other words, this is a redaction problem. Redact all information that threatens the privacy of judges and safety of judges, absolutely. But if you have got to publicly disclose the redacted stuff, I don't think it makes a difference whether the Judicial Conference posts it online or whether interest groups, which are currently doing it, request it and then post them online themselves.

Mrs. ROBY. And then, Professor Frost, would the disclosure of potential conflicts that do not justify recusal encourage parties to file more frivolous appeals of a judge's decision not to recuse himself? And how would this impact already overcrowded dockets?

Ms. FROST. Well, I mean, of course, the parties have incentives themselves not to file frivolous appeals regarding recusal. Recusal is a very sensitive topic. And to file such a motion as a lawyer who appears regularly before the same judges, that is a difficult thing for a lawyer to do. I was a practicing lawyer for many years. And one hesitates to do it.

So there is already a great disincentive to file a motion to recuse. To take a frivolous appeal seems to me something that, both in

terms of the cost and the time that the lawyer would have to expend and the reputational hit that lawyer would take, it strikes me as something that would not be a big problem. And, of course, if it is a truly frivolous appeal, it can be resolved very quickly.

Mrs. ROBY. And, Mr. Roth, if judges' and justices' recusal explanations were publicly available, what safeguards exist to prevent forum shopping?

Mr. ROTH. I think that if you know—if you are a judge and—well, okay. So you can't forum shop if you are at the Supreme Court, obviously, because that is the only option.

This is going to be like a retrospective thing. So it is not—you know, if you have a judge who has a financial conflict, first of all, you might—you may learn that in the annual financial disclosure reports when they come out. And secondly, if you learn it in an early stage of the case, you know, that is fine. I mean, that is the statute working.

Mrs. ROBY. There are no—I mean, there are no protections, particularly when you are talking about the lower court level. Okay. I am going to move on.

Similarly—are you cutting me off?

Okay. I will come back to round two. Thanks.

Mr. JOHNSON of Georgia. Thank you, Madam.

Next we will have 5 minutes of questioning from the Chairman of the Full Committee, Congressman Nadler from New York.

Chairman NADLER. Thank you, Mr. Chairman.

Professor Frost, how would you enforce a code of ethics on the Supreme Court?

Ms. FROST. So that is a tough question. I guess I would say one step at a time. So my first goal for the Supreme Court would be to have a code of ethics.

Because of its prominence and the public attention the justices get for their daily activities, I would hope one enforcement mechanism would simply be that they would buy into it. They would agree to it. They came up with it. They signed onto it. It is now binding on them. They would follow it.

If that doesn't happen, the second line of defense is there is a great deal of public attention focused on those nine people and the criticism would have more bite and go further if they were violating provisions of the code.

Now, the next step is should we have some sort of enforcement mechanism like we do for the lower court judges with the Judicial Conduct and Disabilities Act? I am open to having that discussion. It is a complicated question. I would want us to be careful. But I guess I would say one step at a time. Let's get a code in place first.

Chairman NADLER. Does anybody else want to answer that question?

Mr. WHEELER. About the enforcement of the code?

First, we ought to understand, the code itself is aspirational. I don't regard it, as does my good friend Amanda Frost does, as binding.

But to set up a disciplinary mechanism I think is just a cure worse than any disease of occasional misconduct by the courts. You could have a disciplinary mechanism in which people file complaints with the justices themselves, who would then set up some

sort of a mechanism to resolve the complaints as occurs with the judicial councils under the Judicial Conduct and Disability Act.

In a body whose collegiality is being strained already, I don't think injecting that kind of a thing into the Court makes an awful lot of sense.

The alternative, of course, is to have lower court judges receive the complaints. And there is a potential for even more mischief. Sometimes a sanction on a judge who is found to have committed misconduct is to relieve them of their caseload for a while. Do you want to have a couple of lower court judges telling a Supreme Court justice to sit out a couple of cases? Imagine the consequences of that.

So as I say, there are a lot of instances of Supreme Court justices' engaging in questionable conduct. I have detailed them in my article on the subject. But to try to fix it with imposing that kind of a mechanism seems to me to be folly.

Chairman NADLER. Thank you.

Professor Frost, what signal would it send if the Supreme Court decided that Congress cannot pass laws regulating judicial ethics or procedure?

Ms. FROST. I think that would be extremely troubling. I was troubled by Chief Justice Roberts' 2011 report. I mean, in part because he was commenting on a legal issue that might come before him, and because in that report he suggested, he didn't state outright, but he suggested that there might be a constitutional problem should Congress impose ethics legislation.

I am hopeful now that, perhaps upon rethinking this issue and maybe in consultation with his colleagues, they are now moving to a different position, not that Congress lacks the constitutional authority, but let's not test that issue. How do we avoid testing that issue? We create a code for ourselves. That is what I am hopeful this conversation is leading towards.

Chairman NADLER. And what would the consequences be to our constitutional structure if the Supreme Court did issue such a ruling?

Ms. FROST. So there have been lots of fascinating examples in this Nation's history of what I will call the showdowns between Congress and the courts. And sometimes the courts back off and sometimes Congress backs off.

What typically happens is the American people, in some way, shape, or form, decide through their views of these two institutions. And, frankly, if the Supreme Court were to issue such a self-dealing opinion that said Congress, which is supposed to under the Constitution regulate us in all sorts of ways, lacks the authority to keep us ethically within bounds, I would hope that, in part, the public reaction would be powerful and would affect the court. And there is lots of examples and scholarship to show the court responds to public opinion.

Chairman NADLER. We know that.

And finally on this subject, for Professors Frost and Geyh, how do you see judicial ethics recusal and disclosure reforms as fitting within the separation of powers doctrine, or did you just answer that?

Ms. FROST. Yes. Well, although I will make one point, which is I care enormously about the independence of the court and, to use the term Professor Geyh has used, decisional independence. I would be very upset to see Congress try to control the decisions of the court by penalizing the court for issuing decisions whose outcomes they don't like.

That is not what we are talking about here. We are talking about regulating the court as an institution. And that is appropriate and well within the bounds of what Congress has always done.

So I care very much about protecting the separation of powers when it comes to the court's decisional independence. And it is appropriate and within the Constitution's structure for Congress to oversee the institution of the courts through such legislation as we have been discussing.

Chairman NADLER. Thank you.

Mr. JOHNSON of Georgia. Thank you.

We will now hear 5 minutes of questions from the gentleman from Arizona, Mr. Biggs.

Mr. BIGGS. Thank you, Mr. Chairman.

I appreciate all of you being here. This has been very interesting, and I appreciate it.

I want to go with what Professor Frost was just talking about, because as you sit here and we are talking and I think of the Judiciary Act of 1789 where we did—Congress set a precedent of getting in and basically setting up a court from a very, I would say, some fine-tuning some administrative issues and setting it up. And you get to the point of separation of powers.

What is—and we talk about this, we talk about this all the time anyway, at least in my little group in Congress we do. Where do we set these boundaries? What do you see as the legitimate check on the independent judiciary from this branch?

And that is all of you. Be as brief as you can, but as extensive as you can, knowing that I might have some followup questions for you.

Mr. GEYH. Well, I think the array is pretty significant. The 100-ton gun is the power to impeach and remove judges. There is the power over the budget to make sure they are not engaging in wasteful spending. There is the power to establish lower courts, by implication disestablish lower courts, and regulate their operations fairly extensively, their practice, their procedure, their administration—

Mr. BIGGS. And their jurisdiction?

Mr. GEYH. What?

Mr. BIGGS. And their jurisdiction?

Mr. GEYH. Yes, and their jurisdiction, yes.

And I think that there is also the power, the necessary and proper power, to make sure that they have the framework necessary to create the Judicial Conference of the United States, to create the Administrative Office, to create the Federal Judicial Center where Russell used to work.

And so I think that that is kind of the array, and at the Supreme Court level to manage its jurisdiction as well.

Mr. WHEELER. One other thing I would add. That is the power of oversight, Congress has the authority to oversee the operations

of the Federal courts and it should exercise it. It is good for the Federal courts to have someone looking at their operations. That is important as well.

Mr. ROTH. And recent history bears that out, right? It is the Ethics and Government Act of 1978 that applied to the justices in terms of disclosure, the Ethics Reform Act of 1989. So every 20 or 30 years in the history of the country there has been some form of judiciary act which, in most cases, applies both to the justices and the lower court judges.

Ms. FROST. I agree with everything that my fellow panelists said. I just want to add, I think this kind of legislation should not be viewed as diminishing or undermining the courts, but as strengthening it. And that is one of Congress' roles, to protect and strengthen the courts.

Mr. BIGGS. So when we look at Article III, section 1, and we talk about—and it says specifically that the justices shall hold their offices during good behavior, right, it is not lifetime, but it is good behavior, expand on what you have been talking about this morning on the authority of the legislative branch to basically monitor or check bad behavior. And we just talked about some of that, but if you would. And we are taking this right into the ethics of the Supreme Court justices, in particular.

Mr. GEYH. I mean, I think there is the argument of there being a gap between the high crimes and misdemeanors that are subject to removal for impeachment and less than good behavior that is subject potentially to regulation. And the Judicial Conduct and Disability Act of 1980 tries to fill that gap by creating a disciplinary mechanism within the Federal judiciary, which I think is and has been deemed constitutional.

For reasons that Mr. Wheeler gave, I am on board with the notion that it is a bad idea to extend that to the Supreme Court, but I think that is that middle ground that is open to regulation by the Congress.

Mr. BIGGS. Mr. Wheeler.

Mr. WHEELER. I really have nothing to add to that. I will yield back my time.

Mr. BIGGS. All right. So we are good there. All right.

And I appreciate you being here and look forward to the rest of this hearing.

I yield back.

Mr. JOHNSON of Georgia. The gentleman yields back.

And we will now recognize the other gentleman from Arizona, Mr. Stanton.

Mr. STANTON. All right. Thank you very much, Chairman Johnson. Thank you for holding this important hearing.

Thank you to the witnesses.

I am a new Member of Congress and I was surprised and even shocked that there isn't a code of conduct for our United States Supreme Court to build confidence, public confidence in that incredibly important institution. We can do this and do it right and strike the necessary balances.

This is a question for all witnesses. In *Caperton v. Massey*, the Supreme Court recognized, quote, "Judicial integrity is a State interest of the highest order," and that judicial codes of conduct,

quote, "serve to maintain the integrity of the judiciary and the rule of law," unquote.

How do we square these statements with the Court's refusal to adopt a code of conduct for itself?

Professor Frost, you want to jump in first?

Ms. FROST. Maybe human nature seems to play a role here. I think that is, of course, one of the interesting catch-22s of recusal where judges decide for themselves whether to recuse or a Supreme Court that says: We don't want a code of ethics but we will follow the one that exists that doesn't apply to us.

I think it is just very difficult for the justices to both live up to their highest ideals and also to avoid public criticism, some of it unfair, for not following a code that was not designed for them.

So I am going to reference Professor Geyh's excellent written testimony where he discussed how Justice Scalia and Justice Thomas spoke at a fundraiser. That clearly violates the code of conduct that Chief Justice Roberts had said: We all follow.

But the answer is not—perhaps that was appropriate to speak at that fundraiser. I think that is an open question. I think it is actually very good when justices give public speeches at many different events to educate the public about what they do.

The question is, because the Court itself had not come up with a code that was specific to those nine people and their preeminent role in our system of justice, they run the risk of violating a code that maybe isn't appropriate to them.

I would rather see them come up with a code, obviously with a lot of public scrutiny and public participation to make sure that it is appropriate, that would have their highest ideals, their best goals for how to behave. And then, having signed on to it, I would hope for the most part they would obey it; and if they didn't, we would have, I think, a lot of public discussion and public controversy about why they didn't, which hopefully would help keep everyone in line.

Mr. STANTON. All right. Any other witnesses?

Mr. Roth.

Mr. ROTH. Sir, just two quick points.

One, when you talk about Caperton, it is part of what I call the self-referential docket. There are certain cases that the Supreme Court has come out with opinions, but they don't reflect back on themselves.

There is a case in Missouri saying that it is okay to term limit judges, yet they serve for life. There is a case *Estes v. Texas*, *Nebraska Press Association v. Stuart*, allowing journalism and broadcast journalism in courtrooms, yet they don't allow cameras or live audio in the courtroom.

Similarly with *Caperton v. Massey*, it is avowing how important judicial ethics are, but they don't have ethics.

So that to me means that Congress needs to step in and fill in the gap and actually write a code for them since they clearly don't feel that interested in doing it themselves, or if they say they did, well, you know, I don't know if we necessarily should trust that it is going to be a high level code.

Mr. STANTON. The code is not just for the benefit of the public to build confidence in the Supreme Court, it is also for the protection of the members of the Supreme Court themselves.

Mr. Wheeler, did you have a comment?

Mr. WHEELER. I think that is the key point. There is a view that the Supreme Court, because it doesn't have a code, it is a kind of a judicial ethics no man's land. It seems to me the court is in its own self-interest to adopt a code, put to rest all these arguments about why it doesn't have a code, and exhibit a seriousness about this which we haven't seen.

Sometimes the—I am not going to name names—but sometimes the justices have been asked about in hearings like this one about their ethical regulations and, frankly, the answers they give are wrong. I just don't understand what they are—I am not going to say they don't understand what they are talking about, but they give incorrect answers, which I don't think is a sign of their weakness; it is just they don't give enough attention to this matter as they should. And they could put a lot of this to rest by adopting a code. It is not for me to tell the Supreme Court what to do, but that is my view of it.

Mr. STANTON. Sadly, in recent years nominees of the U.S. Supreme Court from both parties have been dragged through the mud in the nomination process, and big money has been spent, a lot of dark money, big money has been spent from outside interests who want to influence the Senate's confirmation process.

Should Congress do anything about that?

Professor.

Ms. FROST. I completely agree that the confirmation process is now deeply troubled and that it is time, high time, for that process to be revamped and restructured and for there to be a robust conversation followed by a set of principles and guidelines going forward.

We do not want to see any justice go through the system that we have in place now. It is bad for those justices and it is bad for the court. So I very much hope that will change.

Mr. STANTON. What are your ideas? Oh, out of time.

All right. Next time.

Mr. JOHNSON of Georgia. Thank you.

We will now hear 5 minutes from the gentleman from Virginia, Mr. Cline.

Mr. CLINE. Thank you, Mr. Chairman. I think it is because it is a fly-out day, I think that is why the gavel is quick today.

I want to thank our witnesses for being here. I read your testimony with interest, and I agree that transparency and accountability are critical for the successful operation of our courts. We need to encourage that and promote that.

I also believe that it is a resolved question on here, but that Congress does have the authority under Article I, section 8 to regulate the courts.

I think that there is general unanimity that the Supreme Court should operate under a code of conduct. The question is, should it be—is it preferable to have it imposed by the Supreme Court or should we seek to impose it upon them? And what are the unintended consequences of that?

I think that leads us down a rabbit hole that Professor Frost spoke of that could potentially lead to a greater constitutional crisis than not imposing one.

But I would ask the witnesses for really just a yes-or-no answer, I think. Should the Supreme Court have a code of conduct, yes or no?

Ms. FROST. Yes.

Mr. CLINE. Professor Frost, yes.

Mr. Roth?

Mr. ROTH. Yes.

Mr. CLINE. Mr. Wheeler?

Mr. WHEELER. Of course, yes.

Mr. CLINE. And Professor Geyh?

Mr. GEYH. Yes.

Mr. CLINE. And now, yes or no, is it preferable for them to adopt their own code to us imposing one on them, yes or no?

Ms. FROST. It is preferable for them to adopt their own code.

Mr. ROTH. I think equally preferable.

Mr. CLINE. Equally?

Mr. ROTH. Yes.

Mr. WHEELER. The court should adopt a code itself. I think that is the preferable course.

Mr. GEYH. I agree, they should adopt their own code.

Mr. CLINE. Okay. I noted from Professor Frost's testimony, in your overview the recusal laws do apply to the Court, the Ethics and Government Act of 1978 dealing with income reports applies to the Court, the Ethics Reform Act of 1989 applies to the Court. The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 does not. That deals with complaints and the review of complaints.

Do you think that should apply to the Court? And if so, who should be filing complaints? How should those be reviewed? And are you, again, opening something that is going to have unintended consequences and make the operation of the courts more challenging and more subject to partisan attack?

Professor Frost.

Ms. FROST. So, as I just answered, yes, there should be a code of conduct for the Court. I explained it is preferable for the Court to come up with one, but if it won't, then I would say this body should.

Your question is, well, what about a mechanism to investigate and sanction the justices, obviously short of impeachment, which is always something this body can do? And there I would say that I think Mr. Wheeler, who mentioned sometimes the cure can be worse than the disease, I would hesitate to create a disciplinary mechanism for the justices.

First of all, I think the nine of them do, in fact, informally discipline each other. At least in history, looking back at history, we have seen some examples of justices refusing, for example, to allow a particular justice who they think may not—no longer be of sound mind to be the sole deciding vote on a case. The justices protect themselves and sanction themselves a bit.

I think also as both Congress' oversight and members of the public we should all be vigilant and we should speak out and criticize

the Court when we think it has overstepped and that is in a way a public censure and sanction.

I would hesitate, I would be against having either lower court judges have a method of overseeing the Court or giving to the nine themselves the ability to investigate complaints through something like the Judicial Conduct and Disability Act. I think that would be worse than the problem we are trying to solve.

Mr. CLINE. Isn't giving the Judicial Council Or Conference the ability to create this code exactly that oversight and influence?

Ms. FROST. So I think I agree with my fellow panelists here who said that the Judicial Conference should not be charged with coming up with a code for the Supreme Court, rather the Court itself should be encouraged to come up with a code or we could find—this body, I think, at the last instance could be the one to come up with a code.

I would hesitate to have the Judicial Conference do it because it does not regulate the Supreme Court, it is made up of judges who are overseen by the Supreme Court, and it, itself, has said it does not think that role is appropriate.

Mr. CLINE. Really quickly, should we allow citizens to file complaints against Supreme Court justices for violations?

Ms. FROST. I guess maybe semantics. Should we allow, citizens to say there is a code of conduct in place—this is in the future where I am imagining such a code—there is a code of conduct in place and a justice has violated it? Yes, that should be a very loud and very public conversation when that happens.

Mr. CLINE. Thank you.

Mr. JOHNSON of Georgia. Thank you.

Our next questioner will be the gentleman from Florida, Congressman Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Thanks to the witnesses for being here.

The pinnacle of our Nation's judicial system, the United States Supreme Court, doesn't have a written code of ethics. They are the only court within the judicial branch that doesn't have a code of ethics. It is confounding that the Supreme Court's nine lifetime members have spoken about, but have not yet drafted and enacted a code.

And, Professor Frost, it is, I think, little consolation that justices informally discipline each other from time to time.

Lower Federal courts comply with the code of conduct for U.S. judges, every State court, as we have discussed today, complies with the code of ethics that has been enacted by the State, modeled on the ABA's model code.

I have got many significant concerns about lack of a written judicial code of ethics for the Supreme Court, but it has had a direct impact on the confirmation process of the newest justice. I would like to just explore that a bit.

After Judge Kavanaugh was confirmed by the Senate but before he was sworn in as a justice, Chief Justice Roberts referred 15 complaints against Judge Kavanaugh to the Tenth Circuit Court of Appeals. Chief Justice Roberts instructed the Tenth Circuit to form a judicial council to review the complaints.

As the Tenth Circuit judicial council commenced its review, the 15 complaints grew to 83. But then, on December 18, the Tenth Circuit judicial council determined that it didn't have jurisdiction to review the complaints due to Judge Kavanaugh being sworn in as a justice on the Supreme Court.

So I am the Chairman of the House Ethics Committee. We lose jurisdiction over Members of this body—we lose jurisdictions to enforce the rules of the House, the ethics rules, when a Member leaves the House of Representatives.

Judges, it seems now, in the judicial branch of government, the ethics laws no longer are binding on judges once a judge is confirmed to a lifetime appointment on the United States Supreme Court.

It doesn't seem quite right. I think it is understandable that people would be puzzled by the situation that we find ourselves in, specifically, this process for reviewing substantive ethics complaints against sitting judges who ultimately are confirmed to become members of the Supreme Court.

So that specific situation, I wonder if any of our witnesses have thoughts.

Yes, Mr. Wheeler.

Mr. WHEELER. Well, all they are doing is applying the statute. The statutory definition of judge to whom the act applies is a magistrate judge, bankruptcy judge, district judge, and circuit judge. It excludes the Supreme Court.

So when Judge Kozinski resigned his—retired from the bench entirely, the Second Circuit Judicial Council, to whom that complaint was referred, lost jurisdiction. So, too, when Justice Kavanaugh was no longer a judge of the court of appeals, the statute lost its jurisdiction over him. You can amend the statute.

Mr. DEUTCH. And what happened as a result? What happened to the investigation as a result?

Mr. WHEELER. Well, it died. It had no reason to exist because—

Mr. DEUTCH. Right. Well, I would quibble with the suggestion it had no reason to exist. I mean, there was a very serious reason for it to exist.

I guess my question is, if the confirmation had been delayed by a year, how would that investigation have proceeded, that is my question, under the existing law that applies to judges?

Mr. WHEELER. Up until the point that he was confirmed and was sworn in, well, just off the cuff, I guess all I can say is, off the cuff, you have a very messy situation on your hands, because you have someone pending for confirmation and a judicial council out in Denver evaluating his conduct during the confirmation hearing.

I don't know what—I am not going to spell out what is going to happen. It seems to me it would be—

Mr. ROTH. Well, it is still ongoing. The Judicial Conference—the Tenth Circuit dismissed the complaint. It got kicked to the Judicial Conference committee on—they have several committees, one of their committees. So they are still reviewing the complaints. That is still ongoing.

I think that just overall we want to be sure that what—the proposals that we are doing today predate Kavanaugh, they are not

trying to single out any individual justice. We could go back 30 years and talk about ethical complaints. I understand your concerns.

But I do think there are things that we can do to change the law. Kozinski shouldn't be getting his \$200,000 a year pension. That is well within Congress. There are about a dozen judges who have retired in the last 10 years because of misconduct who are still getting huge pensions. There is definite language that can be inserted into law.

But as soon as you become a justice that becomes a question, you know, an extrajudicial question that is, again, up to you guys. But, you know, I don't see how you square the two.

Mr. DEUTCH. Thank you.

Mr. JOHNSON of Georgia. Thank you.

We will now have 5 minutes of questions from the gentleman from Pennsylvania, Congressman Reschenthaler.

Mr. RESCHENTHALER. Thank you, Mr. Chairman. I appreciate it.

I am really troubled by a lot of the recommendations. I was a magisterial district judge. I was a rather young magisterial district judge. But the disclosure of information is troubling.

There was a district judge in Pennsylvania who his father-in-law was killed because there is an assassination attempt on the district judge.

You are dealing with some bad individuals. You are sending people to jail, revoking their freedom. I just think the disclosures are troubling.

The recusal explanations also are counterintuitive, because as a judge you would only recuse for certain personal reasons. If you required a judge to then say why he or she is recusing, it would actually have the unintended consequence of keeping the judge on the case because he or she might not want to say why they are recusing themselves.

So I actually think that there is an unintended consequence here that actually thwarts what you are trying to do and actually forces a judge to—it puts a judge in an uncomfortable position where they may—where they otherwise wouldn't be in. So I understand where you are coming from, but I just think it is not thought through.

And with that, I am going to yield to my colleague from Alabama.

Mrs. ROBY. Well, thank you for yielding.

And I guess, because we are pushing up against votes being called, so maybe no round two. So thank you.

I am going to pick up where we left off.

I was expressing some concerns about forum shopping, and similarly is where I left off. Could public explanations for recusal result in attorneys abusing those explanations to attempt to disqualify a judge that they deem unfavorable.

Mr. ROTH. It is possible. I mean, to your example, if you have an AT&T. Smith in the Western District of Texas—you know, AT&T is a big company, maybe they would want to sue in the Eastern District—I think that is already happening.

In terms of trying to get judges off of cases, the Judicial Conference and the Supreme Court actually put forth an opinion saying that if you are an amicus and you are putting this amicus on

the record just to get a judge or justice off the case, you can't submit that amicus.

So I think that there is—look, this is an ongoing conversation. You know, there are a lot of missed recusals recently. So this is sort of what we have come up with as a good response. I don't think that one law that is passed is going to be the end to the story.

Mrs. ROBY. The reason I bring up these points is because I think it is very important as we are having this discussion, these have to be, as I said in my opening statement, very well thought out and discussed ideas. And so it is interesting to see all of the different perspectives represented here on each of these issues. And so, again, I just want to thank you all for being here today.

I do want to point out one other concern that was brought out in the letter dated June 19, 2019, from the Judicial Conference signed by James Duff, and this is also a concern. Were a judge to specify the nature of every recusal explicitly—and already been mentioned multiple times about the security questions—or by implication that a disqualification is not related to financial conflict, the effect could be to expose personal information needlessly about the litigant and/or prejudice the litigant before the judge's colleagues. And I think that also is a very important point to make as well.

So I appreciate the gentleman yielding.

I would like to, Mr. Chairman, enter into the record this letter. I would ask for unanimous consent.

Mr. JOHNSON of Georgia. Without objection so ordered.

[The information follows:]

**MS. ROBY FOR THE RECORD**

---



## JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

June 19, 2019

Honorable Martha Roby  
Ranking Member  
Subcommittee on Courts, Intellectual Property, and  
the Internet  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Representative Roby:

I write in my capacity as Secretary of the Judicial Conference of the United States (“Judicial Conference”) regarding the hearing that your subcommittee is scheduled to hold on Friday, June 21, 2019.<sup>1</sup> I have been informed that this hearing will discuss various topics, including: a potential code of conduct for justices of the Supreme Court of the United States and other federal judges; a mandate that the financial disclosure reports of judges and justices be posted on the internet; and a requirement for judges and justices to disclose publicly their reasons for recusing from cases. We appreciate your solicitation of our views on these topics. We will address several concerns we have expressed previously regarding each of them herein, as they have been proposed previously.

Mandatory Code of Conduct Administered by the Judicial Conference

The Judicial Conference opposes any legislation that would require it to issue a code of conduct for Supreme Court justices, as it is inappropriate for the Judicial Conference to do so. JCUS-MAR 19, pp. 4-5. The Judicial Conference does not oversee the Supreme Court and does not have the requisite expertise to craft a code for the justices. The Supreme Court is also separately administered from the lower courts and the Judicial Conference. In the few instances where the Judicial Conference or the Administrative Office of the United States Courts (“Administrative Office”) assists the

---

<sup>1</sup> The Judicial Conference serves as the principal policy making body of all Article III courts except the Supreme Court of the United States. Many of the issues discussed in this letter affect both the Supreme Court and the lower courts, but the views expressed herein only represent those of the lower courts over which the Judicial Conference presides.

Honorable Martha Roby  
Page 2

Supreme Court administratively, it is at the Supreme Court's own request or delegation.<sup>2</sup> It is the firm view of the Judicial Conference that Congress should not alter this nearly century old administrative relationship and thereby place lower court judges in an inappropriate supervisory role over Supreme Court justices.

As for a code of conduct for lower court judges, such a code has been in existence for more than four decades. It is reviewed periodically and was amended recently this past March. It is unnecessary for Congress to require such a code to be re-created.

Releasing Financial Disclosure Reports Without Ongoing Safety Review

The Judiciary makes judges' financial disclosure reports routinely available, but in a manner that addresses the security concerns of judges. Each year, the Judiciary releases many thousands of copies of financial reports.<sup>3</sup> The Judiciary continually studies ways to make the reports available in a manner more convenient to the public. For example, since March 2017, most reports have been mailed to requesters at no cost to them on electronic storage devices. The Judiciary has considered the feasibility of posting reports online and will continue to do so.

There are serious concerns with a mandate that judges' financial disclosure reports be posted online because a statutory mandate is unlikely to account adequately for judges' security over time. Judges have unique security concerns because of their role in adjudicating individual criminal and civil litigation, which sometimes involve disgruntled or violent individuals and highly contentious issues. Congress has recognized the unique nature of the judicial function, and the increased security risks that it entails, and enacted legislation that allows the redaction of statutorily required information in a financial disclosure report in limited instances when the release of the information could endanger a judicial officer or employee or his or her family.<sup>4</sup> We thank the members of the Committee for their past support of this critical safeguard.

Regulations require any individual seeking a Judiciary financial disclosure report to provide his or her name, occupation and address, as well as the name and address of any other person or organization on whose behalf the report is requested. In addition, the requestor is required to complete a certification that he or she is aware of the prohibitions and restrictions for obtaining or viewing the report. Under the regulations, judicial

---

<sup>2</sup> The Supreme Court currently consults the Code of Conduct for United States Judges that is promulgated by the Judicial Conference. As Chief Justice Roberts explained in his 2011 Year-End Report on the Federal Judiciary, "[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges..."

<sup>3</sup> The number of reports requested in 2017 and 2018 was 19,111 and 7,874 respectively.

<sup>4</sup> The Identity Theft and Assumption Deterrence Act of 1998, Section 7.

Honorable Martha Roby  
Page 3

officers and employees are notified when their financial disclosure reports are requested and are provided an opportunity to view the written requests. They then may assess the threats posed at a time contemporaneous with the request (which may have changed since the time of filing) and, if necessary, when the reports are filed or upon receipt of a notification that their reports have been requested ask for the redaction of certain information from their financial disclosure reports.

The authority to redact information has been exercised carefully. Although only a small percentage of reports released to the public are approved for any redactions, the written application to examine a financial disclosure report and the ability to withhold sensitive information remain important protections for the judicial officers and employees who are most at risk for facing serious threats and inappropriate communications. A person requesting a report may view the report in person at the Administrative Office or may request a paper copy of the report and pay for the reproduction and mailing costs, if they opt not to receive the reports for free on an electronic storage device.

Simply posting financial disclosure reports online would eliminate the important safeguards the Judiciary currently has in place to ensure threat assessments are timely. It is the view of the Judicial Conference that Congress should allow the Judicial Conference to continue to innovate and adjust its practices as technology evolves.

#### Public Disclosure of Relationships to Potential Litigants

There are also several concerns with a statutory mandate to post “recusal lists” or requiring judges to explain why they decided to recuse in a particular case. First, such a requirement risks inappropriately impinging on legitimate privacy interests of litigants, family members of judges, and the judges themselves. The legal and ethical requirement for a judge to disqualify himself or herself from a proceeding when his or her impartiality might reasonably be questioned includes not only financial relationships with the subject matter or a party, but also bias or prejudice concerning a party, or the involvement of a relative. This includes, for example, situations in which the judge has a personal conflict or personal relationship with the litigant. Were a judge to specify the nature of every recusal explicitly (or by implication that a disqualification is not related to financial conflict) the effect could be to expose personal information needlessly about the litigant and/or prejudice the litigant before that judge’s colleagues. The law is currently intended to promote recusal when it is necessary. Requiring the disclosure of private personal information of the judge, the judge’s family members, or others as the “price” of recusal runs counter to that goal.

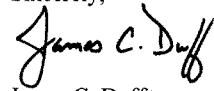
Honorable Martha Roby  
Page 4

Additionally, access to personal information about the judge (or financial information not otherwise publicly available) may create the potential for judge shopping and the manipulation of case assignments. If judges' recusal lists are required to be made available upon request, then litigants could join or remove parties to cases in order to disqualify (or avoid the disqualifications of) specific judges. Finally, as discussed above, judges have serious and atypical security concerns and a requirement for public disclosure of a judge's personal associations and relationships can put them at greater risk. The Judicial Conference previously considered and rejected a suggestion that it encourage lower courts to maintain a recusal list for each judge that would be available to litigants upon written request. JCUS-MAR 99, pp. 11-12, 17-18.

In sum, we recognize that many of these proposals are motivated by a desire to promote public confidence in the Judiciary, but having examined them in detail we believe they would have serious negative effects.

Thank you for your consideration of these views. If we may be of further assistance, please do not hesitate to contact me or the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



James C. Duff  
Secretary

cc: Honorable Hank Johnson

Mrs. ROBY. And I yield back to Mr. Reschenthaler.

Mr. RESCHENTHALER. Thank you.

I yield the remainder of my time.

Mr. JOHNSON of Georgia. Thank you.

Our next interrogator is the gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair. Interrogator is not going to be the right term.

I came a little late, so I might have missed some of your earlier testimony. I would just like to ask whoever wants to respond, have any of the justices said that they were interested in doing their own.

The nodder. Is it Mr. Roth?

Mr. ROTH. Yes. At a hearing before the House Appropriations Subcommittee on Financial Services and General Government, Justice Kagan reported that Chief Justice Roberts was considering writing a code for the judiciary, which is a positive step. But I would just counsel that given, you know, previous activities demonstrate future results, I think we would be in a better situation if it were Congress writing that code. I would trust that more than if it was coming from the judiciary itself.

Mr. COHEN. When was that?

Mr. ROTH. She mentioned that in March of this year.

Mr. COHEN. In March.

Mr. ROTH. And there hasn't been any further information from the Court since then.

Mr. COHEN. They have a lot of restrictions or requirements to give notice and limitations on moneys that are, I guess, mostly through Congress and they abide by them pretty much, I guess, but they don't file those papers on the internet. Is that right?

Mr. ROTH. That is right. I have to fill out a form, which I have right here, you know, by pen. I got to fax it in or email it in. And then, within a few weeks, I will get back those on a thumb drive. And then they are in a very hard-to-read format, so I change the format, and then I post them on fixthecourt.com.

Mr. COHEN. Is the reason for that that the Court considers long-standing judicial tradition important?

Mr. ROTH. I think it is. It would be very easy for them—I have been told there is metadata, there is personalizing information. There is not. Just make it a pdf and upload it to uscourts.gov.

Mr. COHEN. Well, I just want to say, as we close, that I have the utmost respect for Justice Roberts. I think I feel comfortable with his position. I feel confident that he will do the right thing. And I pray and I hope that he does the right thing at the right time, to paraphrase Dr. John, when the cases come before him to save the Republic.

And I yield back the balance of my time.

Mr. JOHNSON of Georgia. I thank the gentleman.

We will now have 5 minutes from the gentleman from Louisiana, Congressman Johnson.

Mr. JOHNSON of Louisiana. Thank you very much.

Thank you all for being here.

I want to just follow up on a little bit of what a couple of my colleagues have pointed on, just with regard to the idea—the general

idea of separation of powers. I had a couple questions for Mr. Wheeler.

Based on your time on the Breyer Committee and the Federal Judicial Center, how do you explain this to a layman, you know, to a nonlawyer? Does the Congress have the constitutional authority to force the Supreme Court to adopt a code of conduct?

Mr. WHEELER. I would probably want to yield to my colleagues, both of whom teach constitutional law, but on the face of it, I think it does have the authority to require the Court to adopt a code of conduct. I just think as a practical matter, it would be much better if the Court were to do it on its own. I can't add much to that.

Mr. JOHNSON of Louisiana. Before you yield to the other scholars, let me ask you this. You cited, I think, in your written statement a 2011 year-end report that was authored by Chief Justice John Roberts. And in that report, Justice Roberts discussed the constitutionality of Congress creating a set of ethics for lower courts, but he made the point that it was per the enumerated powers under Article III.

And I wonder if you could expand on the concept of lower courts being created by Congress and some of the constitutional reasonings for why a code that was designed for lower courts may not necessarily apply to the Supreme Court.

Mr. WHEELER. What Chief Justice Roberts said in the 2011 year-end report was, as Professor Geyh has said, we really don't know whether or not Congress has the authority to impose these things on the Supreme Court. It hasn't been tested. But his basic argument was that the Constitution created a Supreme Court. That puts it in a different posture than the so-called lower courts, which are created by Congress pursuant to constitutional authorization, and that is where he left it. And you can get scholars on both sides to examine whether or not that is really a sound analysis.

Mr. JOHNSON of Louisiana. Okay. One more.

In your testimony you stated that often the reasons for recusal are fairly obvious and requiring reasons for all recusals could start judicial ethics regulation down a slippery slope because the reasons could involve delicate personal matters. Mr. Reschenthaler was referencing some of that.

What do you think would be the benefit of making a judge's personal matters public like that? I know there is a lot of concern about it.

Mr. WHEELER. I can't see any particular benefit in making details of some sort of salacious interchange that a judge or the judge's spouse had, I can't see any benefit of that.

Let me add one thing, though. You know where this whole question of recusal is really being wrestled with is in the States, the States, partly because of the conflicts created by judicial campaigning and financing.

But beyond that, I think the States—some of the States, like Texas, are really looking very seriously about recusal policies. And I think it would behoove the Federal courts and the Congress to look at what the States are doing, because they are being very creative and very thoughtful in their analysis of this whole matter.

Mr. JOHNSON of Louisiana. This is sort of a follow-up on that, but, I mean, I was a practicing attorney for 20 years, and it seems

to me that there would be a risk you could open a Pandora's box if you start making publicly available explanations for recusal. I mean, attorneys might abuse that. They might take the explanations to attempt to disqualify a judge they deem unfavorable. And you could see how that information could be misused, I think. So that is one of the concerns. Would you agree?

Mr. WHEELER. Well, no, that is one of those difficult questions of balancing a couple of competing valid interests. I have said, I am on the record of saying I think, by and large, judges ought to state the reasons for their recusal, and there are several reasons for that. Transparency, for appellate review and also to create a common law recusal.

But I think there is a difficult matter in this rather narrow range of personal and perhaps salacious information that judges might not want to reveal, so that they are at the risk of not recusing when they should.

Mr. JOHNSON of Louisiana. Go ahead.

Mr. ROTH. Just recently there was a judge in the Fifth Circuit who recused on a case, James Ho, and there was this uproar on the left: Oh, he is recusing because he has got a—no, it is because his former—it took a little while to find out, but we learned that it was because his former law firm was involved in the case and it sort of tamped down that partisanship.

So I think there is sort of that positive, like, let's calm down, they are not abusing the system, but we just don't know about it, so certain elements among us are going to assume the worst.

Mr. JOHNSON of Louisiana. That is well said.

Professor Geyh, in your written testimony you stated that the subcommittee should not pass legislation imposing a code of ethics of its own, nor should we direct the Judicial Conference to issue a code of conduct applicable to the justices. Why is the Judicial Conference not the appropriate mechanism to regulate the Supreme Court?

Mr. GEYH. Because the Judicial Conference is responsible for governing lower court judges, and they, in effect, justices of the Supreme Court oversee those lower Judicial Conference judges both as designated supervisors of their circuits and as a high court. And so to me I think it is just a poor idea to have the supervisees regulate the ethics of the supervisors.

Mr. JOHNSON of Louisiana. I tend to agree.

I will yield back. Thank you.

Mr. JOHNSON of Georgia. Thank you.

I next recognize the gentleman from California, Mr. Correa, for 5 minutes.

Mr. CORREA. Thank you, Mr. Chairman. I want to thank you very much for holding this most important hearing.

I want to thank our witnesses for being here today.

Checks and balances, a third branch of government, is so darn critical, especially in these times when the executive and, of course, our legislative branch are debating issues.

Question to all of you with reference to financial disclosure. I hear what you are saying with reference to self-policing. To my knowledge, there is no financial disclosures right now online by members of the Supreme Court. Is that correct?

Mr. ROTH. Just the ones that I have put there myself on fixthecourt.com, but I had to get them and jump through hoops to get them.

Mr. CORREA. And I think my thought is, look, as a person who has been in elected office for a number of years, I do a lot of work to make sure I am fully transparent. I even go further than what is required by the law to make sure that I comply with every nuance of the law when it comes to financial transparency. It guides me in terms of where I invest my personal resources, because I try to avoid conflict of interests, to the best of my ability.

You said what is disclosed is what you put online, yet in campaigning there are enough people doing op research out there that essentially know what every justice owns, what they do.

And to me the thought of, okay, it should be very simple and just, you know, self-police, I don't know who writes the letter or signs the letter to the Supreme Court saying: Please write your own code of ethics. We have got to figure that one out.

But number two is, what is the downside to having full disclosure? Haven't done it. There has got to be a reason.

It is very uncomfortable, I know. But it should be done. Why?

Mr. GEYH. Well, the reason that has been offered here is private information can jeopardize the judge's safety, and my answer to that is you have redaction.

Mr. CORREA. But to me it is already there. I mean, you just have an op research person who can put this stuff out.

Mr. GEYH. Maybe so, but I do understand we are identifying, for example, relatives and family members of judges who could—that you redact those, but then you do post it publicly.

I mean, to me the problem is we are having this odd—I mean, to me it is a rather odd argument that we are having because, as a practical matter, these things are posted online. It is just they are being posted by him instead of by the Court.

And so why—what is the privacy problem with having the Court just do it? I mean, post the same things they give to him. And I don't see, if they carefully redact all sensitive information and just publish the stuff that needs—that the public has a right to see, then why online is a problem I just don't get.

Mr. CORREA. So I am not missing something?

Mr. GEYH. I don't think so.

Mr. CORREA. We are not missing anything?

Ms. FROST. I just want to add that there has been now a number of comments about how making publicly available reasons for recusal and possibly also some of the financial data could be manipulated or abused by lawyers who are practicing before judges and maybe trying to select a judge. There are two quick points. One is—

Mr. CORREA. But you can do that already?

Ms. FROST. Well, yes. One is, we can do that already.

Mr. CORREA. If it is a big case, you are going to do your own research, op research, and say, hey—

Ms. FROST. And, second, even if you get a judge recused, you cannot then pick the replacement judge.

And third, Rule 11 of the Federal Rules of Civil Procedure provides an ability to sanction lawyers who take action for improper purposes, and this would be a classic example of that.

So all of those things, I think, protect.

Mr. CORREA. Further comments?

Mr. Chairman, I just would like to nominate you to write that letter to the Supreme Court asking that they adopt rules of ethics.

With that, I yield the remainder of my time. Thank you.

Mr. JOHNSON of Georgia. I thank the gentleman.

And with that, our hearing today is concluded. Thanks to our distinguished witnesses for appearing and testifying.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

The hearing is adjourned.

[Whereupon, at 10:35 a.m., the subcommittee was adjourned.]

**APPENDIX**

---

---

**Hearing on the Federal Judiciary in the 21<sup>st</sup> Century: Ethics,  
Accountability, and Transparency**  
**Questions for the Record**  
**Rep. Henry C. "Hank" Johnson, Jr., Chairman**

**For Professor Frost:**

1. In your written testimony, you note that recusal decisions are currently reviewed under a very deferential "abuse of discretion" standard. Should that standard be changed?
2. Are there special procedures regarding recusal that should apply only to the Supreme Court?
3. May a federal district court or court of appeals:
  - a. Require its judges to post their financial disclosure reports online?
  - b. Require its judges to provide an explanation for their disqualification decisions?
  - c. Require disqualification motions to be heard by a different judge?
4. Are there any additional points you would like to make in response to the questions asked at the June 21<sup>st</sup> hearing?

**For Mr. Roth:**

1. In his letter to this Subcommittee, the Secretary of the Judicial Conference wrote: "It is the view of the Judicial Conference that Congress should allow the Judicial Conference to continue to innovate and adjust its practices as technology evolves."
  - a. What kind of innovations would you like to see?
  - b. Would making financial disclosure forms available online prevent meaningful innovation?
2. In 2000, the Judicial Conference addressed whether to make judges' financial disclosure reports available for online publication by third parties. Does this history of that decision have any bearing on the question of whether the Judicial Conference can and should post judges' financial disclosure reports online on its website?
3. Are federal judges permitted to post their financial disclosure reports on their respective courts' websites? Do any judges currently do so?
4. May a federal district court or court of appeals amend its rules to require its judges to post their financial disclosure reports online?

**For Mr. Wheeler**

1. What state rules might serve as models for a federal rule or law requiring that disqualification decisions be made by someone other than the judge who a party seeks to have disqualified?
2. May a federal district court or court of appeals amend its local rules to:
  - a. Require its judges to provide an explanation for their disqualification decisions?
  - b. Require disqualification motions to be heard by a different judge?

**For Professor Geyh:**

1. Could the Supreme Court and the lower courts adopt rules requiring the following:
  - a. Online, public access to financial disclosure reports?
  - b. Procedures requiring disqualification motions to be decided by another judge?
2. What protections currently exist to prevent abuse of the judicial disqualification statutes?
  - c. Do the judicial disqualification statutes currently raise “forum shopping” concerns?
  - d. Would requiring courts to provide an explanation for their recusal decisions create “forum shopping” problems? If so, how could those problems be addressed by Congress or the courts?
3. Recusal decisions are currently reviewed under a very deferential “abuse of discretion” standard. Is the standard consistent across circuits? Should this standard be changed?
4. The American Bar Association’s Model Code of Judicial Conduct differs from the Code of Conduct for United States Judges. For example, the Model Code is written in mandatory terms, while the Code of Conduct for United States Judges is hortative. Should the Code of Conduct for United States Judges revised to match the Model Code? Do the courts have the authority to make that change without Congressional legislation?
5. Until this year, no Canon in the Code of Conduct for United States Judges mentioned harassment, whereas the American Bar Association’s Model Code of Judicial Conduct has done so since 2007; similarly, since 1990 the official commentary to the Model Code has included discussion of harassment, whereas official commentary mentioning harassment was not included in the Federal Code until 2009.
  - a. Should the Judicial Conference commit to more frequently update Code of Conduct for United States Judges?

- b. Should Congress consider legislation requiring the courts to more frequently revise their code of conduct?
- c. Should Congress consider legislation specifying what the code of conduct should include?

6. Are there any additional points you would like to make in response to the questions asked at the June 21<sup>st</sup> hearing?

**Hearing on the Federal Judiciary in the 21st Century: Ethics, Accountability, and Transparency****Questions for the Record****Response by Professor Amanda Frost****July 24, 2019****1. In your written testimony, you note that recusal decisions are currently reviewed under a very deferential “abuse of discretion” standard. Should that standard be changed?**

Yes, I believe the “abuse of discretion” standard is too high a standard for review of a recusal decision.

As the name suggests, “abuse of discretion” is the standard used when an appellate court reviews questions over which a lower court has significant latitude. Courts use the abuse of discretion standard to review issues in which the first decisionmaker is “better positioned than another to decide the issue in question,” such as requests to expand discovery or rulings regarding the admissibility of evidence. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988).

Under the “abuse of discretion” standard, the reviewing court can only reverse the district court if it thinks that the decision was arbitrary or unreasonable, and not solely because the reviewing court would have made a different decision in the first instance. The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. In other words, the judge reviewing the decision can only reverse if it thinks the decision was not just wrong, but *unreasonably* wrong. *See, e.g., Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only “when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances”).

The abuse of discretion standard is not the appropriate standard of review for a recusal decision because the judge whose partiality is questioned is not “better positioned” to make that decision. *See Pierce*, 487 U.S. at 559-60. To the contrary, the judge making that decision in the first instance is potentially biased against the party making the request, and accordingly merits no deference. A motion to recuse is not equivalent to discretionary and fact-based decisions about whether to extend discovery or admit evidence—questions a district court is well-situated to decide in the first instance, and about which the judge has no conflict of interest.

Finally, because the integrity of the judicial system is at stake when a judge is asked to recuse him or herself, the judge should be disqualified in *all* cases in which the standard is met. Accordingly, to protect the integrity of the judicial system, the, judges reviewing that decision must have the authority to reverse the potentially conflicted judge not only when that judge makes a gross error, but even in closer and more marginal cases.

**2. Are there special procedures regarding recusal that should apply only to the Supreme Court?**

As a threshold matter, it is important to note that justices on the U.S. Supreme Court currently do not follow *any* clear process when determining whether to recuse themselves. There is no procedure in place for a litigant to request that a justice recuse him or herself, and justices decide for him or herself whether to recuse. It is not clear when, if ever, a justice considering whether to recuse him or herself consults with other justices about the matter, or whether the justices consider themselves bound to follow precedent regarding recusal set by their colleagues or lower court judges. The justices are not required to explain why they have chosen to recuse themselves from a case, and only rarely do so. Accordingly, the Supreme Court justices are the only members of the federal judiciary that currently follow no clear procedure when considering recusal, and the only members of the federal judiciary who are never subjected to any review of their decision not to recuse. *See generally* Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 Kansas Law Review 531 (2005); Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 Georgetown Journal of Legal Ethics 443 (2013).

The Supreme Court should be required to follow at least some of the procedures that now govern recusal decisions by lower court judges. First, the justices should make clear to litigants that litigants may request recusal through a written motion, which would normalize such requests. Second, the justices should be required to state their reasons for recusal, though they need not give details. For example, it would be appropriate for a justice to note that he was recusing himself due to a “potential financial conflict of interest,” or a “personal connection to a litigant or lawyer involved in the case,” without specifying the nature of the financial interest or personal connection. Third, because of the very real potential that a justice will either inadvertently or intentionally discount a potential source of bias, the other eight justices should review the individual justice’s decision not to recuse him or herself. In the vast majority of cases, I would expect that the eight colleagues would agree that recusal is unnecessary. Nonetheless, this review is important both because it protects against failure to recuse in egregious cases, and because the existence of such review will ensure that each justice is more thoughtful about his or her decision to recuse.

The procedures described above take into account the special situation of Supreme Court justices, and leave the Court in control of recusal decisions for its members, while at the same time protecting the integrity of the judicial system.

**3. May a federal district court or court of appeals:**

**a. Require its judges to post their financial disclosure reports online?**

Yes, judges should be required to post financial disclosure reports online. As noted by other witnesses at the hearing, such financial disclosure reports are already being posted online by groups and individuals. Requiring the judges themselves to do would ensure that an accurate and official version is made immediately publicly available.

**b. Require its judges to provide an explanation for their disqualification decisions?**

Yes, judges should be required to explain their decisions to recuse themselves (or not). Doing so would provide guidance to future judges facing similar questions about whether they should disqualify themselves, creating a body of precedent that would help to strengthen the integrity of the judiciary and the public’s perception that judges are impartial. As explained above and in my testimony, judges should

not be required to provide potentially embarrassing details about their reasons for recusing, but instead may state their reasons for recusing in general terms.

**Hearing on the Federal Judiciary in the 21st Century:  
Ideas for Promoting Ethics, Accountability, and Transparency**

**Questions for the Record**

Response by Gabe Roth, Executive Director, Fix the Court  
July 24, 2019

1. In his letter to this Subcommittee, the Secretary of the Judicial Conference wrote: "It is the view of the Judicial Conference that Congress should allow the Judicial Conference to continue to innovate and adjust its practices as technology evolves."

**a. What kind of innovations would you like to see?**

Though I appreciate that the Judicial Conference is open to innovation, here is how I look at this issue:

The technology that facilitates online audio streaming has existed for almost 25 years. Yet only two U.S. courts currently permit livestreaming of argument audio. Since the passage of the STOCK Act in 2012, the annual financial disclosure reports of members of Congress and top-level executive branch officials must be posted online. Yet it typically takes months for the public to obtain federal judges' disclosures, and even then, they are not posted online. Countless types of public records are available for free for the public to download, from presidential records<sup>1</sup> to the Congressional Record<sup>2</sup> to state court records.<sup>3</sup> Yet the judiciary charges \$0.10 per page to read documents that cost, according to one estimate, one half of one ten-thousandth of a penny per page<sup>4</sup> to produce.

A quarter of a century into the digital age, the Judicial Conference has had every opportunity to innovate. Yet left to its own devices, it will either fail to do so, or it will merely enact half-measures that fall short of modern expectations of transparency in government.

That is why I believe Congress should enact basic, yet critical reforms to help the judiciary move into the 21<sup>st</sup> century – all of which can enhance the vital work of the courts, not compromise it.

Requiring live audio in every appeals courts would yield consistency in audio availability and quality across the country, so members of the public could follow along via the Internet no matter where they live. Encouraging the Supreme Court to draft its own code of conduct and requiring judges and justices to describe in a few words the statutory basis for their *sua sponte* recusals would dispel any notion of bias among our jurists.

---

<sup>1</sup> "Digital Library," George W. Bush Presidential Library and Museum, <https://www.georgewbushlibrary.smu.edu/Home/Research/Digital-Library>.

<sup>2</sup> "Congressional Record: Proceedings and Debates of the U.S. Congress," <https://www.congress.gov/congressional-record>.

<sup>3</sup> "South Carolina Judicial Branch: Case Records Search," <https://www.sccourts.org/caseSearch>.

<sup>4</sup> "Attacking a Pay Wall That Hides Public Court Filings," New York Times, Feb. 4, 2019, <https://www.nytimes.com/2019/02/04/us/politics/pacer-fees-lawsuit.html>.

Requiring online disclosures would streamline the painstaking work of the Committee on Financial Disclosure, sparing them the hassle of responding to hundreds of disparate requests for certain segments of the reports each year. And retiring the fee-based system for access to public court records would remove unnecessary barriers that often inhibit the press and public from doing their jobs.

None of these reforms would fundamentally change the operation of the federal courts. Rather, they would improve transparency and give the American public a more complete view of an unbiased, hard-working branch of government.

**b. Would making financial disclosure forms available online prevent meaningful innovation?**

No, making financial disclosure forms available online would not prevent innovation. In my view, increased access to these reports would improve public understanding of our federal courts and its jurists. Right now, when judges or justices disqualify themselves from cases or petitions, or, say, when they are photographed abroad, there is often needless speculation as to why they are doing these things, which fuels partisan rancor based on the case in question or based on the president who appointed that jurist.

Online access to disclosures would quickly demonstrate that, by and large, members of the judiciary are following the recusal statutes to the letter and are spending their out-of-court time not on fancy junkets but on writing books and lecturing to law students the world over – and that they are far more likely to be judging a moot court at a Holiday Inn than hobnobbing at the Ritz.

Online financial disclosures would present a more comprehensive, more accurate and, frankly, more sympathetic picture of the judiciary to the American people.

**2. In 2000, the Judicial Conference addressed whether to make judges' financial disclosure reports available for online publication by third parties. Does this history of that decision have any bearing on the question of whether the Judicial Conference can and should post judges' financial disclosure reports online on its website?**

Yes, the Judicial Conference's decision in 2000 to allow financial disclosures to be made available to media outlets that had indicated they would publish them online suggests that the Conference can and should take the next step and post judges' and justices' financial disclosure reports online itself.

In explaining the 2000 decision, Chief Justice William Rehnquist acknowledged the safety concerns involved in widespread dissemination of judges' financial information but also the legitimate public interest in such information. The Judicial Conference balanced those concerns, in the Chief Justice's words, by developing regulations "to facilitate redacting the sensitive information in the reports to avoid an *en masse* production, that in the words of the statute, 'could endanger' the judges.<sup>5</sup>"

---

<sup>5</sup> His full remarks are available here: [https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp\\_05-15-00](https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-15-00).

These redactions remain operable today, and any legislation requiring online disclosures should preserve the Conference's annual charge, carried out with the assistance of the U.S. Marshals Service, of ensuring that any information deemed private, or relating to a minor in a judge's care, is stricken from the version of a disclosure that is made available to the public.

**3. Are federal judges permitted to post their financial disclosure reports on their respective courts' websites? Do any judges currently do so?**

Currently, there are federal judges who post their disclosure reports on their court-based websites. Two we have identified are Judge Lynn Hughes<sup>6</sup> from Southern District of Texas and Senior Judge Richard Kopf<sup>7</sup> from the District of Nebraska, and the fact that some judges do this provides strong evidence that it is permitted under the law.

**4. May a federal district court or court of appeals amend its rules to require its judges to post their financial disclosure reports online?**

Yes, I believe they may, as I have found nothing in the financial disclosure statute or in the Judicial Conference's rules that would prevent a district court or court of appeals from compelling its judges to post their financial disclosure reports online, so long as the court created a simple web form that mirrors the statute-based Financial Disclosure Report Request, Form AO10a<sup>8</sup>, that requires members of the public who want to view the disclosures to submit their name, address, occupation and organizational affiliation and affirm they will not use information from the reports illegally or for commercial gain.

Additionally, the online availability of these reports can and should conform to the part of the disclosure statute, 5 U.S.C. App. §105(b)(3), that permits the U.S. Marshals Service to withhold the release of a report should public access to it pose a danger to a judge or his or her family.

Finally, I want to call attention to the fact that it is not just the posting of disclosure reports online that would give the public much-needed insight into the workings of our federal courts. For example, since 2007 the Judicial Conference has required district and circuit judges to use conflict-screening software when deciding whether to recuse themselves from cases, and as part of that mandate, several<sup>9</sup> circuit courts created "Mandatory Conflict Screening Plans" that laid out how this software was to be employed.

Yet almost none of these plans addresses potential conflicts and close calls that software will not catch and disclosure reports will not clarify. What are judges to do in those instances?

It would be instructive to the public, then, in order to ensure that the men and women serving in the third branch remain conflict-free, for courts of appeals and district courts to amend their rules

---

<sup>6</sup> Judge Hughes has posted his most recent disclosure report here: <https://www.txs.uscourts.gov/page/judge-lynn-n-hughes>.

<sup>7</sup> Judge Kopf has posted his 11 most recent disclosure reports here: <https://www.ned.uscourts.gov/attorney/judges-information/richard-g-kopf>.

<sup>8</sup> Available at <https://www.uscourts.gov/sites/default/files/ao010a.pdf>.

<sup>9</sup> I was able to locate online the Mandatory Conflict Screening Plans for only four of the 13 circuits.

to include a description of the process its judges take to determine whether to disqualify when possible conflicts are not captured by the software, the screening plan or the recusals statutes, 28 U.S.C. §455 and 28 U.S.C. §144.

Though the Supreme Court has different rules and customs when it comes to comes to recusal, since justices, unlike lower court judges, are not fungible, there arise several cases over the course of the year for which the press and public wonder why no disqualifications took place, in spite of a justice's known financial holdings, previous work or family ties.

Periodic reports by the Chief Justice describing how he and his colleagues decide whether to recuse when guidance from the federal recusal statutes proves inconclusive would be beneficial to the public understanding of the institution and its conflict-screening practices.

RUSSELL R. WHEELER

The Governance Institute and the Governance Studies Program of the  
Brookings Institution

Re: House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on "Federal Judiciary in the 21<sup>st</sup> Century . . ." (June 21, 2019)

Response to Questions Submitted by Rep. Johnson, Chairman

Submitted July 23, 2019

1. **What state rules might serve as models for a federal rule or law requiring that disqualification decisions be made by someone other than the judge whom a party seeks to have disqualified?**

At the above-referenced hearing, I suggested that the state courts are wrestling with the matter of recusal policy, especially given increased demands for recusal arising in part from contributions to judicial election campaigns and liberalized rules on speech by candidates for judicial office. State rules may have limited ability to serve as "models" for the federal system, given differences in judicial selection and tenure and the number of judges. The greater number of judges in many state judiciaries, for example, means that more judges may be available than in the federal system to here referred motions; on the other hand, state courts may have more judges in remote, one-judge venues, which makes reference more difficult as a practical matter.

That said, federal courts might find state court policy initiatives and policy experiences instructive. In that regard, I note a 2017 report of the University of Denver's Institute for the Advancement of the American Legal System titled *Judicial Recusal Procedures* (available at [https://iaals.du.edu/sites/default/files/documents/publications/judicial\\_recusal\\_procedures.pdf](https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf)).

(Full disclosure: I am a Fellow of the Institute, and I helped prepare the referenced report.)

I note in particular Section II of the report itself ("Recusal Motions decided by another judge, or Prompt Review by Other Judge(s) of the Subject Judge's Motion Denial") and the corresponding state statutes and rules summarized in Appendix B, viz., sections IIA and IIB. Those sections include excerpts from provisions governing recusal policies in Alaska, California, Louisiana, Michigan, Mississippi, Nevada, Texas and Utah.

I call particular attention to the rules established for the Texas judicial system

2. **May a federal district court or court of appeals amend its local rules to:**

- a. **Require its judges to provide an explanation for their disqualification decisions?**
- b. **Require disqualification motions to be heard by a different judge?**

I claim no expertise in the law or practice governing local rules. With that substantial caveat in place, I see no reason why a court could not use its authority under 28 U.S.C. § 2017 and consistent with the Rules Enabling Act generally (chapter 131 of Title 28) to require a judge to explain his or her decision to recuse (or not) pursuant to a motion filed pursuant to 28 U.S.C. § 455 or to recuse *sua sponte* pursuant to that same section.

Any such rule should recognize that a judge's decision to recuse (or not) pursuant to a motion filed under 28 USC § 455 is a merits decision, reviewable on appeal and thus treat the decision

and opinion explaining it in that context. Any such rule should also be consistent with 28 U.S.C. § 137 (“Division of business among district judges”).

Whether a court’s procedure to assign a disqualification motion to another judge should be prescribed by local rule is a separate matter from any requirement for an explanatory opinion. Section 2071 (b) of Title 28 obligates a court, in prescribing a local rule, to “giv[e] appropriate public notice and an opportunity for comment.” How a court assigns cases is arguably an internal matter of court management—to be implemented by an internal administrative order—rather than an appropriate subject for public comment.

**Questions for the record submitted by Charles Gardner Geyh  
John F. Kimberling Professor of Law  
Indiana University Mauer School of Law**

Following my testimony at the June 21, 2019 hearing, Chairman Johnson requested that I supplement the record with answers to the following questions:

- 1. Could the Supreme Court and the lower courts adopt rules requiring the following:**
  - a. Online, public access to financial disclosure reports?** Yes. The Supreme and lower courts already comply with the Ethics in Government Act, which requires judges and justices to submit financial disclosure reports and make those reports available to the public. Processes already in place can easily be amended to provide for making reports available online, in redacted form.
  - b. Procedures requiring disqualification motions to be decided by another judge?** In some circuits but not others. The First and D.C. Circuits, for example, have issued opinions that authorize but do not require district judges to assign disqualification requests to a different judge. Other circuits have read 28 U.S.C. 455 in a hyper-literal way, interpreting the phrase “shall disqualify himself” to require that judges rule on their own disqualification. In the latter circuits, as long as the precedent remains in place, nothing short of a statutory amendment will allow for the transfer of disqualification requests to a different judge.

**2. What protections currently exist to prevent abuse of the judicial disqualification statutes?**

In civil litigation, written requests to disqualify a judge are subject to Federal Rule of Civil Procedure 11, which allows judges to impose sanctions for motions that are unsupported by a reasonable inquiry into applicable facts and law. But there is not much need for recourse to Rule 11, given the dynamic of disqualification litigation. If a party seeks to abuse the disqualification statute by filing a frivolous disqualification request, two consequences ensue: 1) the request will be denied, because there is a longstanding presumption of impartiality that operates as a default against unwarranted disqualification; and 2) the litigant will have alienated the judge with false accusations of bias, to the detriment of the litigant's cause. It is conceivable that some judges may respond to a bogus request for disqualification by stepping aside out of an abundance of caution, but the Code of Conduct for US Judges includes Canon 3A2, which advises judges against that course, with the admonition that "A judge should hear and decide matters assigned, unless disqualified."

**a. Do the judicial disqualification statutes currently raise "forum shopping" concerns?**

Personal jurisdiction, venue, subject matter jurisdiction, and choice of law rules afford lawyers and their clients choices relevant to where they should file suit. These "forum shopping" opportunities have always been part of the American litigation landscape. Disqualification provides a form of shopping opportunity (more aptly, a "judge-shopping" opportunity) in the twenty state systems that provide

procedures for preemptive strikes or substitution of judges, where a party is entitled to an automatic substitution of judges upon request. The opportunities for abuse of these preemptive strike procedures are limited, because the parties are entitled to only one strike each and have no control over who is assigned to replace the excused judge. But in the federal system, where such preemptive strikes are effectively unavailable (28 USC 144 being a dead letter), the only conceivable means by which to judge-shop via disqualification practice is to file unjustified requests to disqualify in the hopes that the requests will be granted. But as already noted, the risk that an unwarranted request will backfire dampens the ardor for misuse.

**b. Would requiring courts to provide an explanation for their recusal decisions create “forum shopping” problems? If so, how could those problems be addressed by Congress or the courts?**

This is a non-issue for all disqualification decisions initiated at the request of a party, because the reason for disqualification is already embedded in the brief in support of the request. If the judge denies the request, offering reasons for the denial is essential to a possible appeal and furnishes no basis upon which future litigants could judge shop. In cases where judges disqualify *sua sponte*, one could conceivably envision a scenario in which it might lead to over-disqualification: If Judge X disqualifies herself from Case A, not because disqualification is strictly necessary, but out of an abundance of caution, and must explain her decision, that decision could be used against the judge the next time, as a kind of precedent to force her disqualification pursuant to the relaxed standard she created for herself. That might allow for a kind of judge-shopping, wherein a party who is assigned that

judge and wants out, could use the judge's past precedent against her as a means to force unnecessary disqualifications. I do not see this as a problem for three reasons. First, under Canon 3A2, judges have an ethical duty to hear and decide matters unless disqualified, which means that they should NOT disqualify themselves when it is unnecessary. Second, if judges only disqualify themselves when necessary, I see no risk of over-disqualification resulting from judges explaining the basis for their decisions and applying a consistent disqualification standard to themselves across cases. Third, the explanations judges would need to offer for disqualification need not be elaborate--indeed, busy judges will simply note that they are disqualifying themselves because one of the lawyer sis a family member, because they have a financial interest in one of the parties, or because their impartiality might reasonably be questioned--none of which will supply the kind of detail needed to exploit such "precedent" for the purpose of judge-shopping.

**3. Recusal decisions are currently reviewed under a very deferential "abuse of discretion" standard. Is the standard consistent across circuits? Should this standard be changed?**

The general rule is to apply a deferential standard of review, although the Seventh circuit has sometimes applied a de novo standard. Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* 99 (2d Ed. 2010), <https://www.fjc.gov/sites/default/files/2012/JudicialDQ.pdf>

The traditional abuse of discretion standard of review makes sense in most cases, where deference is properly accorded the factual determinations of a judge who has "boots on the ground," who presided over the operative hearing, was able to assess the demeanor of witnesses, and has more than a paper record to work with. If disqualification requests were decided by someone other than the subject judge, I would be comfortable with retaining a deferential standard of review for these reasons. But when the judge rules on her own qualification to sit, the deference ordinarily accorded the trial judge's factual determinations is offset by the concern that the judge is ruling on her own case. And because judges--like the rest of us--have a hard time identifying their own biases or how their conduct is perceived by others, deferring to a judge's self-assessment on such questions is problematic. Accordingly, *de novo* review makes more sense if it is the subject judge's non-disqualification ruling that is under review.

4. **The American Bar Association's Model Code of Judicial Conduct differs from the Code of Conduct for United States Judges. For example, the Model Code is written in mandatory terms, while the Code of Conduct for United States Judges ishortative. Should the Code of Conduct for United States Judges be revised to match the Model Code? Do the courts have the authority to make that change without Congressional legislation?**

The ABA Model Code is, by definition, a "Model." Although all fifty states (and the federal government) have adopted a version of the Model Code, none to my knowledge have done so verbatim. That is as it should be: The Model Code should be tailored to meet the needs of the particular jurisdiction. The promulgation of each Model Code (In

1972, 1990, and 2007) provides judicial systems with an opportunity to update their Codes in light of changing developments and accumulated wisdom. The vast majority of states have updated their Codes in light of the 1990 and 2007 Models, but the Judicial Conference has not. The Judicial Conference has made occasional changes, to be sure, but despite the fact that three federal judges participated actively in promulgation of the 2007 ABA Model Code, the federal judiciary took no formal steps to update its Code in light of the 2007 ABA Model, preferring to remain one of the few jurisdictions in the United States that has not overhauled its Code in over 45 years. The Code of Conduct for U.S. Judges is based on the 1972 Model, which its used “should” instead of “shall” in its canons; unlike the 1972 Code, however, which included prefatory language noting that the Model was intended to establish standards of Conduct for disciplinary purposes, the Judicial Conference did not adopt that language. That made sense in the 1970s, before the federal judiciary had a disciplinary mechanism in place. It makes less sense after the Judicial Conduct and Disability Act was enacted in 1980, when its continued reluctance to bring the Code to bear in disciplinary proceedings (as the state systems have done) creates the perception that the Conference takes neither its Code nor the disciplinary process as seriously as it should. I would encourage the Judicial Conference to undertake a periodic, sweeping review of its Code in light of the ABA Models and tether its Code more tightly to the disciplinary process, as state systems have done, because it is the right thing to do, because it will keep the Code in step with the times, and because it will reassure the public that the federal judiciary is taking judicial ethics and discipline seriously. The federal courts require no legislation to take those steps.

**5. Until this year, no Canon in the Code of Conduct for United States**

Judges mentioned harassment, whereas the American Bar Association's Model Code of Judicial Conduct has done so since 2007; similarly, since 1990 the official commentary to the Model Code has included discussion of harassment, whereas official commentary mentioning harassment was not included in the Federal Code until 2009.

**a. Should the Judicial Conference commit to more frequently update Code of Conduct for United States Judges?**

Yes. See my response to the preceding question.

**b. Should Congress consider legislation requiring the courts to more frequently revise their code of conduct?**

No--I do not favor that level of micromanagement

**c. Should Congress consider legislation specifying what the code of conduct should include?**

No--Code of conduct need to be nimble instruments that are best drafted by judges who are familiar with the ethical dilemmas judges face and how to address them.

**6. Are there any additional points you would like to make in response to the questions asked at the June 21<sup>st</sup> hearing?**

I want to offer two follow-ups on last month's hearing:

- 1) With respect to a Code of Conduct for the U.S. Supreme Court: While three out of the four witnesses thought that it was best for the Court to promulgate its own Code on its own initiative, all of us agreed that having a code was important, and that it was constitutional for Congress to direct that the Court to promulgate such a code. Given how long the Court has resisted calls for it to have a code, and that it is considering such a code now, only after years of pressure, it would be naive to think that a bill is unnecessary to keep the pressure on the Court to do something. I favor a bill, but one that reassigns the task of writing a code from Judicial Conference to the Court--akin to bills that Senator Leahy introduced a in recent congresses (if the Chief Justice wishes to seek the guidance of judges on the JC Code of Conduct Committee, he is of course free to do so).
- 2) With respect to financial disclosure: Apart from reinforcing the point that interest groups are already obtaining financial disclosure statements from the AO and then posting them on line, rendering safety concerns about the AO doing so moot, I want to make the point that one important role these statements serve is to enable lawyers to confirm that judges before whom their clients appear do not have disqualifying financial conflicts. Judges sometimes overlook such conflicts until called to their attention. That process is hindered if the relevant information can only be obtained upon request and after a delay. And some lawyers may be understandably reluctant to rely on

financial disclosure reports posted online by interest groups rather than an official government source.

**EMBARGOED FOR RELEASE  
May 15, 2000, 2:00 p.m., e.d.t.**

**REMARKS OF CHIEF JUSTICE WILLIAM H. REHNQUIST  
AMERICAN LAW INSTITUTE ANNUAL MEETING  
MAYFLOWER HOTEL**

**MAY 15, 2000**

The Judicial Conference of the United States is, I think I can say without fear of contradiction, not a well known organization. But one of the decisions reached by the Conference at its meeting last March has attracted considerable public interest - a decision relating to the publication of federal judges' financial disclosure reports on the Internet. This afternoon I would like to tell you some of the background of these deliberations.

The Judicial Conference of the United States was created by statute back in 1922 and today is composed of the 13 chief judges of the federal Courts of Appeals, 13 elected District Court representatives from each of the circuits, and the Chief Justice. The Conference is assisted in its work by 19 committees. It meets here in Washington semi-annually, in September and March.

The Conference oversees the operation of the Administrative Office of the federal courts, an organization ably headed by its Director, Leonidas Ralph Mecham - who has been in his position longer than I have been in mine. The Administrative Office furnishes support systems for the federal courts throughout the country.

The Judicial Conference passes upon many matters relating to the administrative side of the federal judiciary. Some of them are quite arcane, and of virtually no interest to the general public; I remember at one meeting we debated whether the second secretary for the chief judge of a District Court should have a personnel classification of GS-12 or GS-13. But the Judicial Conference also debates matters of great importance to the Judges, and speaks for the Judiciary with respect to pending legislation in Congress.

The Ethics in Government Act requires that federal judges, among other federal employees, must file financial reports annually. The Act mandates that federal judges file their reports with the Judicial Conference's Financial Disclosure Committee. It also sets forth the general content requirements of the reports and provides for public access to the reports. There are, it seems to me, legitimate purposes served by the Act. Among them, insofar as judges are concerned, is to expose the judges' financial holdings to public scrutiny which assists judges in avoiding conflicts of interest. The requirement that publishing the full extent or even a range of the financial holdings may not be necessary because a judge should recuse himself whether he holds one share or a thousand shares of stock in a corporation that is a party in a case before his court. But few would argue that there is no need to publicize a list of judges' holdings for conflicts purpose.

Yet for all of the public benefits of the Ethics in Government Act, the Act also presents judges with troubling security issues as well and it may be in need of some legislative adjustments which I will discuss. The security issue presented by requirements in the Ethics in Government

Act came to a head a few months ago when, pursuant to the Act's provisions for public access, a news organization sought copies of every Article III and federal magistrate judge's financial disclosure report for the express purpose of placing those reports on the organization's Internet website. The Financial Disclosure Committee of the Judicial Conference initially denied the company's request for all of the reports and withheld them from disclosure. Contrary to some press reports, the Financial Disclosure Committee's actions were not without some foundation.

First, in reviewing the company's request for the reports, the Financial Disclosure Committee concluded that the company's intentions to publish the reports on the Internet would contravene the requirements in the Act that prohibit disclosure to any person who has not made a written application. The written application requirement provides a mechanism to spot requests from individuals who have threatened judges. Additionally, the Committee thought that the all-encompassing request for Internet publication would thwart the Committee's authority to approve redactions of information in the reports when it determined (in consultation with the U.S. Marshals Service) that certain personal or sensitive information in the report could endanger the judge who filed the report.

Simply put, by placing all judges' financial disclosure reports on the Internet, there would no longer be a means to filter information on those reports that could endanger the individual judge. And anyone who wanted the financial information about the judge - in particular, those individuals who may pose a threat to the judge - could obtain it on the Internet without the judge's (or the Committee's) knowledge and opportunity to redact sensitive information.

The Financial Disclosure Committee's concern for the safety of judges was a well-founded one. Unfortunately, there are too many examples of federal judges - particularly trial judges - having been the targets of violence and threats in our country. Three federal judges - Robert Vance of Alabama, Richard Daronco of New York and John Wood of Texas - have been killed in recent years. Trial judges in general are exposed to the criminal element in our society in ways that most federal employees who must file financial disclosure reports, such as Senators, Congressmen (and appellate judges for that matter) are not. Sentencing judges sit face to face with the criminal defendant. Some of the disclosure requirements in the Ethics in Government Act may also expose where a judge's spouse works, the spouse's income, where a family member is attending school if the school has made a loan to the student, or even where a judge may reside if, for example, the judge is on a condominium board. Thus the risks to federal trial judges are real and deserving of careful consideration. The Financial Disclosure Committee's view was overwhelmingly supported by the Federal Judges Association, consisting of several hundred members.

I should note at this point that all judges' financial disclosure reports have always been available to the public, but only by request to the Administrative Office. Typical requesters under this regime are reporters covering the courts, attorneys participating before cases before the courts, and perhaps an occasional litigant.

But, as many of you probably realize, publication on the Internet makes these statements "publicly available" not just to those who seek them out by way of request to the Administrative Office, but to anyone who wishes to make a "hit" on the Internet site. This surely illustrates one

of the changes wrought by the so-called "technological revolution" and illustrates the difference between requiring some effort to acquire public information, and requiring virtually no effort to acquire it. It was this far broader disclosure - albeit of the same material - that raised the concerns of the judges and of the Financial Disclosure Committee.

Without in any way desiring to minimize or downgrade those concerns, when the matter came up for discussion at the March meeting of the Judicial Conference, a large majority of the members, myself included, felt that the Financial Disclosure Committee's willingness to withhold financial disclosure reports in their entirety - well intentioned as it might be - could not be supported in view of the statutory language. Congress specifically provided in the Ethics in Government Act an exemption from the prohibition on use of the reports for commercial purposes to "news and communications media for dissemination to the general public." That is to say that the news media can use the reports for "commercial purposes" to disseminate the reports to the public. And there are no exceptions to this for the Internet.

The statute also provides that the disclosure statements can be redacted if the Judicial Conference, in consultation with the U.S. Marshals Service, finds that "revealing personal and sensitive information could endanger" the judge. The reports may be redacted "only to the extent necessary . . . and for as long as the danger . . . exists." Clearly, these provisions contemplate some production of some portion of the reports at some point in time. They provide only for delay in production, conditions on the production, and redaction in the production of the reports, and do not provide for withholding the production entirely.

So the Executive Committee of the Judicial Conference, in cooperation with the Financial Disclosure Committee, undertook to prepare a set of regulations which would, in their view, fully conform to the current statute. These regulations are being designed to facilitate redacting the sensitive information in the reports to avoid an en masse production, that in the words of the statute, "could endanger" the judges.

The Judicial Conference may also request Congress to consider amendments to the Ethics in Government Act filing requirements so as to reduce security risks to federal judges. That Act already provides that individuals engaged in intelligence activities - such as the CIA, for example - need not make their reports publicly available. I don't think the Judicial Conference has any desire to obtain a complete exemption for judges, but simply wishes to assure its membership that their legitimate concerns are adequately addressed in the Act.

For the most part, the Judicial Conference of the United States operates in relative anonymity. Occasionally, however, an issue arises that captures the public's attention. With regard to the issue of posting all judges' financial disclosure statements on the Internet, I believe the Judicial Conference has acted responsibly and demonstrated a good faith effort to comply with a law that frankly poses some risks to judges. The Conference now hopes that Congress will also act responsibly and balance the legitimate needs for public disclosure of judges' financial holdings with the judges' needs for security.

Thank you for inviting me to be with you today.

**EMBARGOED until 6 p.m. E.S.T.  
December 31, 2011 (No wires, no  
broadcasts, no Internet until  
6 p.m. E.S.T.)**  
For further information, contact the  
Public Information Office  
202-479-3211

### **2011 Year-End Report on the Federal Judiciary**

In 1920, American baseball fans were jolted by allegations that Chicago White Sox players had participated in a scheme to fix the outcome of the 1919 World Series. The team owners responded to the infamous “Black Sox Scandal” by selecting a federal district judge, Kenesaw Mountain Landis, to serve as Commissioner of Baseball and restore confidence in the sport. The public welcomed the selection of a prominent federal judge to purge corruption from baseball. But Judge Landis’s appointment led to another controversy: Could a federal judge remain on the bench while serving as Baseball Commissioner? That controversy brought to the fore a still broader question: Where do federal judges look for guidance in resolving ethics issues?

Since 1789, every federal judge has taken the same solemn oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and “to faithfully and impartially discharge and perform” the duties of judicial office. But for the first 130 years of the Nation’s

existence, federal judges had no formal source for guidance on the broad array of ethical issues that might arise in the course of judicial service. Judge Landis resolved his situation by resigning his judicial commission in 1922 to focus all his efforts on the national pastime. The controversy, however, prompted organized efforts to develop more guidance for judges. That same year, the American Bar Association asked the Nation's new Chief Justice, former President William Howard Taft, to chair a Commission on Judicial Ethics.

Within two years, Chief Justice Taft's commission produced the ABA's 1924 Canons of Judicial Ethics. The 1924 Canons were advisory. As Chief Justice Taft explained, their 34 general principles served as "a guide and reminder" that federal and state judges could consult in discharging their duties. Since that time, the Judicial Conference of the United States—the policy-making body for the lower federal courts—has adopted and regularly updated its own Code of Judicial Conduct to provide guidance to federal judges. The 1924 Canons provided the foundation for that ongoing undertaking.

Some observers have recently questioned whether the Judicial Conference's Code of Conduct for United States Judges should apply to the Supreme Court. I would like to use my annual report this year to address

that issue, as well as some other related issues that have recently drawn public attention. The space constraints of the annual report prevent me from setting out a detailed dissertation on judicial ethics. And my judicial responsibilities preclude me from commenting on any ongoing debates about particular issues or the constitutionality of any enacted legislation or pending proposals. But I can provide some clarification on how the Justices address ethical issues and dispel some common misconceptions.

#### **A. The Code of Conduct for United States Judges**

What is now known as the Judicial Conference of the United States was created by Congress in 1922 to provide national guidance to the lower federal courts. The Chief Justice chairs the Judicial Conference, which includes the chief judge of each of the 13 federal judicial circuits and a district judge from each circuit. The Judicial Conference conducts much of its work through 25 committees, including the Committee on Codes of Conduct. As noted, that committee has promulgated and periodically revises the Code of Conduct for United States Judges. It also provides advice, on a formal and informal basis, to judges and judicial employees on the meaning and application of the Code's provisions.

The Code of Conduct, by its express terms, applies only to lower federal court judges. That reflects a fundamental difference between the

Supreme Court and the other federal courts. Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.

Some observers have suggested that, because the Judicial Conference's Code of Conduct applies only to the lower federal courts, the Supreme Court is exempt from the ethical principles that lower courts observe. That observation rests on misconceptions about both the Supreme Court and the Code.

All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since, as the commentary accompanying Canon 1 of the Code explains, the Code "is designed to provide guidance to judges." It serves the same purpose as the 1924 Canons that Chief Justice Taft helped to develop, and Justices today use the Code for precisely that purpose. Each does so for the same compelling practical

reason: Every Justice seeks to follow high ethical standards, and the Judicial Conference's Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.

The Code of Conduct is not, of course, the only source of guidance for Justices or lower court judges. Because it is phrased in general terms, it cannot answer all questions. And because the Code was developed for the benefit of the lower federal courts, it does not adequately answer some of the ethical considerations unique to the Supreme Court. The Justices, like other federal judges, may consult a wide variety of other authorities to resolve specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues. For that reason, the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance. But as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues.

**B. Financial Disclosure and Gift Regulations**

In addition to establishing the Judicial Conference, Congress has enacted legislation addressing a number of specific ethical matters. In particular, Congress has directed Justices and judges to comply with both financial reporting requirements and limitations on the receipt of gifts and outside earned income. The Court has never addressed whether Congress may impose those requirements on the Supreme Court. The Justices nevertheless comply with those provisions.

The Justices file the same financial disclosure reports as other federal judges. Those reports disclose, among other things, the Justices' non-governmental income, investments, liabilities, gifts, and reimbursements from third parties. For purposes of sound administration, the Justices, like lower court judges, file those reports through the Judicial Conference's Committee on Financial Disclosure. That committee provides guidance on the sometimes complex reporting requirements.

The Justices also observe the same limitations on gifts and outside income as apply to other federal judges. To provide additional guidance for lower court judges, the Judicial Conference has promulgated regulations governing both of those subjects. In 1991, the Members of the Court adopted an internal resolution in which they agreed to follow the Judicial

Conference regulations as a matter of internal practice. As a result, the Justices follow the very same practices on those subjects as their lower court colleagues.

### **C. Recusal**

Congress has directed that federal judicial officers must disqualify themselves from hearing cases in specified circumstances. As in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested. The Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court.

The governing statute, which is set out in Title 28, Section 455, of the United States Code, states, as a general principle, that a judge shall recuse in any case in which the judge's impartiality might reasonably be questioned. That objective standard focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts. Section 455 also identifies a number of more specific circumstances when a judge must recuse.

All of the federal courts follow essentially the same process in resolving recusal questions. In the lower courts, individual judges decide for

themselves whether recusal is warranted, sometimes in response to a formal written motion from a party, and sometimes at the judge's own initiative. In applying the Section 455 standard, the judge may consult precedent, consider treatises and scholarly publications, and seek advice from other sources, including judicial colleagues and the Judicial Conference's Committee on Codes of Conduct. A trial judge's decision not to recuse is reviewable by a court of appeals, and a court of appeals judge's decision not to recuse is reviewable by the Supreme Court. A court normally does not sit in judgment of one of its own members' recusal decision in the course of deciding a case.

The process within the Supreme Court is similar. 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.

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.

As with other ethical questions, Justices and lower federal court judges contemplating recusal can take good counsel from the principles set forth in Canon 14 of the original 1924 Canons of Judicial Ethics. That Canon addresses judicial independence. It provides that a judge “should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.” Such concerns have no role to play in deciding a question of recusal.

I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. 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.

\*\*\*\*\*

When the Chicago White Sox took the field in 1919, they surely had no idea that their play would trigger a chain of events that would lead to the development of a code of conduct for federal judges. The public’s confidence in the integrity of the federal courts led to the appointment of a

federal judge to address the Black Sox Scandal. And when the federal judiciary encountered an ethical issue of its own, it took the lead in articulating ethical standards to bolster that confidence. Since that time, the judiciary has continued to revisit and revise those standards to maintain the public's trust in the integrity of its members.

As Alexander Hamilton put it in *The Federalist* No. 78, federal judges must "unite the requisite integrity with the requisite knowledge" to carry out their duties under the Constitution and laws. Throughout our Nation's history, instances of judges abandoning their oath "to faithfully and impartially discharge and perform" the duties of their office have been exceedingly rare. Judges need and welcome guidance on their ethical responsibilities, and sources such as the Judicial Conference's Code of Conduct provide invaluable assistance. But at the end of the day, no compilation of ethical rules can guarantee integrity. Judges must exercise both constant vigilance and good judgment to fulfill the obligations they have all taken since the beginning of the Republic.

I end this year once again with gratitude to our federal judges and court staff throughout the country for their selfless commitment to public service in the face of demanding dockets and tightened budgets. I am also grateful to Congress, in these times of fiscal constraint, for its careful

consideration of the judiciary's financial needs. Despite the many challenges, the federal courts continue to operate soundly, and the Nation's federal judges continue to discharge their duties with wisdom and care. I remain privileged and honored to be in a position to thank the judges and court staff for their dedication to the ideals that make our Nation great.

Best wishes in the New Year.

## Appendix

### Workload of the Courts

In 2011, caseloads increased in the U.S. district courts and in the probation and pretrial services offices, but decreased in the U.S. appellate and bankruptcy courts. Total case filings in the district courts grew 2% to 367,692. The number of persons under post-conviction supervision rose 2% to 129,780. Cases opened in the pretrial services system also went up 2%, reaching 113,875. In the U.S. courts of appeals, though, filings dropped 1.5% to 55,126. Filings in the U.S. bankruptcy courts, which had climbed 14% in 2010, declined 8% this year to just below 1.5 million petitions.

#### *The Supreme Court of the United States*

The total number of cases filed in the Supreme Court decreased from 8,159 filings in the 2009 Term to 7,857 filings in the 2010 Term, a decrease of 3.7%. The number of cases filed in the Court's *in forma pauperis* docket decreased from 6,576 filings in the 2009 Term to 6,299 filings in the 2010 Term, a 4.2% decrease. The number of cases filed in the Court's paid docket decreased from 1,583 filings in the 2009 Term to 1,558 filings in the 2010 Term, a 1.6% decrease. During the 2010 Term, 86 cases were argued and 83 were disposed of in 75 signed opinions, compared to 82 cases argued and 77 disposed of in 73 signed opinions in the 2009 Term.

*The Federal Courts of Appeals*

Filings in the regional courts of appeals fell 1.5% to 55,126. Growth occurred in original proceedings and bankruptcy appeals. Appeals arising from the district courts decreased. Although civil appeals remained fairly stable, reductions occurred in many types of criminal appeals. Appeals of administrative agency decisions declined as a result of the continued drop in filings related to the Board of Immigration Appeals.

*The Federal District Courts*

Civil filings in the U.S. district courts grew 2% to 289,252 cases. Fueling this growth was a 2% increase in federal question cases (i.e., actions under the Constitution, laws, or treaties of the United States in which the United States is not a party in the case), which resulted mainly from cases addressing civil rights, consumer credit, and intellectual property rights.

Cases filed with the United States as a party climbed 9%. Those with the United States as plaintiff increased in response to a surge in defaulted student loan cases. Cases with the United States as defendant rose largely because of growth in Social Security cases.

Although criminal case filings (including transfers) remained stable (up by 12 cases to 78,440), the number of criminal defendants increased 3% to set a new record of 102,931. Growth in filings occurred for defendants

charged with drug crimes, general offenses, firearms and explosives offenses, sex offenses, and property offenses.

Filings for defendants charged with immigration offenses fell for the first time since 2006, decreasing 3%. The southwestern border districts accounted for 74% of the Nation's total immigration defendant filings, up from 73% in 2010.

*The Bankruptcy Courts*

Filings of bankruptcy petitions declined 8% to 1,467,221. This was the first reduction since 2007, when filings plunged after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. Filings for 2011 were lower in 87 of the 90 bankruptcy courts. Nonbusiness petitions fell 8%, and business petitions dropped 14%.

Bankruptcy petitions decreased 10% under chapter 7, 16% under chapter 11, and 4% under chapter 13.

*The Federal Probation and Pretrial Services System*

The 129,780 persons under post-conviction supervision on September 30, 2011, represented an increase of 2% over the total from the previous year. The number of persons serving terms of supervised release after their departure from correctional institutions grew 2% to 105,037, and amounted to 81% of all persons under supervision.

Cases opened in the pretrial services system in 2011, including pretrial diversion cases, rose 2% to 113,875.



American University Washington College of Law

Washington College of Law Research Paper No. 2013-21

**JUDICIAL ETHICS AND SUPREME COURT EXCEPTIONALISM**

Amanda Frost

This paper can be downloaded without charge from  
The Social Science Research Network Electronic Paper Collection

## Judicial Ethics and Supreme Court Exceptionalism

AMANDA FROST\*

### ABSTRACT

*In his 2011 Year-End Report on the Federal Judiciary, Chief Justice John Roberts cast doubt on Congress's authority to regulate the Justices' ethical conduct, declaring that the constitutionality of such legislation has "never been tested." Roberts' comments not only raise important questions about the relationship between Congress and the Supreme Court, they also call into question the constitutionality of a number of existing and proposed ethics statutes. Thus, the topic deserves close attention.*

*This Essay contends that Congress has broad constitutional authority to regulate the Justices' ethical conduct, just as it has exercised control over other vital aspects of the Court's administration, such as the Court's size, quorum requirement, and even the words of the oath the Justices must take as they are sworn into office. The Essay acknowledges, however, that Congress's power to regulate judicial ethics is constrained by separation of powers principles, and, in particular, the need to preserve judicial independence. Furthermore, legislation directed at the Supreme Court Justices in particular must take into account the Court's special status as the only constitutionally required court, as well as its position at the head of the third branch of government. Although these are important limitations on Congress's power, existing and proposed ethics legislation fall well within them.*

## Table of Contents

I. INTRODUCTION .....	1
II. OVERVIEW OF ETHICS LEGISLATION .....	6
A. FEDERAL LEGISLATION REGULATING JUDICIAL ETHICS.....	6
1. RECUSAL STATUTES .....	6
2. THE ETHICS IN GOVERNMENT ACT OF 1978.....	9
3. THE ETHICS REFORM ACT OF 1989 .....	10
4. THE JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980.....	10
5. THE <i>CODE OF CONDUCT FOR UNITED STATES JUDGES</i> .....	12
6. THE SUPREME COURT TRANSPARENCY AND DISCLOSURE ACT OF 2011.....	13
B. CONSTITUTIONAL OBJECTIONS TO ETHICS LEGISLATION .....	15
III. CONGRESS'S CONSTITUTIONAL .....	16
AUTHORITY TO REGULATE THE SUPREME COURT JUSTICES' ETHICAL CONDUCT.....	16
A. THE SOURCES OF CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE THE JUSTICES' ETHICS .....	17
1. NECESSARY & PROPER CLAUSE .....	17
2. OBJECTIONS.....	21
3. CONCLUSION .....	24
B. LIMITS ON CONGRESS'S POWER TO REGULATE JUDICIAL ETHICS .....	25
1. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE.....	25
2. THE IMPEACHMENT CLAUSE .....	29
3. JUDICIAL HIERARCHY .....	32
4. "ONE SUPREME COURT" .....	36
C. CONCLUSION .....	42
IV. THE HISTORY OF CONGRESSIONAL .....	42
REGULATION OF JUDICIAL ETHICS .....	42
V. CONCLUSION .....	46

## I. INTRODUCTION

In his mild-mannered way, Chief Justice John Roberts has set the stage for a constitutional conflict between Congress and the Supreme Court. Roberts' 2011 Year-End Report on the Federal Judiciary focused on judicial ethics, a subject that has been much in the news lately.<sup>1</sup> In the course of that year, several of the Justices were publicly criticized for their alleged involvement in political fundraisers,<sup>2</sup> acceptance of gifts<sup>3</sup> and travel expenses paid for by groups with political viewpoints;<sup>4</sup> failure to report a spouse's employment;<sup>5</sup> and, most controversially, refusal to recuse themselves from the constitutional challenges to the health care reform legislation despite alleged conflicts of interest.<sup>6</sup> Existing laws

---

1. 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

2. See, e.g., Jeff Shesol, Op-Ed, *Should the Justices Keep their Opinions to Themselves?*, N.Y. TIMES, Jun. 28, 2011, at A23 (describing Justice Alito's attendance at the American Spectator's fund-raising dinner, where he had previously given the keynote address, and Justices Thomas's and Scalia's attendance at political strategy meetings hosted by the conservative Koch brothers); R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for Supreme Court*, WASH. POST, Feb. 23, 2011 (describing public interest group's criticism of Justices Thomas and Scalia for attending political events hosted by the Koch brothers); Nan Aron, Op-Ed., *An Ethics Code for the High Court*, WASH. POST, Mar. 13, 2011 (same).

I do not take a position on the merits of these allegations of unethical conduct by the Justices, in part because some of the facts underlying these claims are in dispute. The allegations are noted here only to support the point that the Justices' ethical conduct is regularly the subject of public debate, which in turn supports calls for congressional oversight.

3. See Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES, June 19, 2011, at A1 (describing real estate magnate Harlan Crow's gifts to Justice Thomas and his wife, as well as his financial support for projects in which they have an interest).

4. See Editorial, *The Justices' Junkets*, WASH. POST, Feb. 21, 2011, at A14 (criticizing Justices Breyer, Ginsburg, and Sotomayor for taking foreign trips paid for by organizations with "liberal agendas").

5. See Jeffrey Toobin, *Partners*, NEW YORKER, Aug. 29, 2011, at 41 (reporting that in January 2011, Justice Clarence Thomas amended several of his financial disclosure forms because he failed to record his wife's employment).

6. See, e.g., Editorial, *The Supreme Court's Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38 ("Liberals in Congress have called for Justice Clarence Thomas to recuse himself from the review of the health care reform law because his wife, Virginia, has campaigned

already cover some of this claimed misconduct, and the spate of negative publicity inspired the introduction of new federal legislation that would further regulate the Justices' behavior.<sup>7</sup> Roberts' Year-End Report acknowledged these accusations of impropriety, as well as the legal framework that governs in this area.<sup>8</sup> Then, in a shot across Congress's bow, he stated that the Court had "never addressed" Congress's constitutional authority to prescribe ethics rules for the Supreme Court— which many took to be a broad hint that, at least in the Chief Justice's view, Congress lacks that authority.<sup>10</sup>

---

fervently against it. Conservatives insist that Justice Elena Kagan should remove herself from the case because, they claim, as solicitor general she was more involved in shaping the law than she lets on."); Toobin, *supra* note 5, at 41 (reporting that in February 2011, 74 members of Congress "called on Thomas to recuse himself from any legal challenges to President Obama's health-care reform, because his wife has been an outspoken opponent of the law").

7. See Smith, *supra* note 2, at 41 (describing the controversies regarding the Justices' political activities and reporting that Representative Chris Murphy was planning to introduce legislation to address the problem); see also Erich Lichtblau, *Democrats Seek to Impose Tougher Supreme Court Ethics*, N.Y. TIMES, Sep. 8, 2011, available at <http://thecaucus.blogs.nytimes.com/2011/09/08/democrats-seek-to-impose-tougher-supreme-court-ethics/?scp=4&sq=ginsburg%20ethics%20%22supreme%20court%22&st=cse>; Robyn Haig Cain, *Rep. Slaughter Wants a Supreme Court Code of Ethics*, Mar. 9, 2012, available at [http://blogs.findlaw.com/supreme\\_court/2012/03/rep-slaughter-wants-a-supreme-court-code-of-ethics.html](http://blogs.findlaw.com/supreme_court/2012/03/rep-slaughter-wants-a-supreme-court-code-of-ethics.html) (describing a letter signed by Representative Louise Slaughter and thirty other members of Congress calling on the Supreme Court Justices to adopt a formal code of ethics).

8. 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 5.

9. *Id.* at 6 ("The Court has never addressed whether Congress may impose [financial reporting requirements and limitations on the receipts of gifts and outside earned income] on the Supreme Court. The Justices nevertheless comply with those provisions."); see also *id.* at 7 ("As in the case of financial reporting and gift requirements, the limits on Congress's power to require recusal have never been tested.").

10. Nan Aron, HUFFINGTON POST, Jan. 4, 2012, *John Roberts On Ethics: Move Along, Nothing to See Here*, [http://www.huffingtonpost.com/nan-aron/john-roberts-on-ethics-mo\\_b\\_1184164.html](http://www.huffingtonpost.com/nan-aron/john-roberts-on-ethics-mo_b_1184164.html) (Chief Justice Roberts' report "inferred" that "no one can make rules for [the Supreme Court]"). See, e.g., William Yeomans & Herman Schwartz, *Roberts to America: Trust Us*, POLITICO, [http://www.politico.com/news/stories/0112/71895\\_Page3.html](http://www.politico.com/news/stories/0112/71895_Page3.html) ("Roberts' discussion may also reflect the astonishing view in his annual report that legislative limitations on a justice's activities are unconstitutional.") (last visited March 16, 2013).

To be sure, the Chief Justice was careful to note that his “judicial responsibilities preclude [him] from commenting on any ongoing debates about particular issues or the constitutionality of any enacted legislation or pending proposals.”<sup>11</sup> But he went on to say that the “Court has never addressed whether Congress may impose [ethical] requirements on the Supreme Court,”<sup>12</sup> and noted that the constitutionality of the recusal statute in particular has “never been tested.”<sup>13</sup> With those words, Roberts put the nation on notice that Congress’s authority to regulate the Justices’ ethics is an open question.

The Chief Justice’s Report raises serious questions about the constitutional status of existing ethics legislation, as well as the Supreme Court Justices’ willingness to abide by laws that at least some of them may consider to be invalid, and thus non-binding.<sup>14</sup> His comments also cast doubt on the constitutionality of the Supreme Court Transparency and Disclosure Act of 2011—a bill pending at the time of the Report’s publication that would subject the Justices to investigation and possible sanctions for ethics violations, and require external review of an individual Justice’s recusal determinations.<sup>15</sup> Although the Report has provoked vociferous responses from those on either side of the issue,<sup>16</sup> thus far there has been little academic analysis of the constitutional issues involved.<sup>17</sup>

---

11. 2011 Year-End Report on the Federal Judiciary, *supra* note 1 at 3.

12. *Id.* at 4.

13. *Id.* at 7.

14. After stating that the constitutionality of ethics legislation is an open question, Roberts went on to declare that the “Justices nevertheless comply with these provisions.” *See id.* at 6. However, his basis for this assertion is unclear.

15. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bill.xpd?bill=h112-862>. The proposed law is described in more detail in Part II.A.6.

16. *See, e.g.*, Editorial, *Judicial Ethics and the Supreme Court*, N.Y. TIMES, Jan. 6, 2012, at A24; Eric J. Segall, Op-Ed, *An Ominous Silence on the Supreme Court*, L.A. TIMES, Feb. 12, 2012, at 26; Editorial, *Umpires in Black: Roberts Says the High Court is up for the Big Game*, PITT. POST-GAZETTE, Jan. 5, 2012, at B4; Editorial, *The Recusal Question*, L.A. TIMES, Jan. 3, 2012, at 14; David G. Savage, *Chief Justice: Each Colleague Decides on Merits for Recusal*, CHI. TRIB., Jan. 2, 2012, at 13; Sherrilyn Ifill, *The Chief Strikes Out, Concurring Opinions* (Jan. 4, 2012, 12:14 PM), <http://www.concurringopinions.com/archives/2012/01/sherrilyn-ifills-the-chief-strikes-out.html> (last visited March 16, 2013).

17. *See* Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 60 U. PITTS. L. REV. 189, 190 (2007) (noting that the

This Essay seeks to fill that gap. As is true for most constitutional questions, Congress's authority to regulate the Justices' ethical conduct turns not just on the Constitution's text, but also on its structure, the original understanding, and longstanding tradition in this area.<sup>18</sup> Accordingly, the Essay examines the relevant text of Articles I and III of the Constitution to locate the source of Congress's authority to enact laws regulating the Justices' ethical conduct, as well as constraints on any such power, and then discusses the history of Congress's oversight and administration of the Supreme Court Justices' ethical conduct. As part of this analysis, the Essay considers whether Congress is more constrained when regulating the ethical conduct of Justices on the U.S. Supreme Court than judges serving on lower federal courts, as the Chief Justice seemed to suggest in his Report.

The Essay is structured as follows: Part II provides an overview of existing and proposed ethics legislation and briefly describes the constitutional objections to that legislation, particularly as applied to the Supreme Court. Part III analyzes the Constitution's text and structure to determine the scope of, and limits on, Congress's authority to regulate the Supreme Court Justices' ethics. Although the Constitution requires that there be a Supreme Court, it did not make that institution self-executing, and thus Congress was empowered by the Necessary and Proper Clause to enact legislation implementing the judicial power. For example, vital matters such as the Court's size, the dates of its sessions, and even the words of the oath each Justice takes before ascending to the bench are all set by federal legislation. Ethics statutes, which promote the effective and

---

regulation of judicial ethics "has received little attention from academics"). One exception is a recent article by Louis Virelli, which argues that Congress lacks the authority to regulate recusal of Supreme Court Justices, but which does not address the constitutionality of other types of ethics legislation. *See* Louis J. Virelli, III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 Wis. L. REV. 1181.

18. Depending on one's theory of constitutional interpretation, some of these sources for ascertaining constitutional meaning are more significant than others. *See, e.g.*, Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673 (1999) (explaining why he puts more emphasis on constitutional text than the framers' or ratifiers' intent). Because my goal in this essay is to raise all the reasonable arguments on either side of the issue, I canvas all the mainstream sources typically used by courts and commentators when attempting to ascertain constitutional meaning.

legitimate exercise of the “judicial power,” fall well within Congress’s broad legislative authority over the Court’s administration and operation. That said, Congress’s power to regulate the Supreme Court’s ethical conduct is limited by separation of powers concerns, such as the need not only to preserve judicial independence, but also to demonstrate respect for the Court’s status as the head of a co-equal branch of government.<sup>19</sup> Part III describes how these constitutional principles serve both to empower and restrain Congress’s legislative authority to regulate the Justices’ ethical conduct. Part IV examines the history of congressional-Court interactions regarding judicial ethics, which further bolsters this Essay’s claim that Congress has the constitutional authority to regulate the Justices’ ethical conduct, albeit within limits.

Two caveats are in order. First, the Essay addresses Congress’s constitutional authority to regulate the Justices’ ethical conduct, and does not discuss in any detail the costs and benefits of such legislation. Constitutional questions are frequently raised by opponents of such legislation, derailing the policy questions that are also worthy of attention. Hopefully, this Essay will help to clear away the obstacles that have too often prevented a full and frank discussion of whether such legislation would prove beneficial.

Second, it is worth acknowledging that the Court itself may have the final say on these constitutional questions if litigants or government institutions seek to enforce ethics regulation against sitting Justices. In other words, unlike most separation of powers cases, this is an issue on which the very individuals with a *personal* stake in the matter may ultimately decide the constitutional issue. Human nature being what it is, the Justices may find such legislation hard to swallow, whatever the merits of the constitutional arguments in its favor.<sup>20</sup> More importantly, even if

---

19. Judicial independence is a component of the separation of powers, though the two concepts are not identical. *See* Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 32 (1998) (“Although separation and independence are not synonymous, structural separation among the branches cannot be maintained unless each branch is independent enough to prevent the other two from usurping its powers, for which reason some measure of independence may be inherent in a system of separated powers.”).

20. Cf. Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 538 (2005) (describing judges’ tendency to narrowly construe recusal statutes). Thus far, however, the Justices comply with most of

Congress has the authority to enact such legislation, it may be preferable as a matter of both policy and precedent for the Court to regulate itself.<sup>21</sup> Thus, the best course of action going forward would be to convince the Court that it should take the lead in regulating the ethical conduct of its members to protect its own reputation, which would diminish the need for Congress to do so. Whatever one's views of Congress's constitutional authority in this area, one thing is clear: If the Supreme Court policed itself, Congress would not need to do so.

## II. OVERVIEW OF ETHICS LEGISLATION

This Part surveys the current and proposed legislation regulating judicial ethics, and then describes potential constitutional problems raised by congressional regulation of the Justices' ethical conduct. Although much of the discussion focuses on Congress's power to regulate the ethics of *all* Article III judges, some scholars claim that the Supreme Court's special constitutional status imposes additional constraints on Congress.

### A. FEDERAL LEGISLATION REGULATING JUDICIAL ETHICS

#### 1. RECUSAL STATUTES

In 1792, Congress passed the first statute requiring lower federal court judges to recuse themselves under certain circumstances.<sup>22</sup> Over the years, Congress repeatedly modified and broadened the law, but continued to limit its application to judges on the "inferior" courts. It was not until 1948 that Congress expanded the law to include the Justices.<sup>23</sup>

---

the ethical requirements imposed on them by Congress most of the time. *See infra* Part IV.B.

21. *See, e.g.*, Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 212 (1993) ("As scholars have noted, the existence of authority to devise mechanisms other than impeachment for judicial discipline does not itself prove that instituting those other mechanisms is desirable."); Editorial, *Trust and the Supreme Court*, N.Y. TIMES, Feb. 20, 2012, at A18 ("The court should embrace sensible ethics rules . . . on its own.").

22. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278–79 (1792).

23. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (1992)). Congress did not discuss this change at any length in the legislative history. The only mention of the decision to include the Justices in the recusal

Today, three different statutes govern recusal of federal judges, of which only Title 28, Section 455 of the United States Code applies to the Supreme Court.<sup>24</sup> That statute requires “[a]ny justice, judge, or magistrate judge of the United States” to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned,” as well as for other listed grounds, such as bias or prejudice, personal participation in the case, pecuniary interest, or a family connection to a lawyer or party to the case.

When a party to litigation asks a judge on a lower federal court to step aside, that judge usually decides the question for herself, though she is free to refer the matter to another judge on the same court.<sup>25</sup> If she does not recuse herself, however, the party can appeal that decision to a higher

---

statute comes in the House Report, which simply describes the amended language. *See* H.R. Rep. No. 80-308 at A53 (1947) (“Section 24 of title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.”).

24. Section 144 of Title 28, which applies only to district court judges, requires the recusal of a judge who has a “personal bias or prejudice in the matter.” A third statute, Section 47 of Title 28, provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” Although this statute applies only to lower court judges, Supreme Court Justices generally recuse themselves from cases they heard or decided when sitting on the lower courts. For example, Chief Justice Roberts recused himself from *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), presumably because he had served on the panel of the D.C. Circuit that issued the decision in which certiorari had been granted.

25. *See In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (noting that “a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a different judge,” though “no reported case or accepted principle of law compels her to do so . . .”).

Chief Justice Roberts observed that a “court normally does not sit in judgment of one of its own members’ recusal decisions in the course of deciding a case.” 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 8. Although typically a district court judge decides for him or herself whether to recuse, on occasion district court judges have referred that question to another judge on the same court. *See, e.g.*, *Bradley v. Milliken*, 426 F. Supp. 929 (E.D. Mich. 1977); *United States v. Zagari*, 419 F. Supp. 494, 497 (N.D. Cal. 1976). Furthermore, a litigant who loses a motion asking a circuit court judge to recuse may also seek rehearing before a new panel or a rehearing *en banc*. *See Jeffrey W. Stempel, Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 639 (1987). Thus, in contrast to the Supreme Court, it is not unprecedented in the lower courts for the recusal decision to be made by another judge on that court.

court—although admittedly doing so is difficult as a practical matter.<sup>26</sup> Nonetheless, there is at least the potential for review of a district or circuit judge’s decision to remain on a case.<sup>27</sup> The same is currently not true for the Justices on the U.S. Supreme Court. Although there are no written rules governing recusal procedures, the longstanding practice has been for each Justice to decide for him or herself whether to step aside, usually without issuing any explanation.<sup>28</sup> Conceivably, a litigant could ask the entire Supreme Court to review a Justice’s decision not to recuse him or herself,<sup>29</sup> but none has ever done so.<sup>30</sup>

---

26. If a trial court denies a motion to recuse, the moving party may seek interlocutory review by petitioning for a writ of mandamus. Most circuits make such interlocutory review hard to obtain by “placing a heavy burden on the movant.” Federal Judicial Center, *Recusal: Analysis of Case Law under 28 U.S.C. §§ 455 & 144*, 69 (2002). A party may also appeal the trial judge’s refusal to recuse after final judgment, but this is an exceedingly expensive and inefficient method by which to try to obtain a new trial before a new judge.

27. *See supra* note 25.

28. In a letter responding to inquiries by Senators Patrick Leahy and Joseph Lieberman, Chief Justice Rehnquist stated that “[t]here is no formal procedure for court review of the [recusal] decision of a justice in an individual case. That is so because it has long been settled that each justice must decide such a question for himself.” *See* David G. Savage, *High Court Won’t Review Scalia’s Recusal Decision*, L.A. TIMES, Jan. 27, 2004, at A12.

29. In *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), the Sierra Club filed a motion seeking the recusal of Supreme Court Justice Antonin Scalia. Alan Morrison, who served as lead counsel for the Sierra Club, was planning to file a second motion asking the entire Court to review Justice Scalia’s decision to remain on the case if Scalia did not respond to the initial recusal motion. *See* E-mail from Alan Morrison, Lerner Family Associate Dean for Public Service Law, The George Washington University Law School, to author (Oct. 2, 2012, 4:23pm EST) (on file with author). Shortly before the oral argument, however, Justice Scalia filed a 21-page opinion in which he explained his reasons for refusing to recuse himself. *Cheney*, 541 U.S. at 916, 923 (Scalia, J., mem.).

30. The Supreme Court’s decision to hear a constitutional challenge to the Patient Protection and Affordable Care Act prompted questions about whether Justices Clarence Thomas and Elena Kagan should recuse themselves from the case. Section 455 of Title 28 requires a Justice to disqualify herself if her “impartiality might reasonably be questioned,” or if she “participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” Some Members of Congress called for Justice Thomas to recuse himself because his wife was paid to lobby against that statute, which they contend casts doubt on Justice Thomas’ ability to remain impartial. *See* Toobin, *supra* note 5, at 41 (reporting that in February 2011, 74 members of Congress “called on Thomas to recuse himself

## 2. THE ETHICS IN GOVERNMENT ACT OF 1978

The Ethics in Government Act of 1978 requires most high-level federal officials in all three branches of the federal government to file annual reports in which they publicly disclose aspects of their finances, such as their outside income, the employment of their spouses and dependent children, investments, reimbursements for travel-related costs, gifts, and household liabilities.<sup>31</sup> Any person who “knowingly and willfully” falsifies such a report, or fails to file a report, is subject to civil and criminal penalties.<sup>32</sup>

The Act applies to all federal judges, including Supreme Court Justices.<sup>33</sup> Judges and Justices alike are required to file their disclosure forms with the Judicial Conference of the United States<sup>34</sup>—the administrative and policy-making body for the federal courts<sup>35</sup>—and with the clerk of the court on which the judge or Justice sits.<sup>36</sup> Those reports are then made publicly available. The Act also requires the Judicial Conference to refer to the Attorney General any person who the Conference “has reasonable

---

from any legal challenges to President Obama’s health-care reform, because his wife has been an outspoken opponent of the law”). Others asserted that Justice Kagan should step aside, arguing that she “participated as counsel” or “advisor” on the legislation while serving as Solicitor General. *See The Supreme Court’s Recusal Problem*, *supra* note 6, at A38; Segall, *supra* note 16. However, none of the litigants filed a motion seeking the recusal of either Justice, and neither recused themselves. Amicus curiae Freedom Watch filed a brief asking Justice Kagan to recuse herself. *See Brief of Amicus Curiae Freedom Watch*, filed in *National Federation of Independent Business v. Sebelius* and *Florida v. Department of Health and Human Services* (Nos. 11-393 and 11-400).

31. 5 U.S.C. app. 4, § 102 (2012).

32. 5 U.S.C. app. 4, § 104(a).

33. 5 U.S.C. app. 4, § 101(f)(11).

34. 5 U.S.C. app. 4, § 103(h)(1)(B).

35. Congress created the Judicial Conference of the United States in 1922 to assist in the administration of the federal judiciary. The Chief Justice chairs the Judicial Conference, and its members include the chief judge of each of the 13 federal circuits as well as a district court judge from each regional circuit and the chief judge of the Court of International Trade. *See* 28 U.S.C. § 331.

36. 5 U.S.C. app. 4, § 103(a).

cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported.”<sup>37</sup>

### 3. THE ETHICS REFORM ACT OF 1989

The Ethics Reform Act of 1989 placed strict limits on outside earned income and gifts for all federal officials, including federal judges. Judges and Justices are prohibited from most outside employment, with the exception of teaching, for which any compensation must be pre-approved by the Judicial Conference.<sup>38</sup> In addition, they may not accept honoraria for an appearance, speech, or article, though reimbursement for travel expenses is permitted. Finally, the Act bars judges and Justices from receiving gifts from anyone whose “interests may be substantially affected by” the performance of their duties.<sup>39</sup>

### 4. THE JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

---

37. 5 U.S.C. app. 4, § 104(b). In January 2011, Justice Thomas amended his annual financial disclosure reports going back several years because he failed to report his wife’s consulting work for a Michigan college and for the Heritage Foundation. Letter from Clarence Thomas, Justice, U.S. Supreme Court, to Committee on Financial Disclosure (Jan. 21, 2001), SCRIBD, *available at* <http://www.scribd.com/JWatchDC/d/74643732-Clarence-Thomas-Financial-Disclosure-Report-for-clarence-thomas-disc-amend-01212011>. In a letter accompanying the amendment, Justice Thomas explained that the omission was inadvertent. *Id.*

38. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 7 § 502(a)(5).)

39. 5 U.S.C. § 7353(a)(2) (2011). The statute authorizes the Judicial Conference to adopt rules and regulations implementing these provisions, and to make “reasonable exceptions” to the gift restrictions when “appropriate.” *Id.* at § 7353(b)(1). In June 2011, the *New York Times* reported that Justice Thomas received gifts and free transportation from Harlan Crow, a wealthy real estate magnate. McIntire, *supra* note 3, at A1. Crow has also contributed financially to projects in which Justice Thomas and his wife have an interest, such as an historical museum in Justice Thomas’s hometown of Pin Point, Georgia. *Id.* Ethics experts debate whether Justice Thomas was prohibited from accepting such gifts under the Ethics Reform Act because it is unclear whether Crow’s “interests may be substantially affected” by Justice Thomas’ work on the Court. *Id.*

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980<sup>40</sup> (“Judicial Conduct and Disability Act”) authorizes anyone to file a complaint alleging that a judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>41</sup> Complaints are then reviewed by the Chief Judge of the Circuit, who may dismiss them, conclude the proceedings after finding that “appropriate corrective action has been taken” or that “action on the complaint is no longer necessary,” or appoint a committee of district and circuit court judges to investigate further.<sup>42</sup> The committee is required to submit a report of its investigation to the judicial council of the circuit<sup>43</sup>—a pre-existing administrative body headed by the Chief Judge of the Circuit and made up of an equal number of district and circuit judges from that circuit<sup>44</sup>—which may conduct a further investigation, dismiss the complaint, or take action to “assure the effective and expeditious administration of the business of the courts.”<sup>45</sup> The “possible action” the council may take includes a public or private censure of the judge, an order that no further cases be assigned to the judge for a “time certain,”<sup>46</sup> or a request that the judge voluntarily retire.<sup>47</sup> Finally, the council may refer the matter to the Judicial Conference of the United States, which in turn can recommend impeachment to the House of Representatives.<sup>48</sup>

The Act applies to circuit judges, district court judges, bankruptcy judges, and magistrate judges, but not Supreme Court Justices.<sup>49</sup> The Supreme Court Transparency and Disclosure Act of 2011, pending at the

---

40. Pub. L. No. 96-458, 94 Stat. 2035 (1988)..

41. 28 U.S.C. § 351(a) (2006).

42. 28 U.S.C. §§ 352, 353 (2006). Either the complainant or the judge may petition for review of the Chief Judge’s final order under section 352 by the judicial council for the circuit.

<sup>43</sup> 28 U.S.C. § 353(c).

44. 28 U.S.C. § 332(a) (2006). By statute, each circuit must establish a judicial council which “shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.” 28 U.S.C. § 332(d)(1) (2006).

45. 28 U.S.C. § 354(a) (2006).

46. 28 U.S.C. 354(a)(2) (2006).

<sup>47</sup> 28 U.S.C. 354(a)(2)(B)(ii) (2006).

48. 28 U.S.C. 355(b) (2006).

49. 28 U.S.C. 351(d)(1) (2006) (defining “judge” as “circuit judge, district judge, bankruptcy judge, or magistrate judge”).

time that Roberts wrote his annual report, would change that by placing the Justices under a similar, though not identical, level of oversight for alleged ethics violations.<sup>50</sup>

#### 4. THE CODE OF CONDUCT FOR UNITED STATES JUDGES

The *Code of Conduct for United States Judges* is not a federal statute, but rather a set of ethical guidelines adopted by the Judicial Conference in 1973 to guide the conduct of federal judges.<sup>51</sup> The *Code* is connected to the Judicial Conduct and Disability Act, however, in that violations of the *Code* can be cause for complaint, investigation, and sanction under the Act.<sup>52</sup> Like the Act, the *Code* excludes the Supreme Court Justices.<sup>53</sup>

The *Code* lays out a set of ethical principles to protect the “integrity and independence of the judiciary.”<sup>54</sup> Its five Canons are broadly worded. For example, Canon 2 instructs judges to “avoid impropriety and the appearance of impropriety,” and Canon 3 requires them to “perform the duties of the office fairly, impartially, and diligently.” Although the *Code* is at times more specific—for instance, declaring that a judge “should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin”—it of course cannot address every ethical dilemma facing judges. The Judicial Conference has authorized its Committee on Codes of Conduct to issue advisory opinions about the *Code* “when requested by a judge to whom this *Code* applies.”<sup>55</sup> These advisory opinions provide further guidance for judges seeking to avoid ethics problems.

The *Code*’s primary purpose is to provide judges with “guidance” on ethical matters. Nonetheless, its canons are not optional; federal judges who violate the *Code* may be subject to investigation and sanction.

---

50. For further description of the bill, see *infra* Part II.A.6.

51. *Code of Conduct for United States Judges* (2009), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

52. See *Code of Conduct for United States Judges* at 2–3, Canon 1 cmt.

53. See *Code of Conduct for United States Judges* at 2–3 (“The Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.”).

54. See *Code of Conduct for United States Judges* at 2–3, Canon 1.

55. *Code of Conduct for United States Judges* at 1–2, Introduction.

Commentary to Canon 1 of the *Code* explains that the *Code* “may . . . provide standards of conduct for application in proceedings under the . . . Judicial Conduct and Disability Act of 1980,” although that commentary also cautions that “[n]ot every violation of the Code should lead to disciplinary action.”<sup>56</sup>

#### 6. THE SUPREME COURT TRANSPARENCY AND DISCLOSURE ACT OF 2011

On March 1, 2011, Representative Christopher Murphy introduced the Supreme Court Transparency and Disclosure Act of 2011 (hereinafter “Murphy Bill”), which would impose additional ethics obligation on Supreme Court Justices to bring them into parity with judges on the lower

---

56. *Code of Conduct for United States Judges* at 3, Canon 1 cmt. Several of the Justices have publicly stated that they follow the *Code of Conduct*, even though it does not apply to them. See Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules, Kennedy, Breyer Say*, 79 U.S. L. WKLY. 2389, 2389 (Apr. 19, 2011). In his 2011 Year-End Report, Chief Justice Roberts asserted that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations,” despite the fact that it is not binding. 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 4. As others have noted, however, some of the Justices’ extra-judicial activities appear inconsistent with the *Code*. For instance, Justices Scalia and Thomas were allegedly speakers at a fundraising event for the Federalist Society, which is at odds with the Code provision stating that a judge “may not be a speaker, a guest of honor, or featured on the program” of a fundraiser. See A Question of Integrity: Politics, Ethics, and the Supreme Court, ALLIANCE FOR JUSTICE, <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/federalist-society-fundraiser.pdf> (last visited March 16, 2013); see also Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, TAKING NOTE, (Nov. 10, 2011, 4:30 PM), <http://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice/>. Justice Ruth Bader Ginsburg has spoken at events sponsored by the National Organization for Women, and Justice Stephen Breyer has attended the Renaissance Weekend, see Shesol, *supra* note 2, an event closely associated with Bill and Hillary Clinton. Attendance at either event could be viewed as violating the *Code*’s requirement that judges “refrain from political activity.” See *The Justices’ Junkets*, *supra* note 4, at A14 (criticizing Justices Breyer, Ginsburg, and Sotomayor for taking foreign trips paid for by organizations with “liberal agendas”). Citing these activities, Members of Congress and numerous newspaper editorials and op-eds have called for the Justices to agree to be bound by the *Code of Conduct* or variations on it. See Letter from Richard Durbin, et al., U.S. Senators, to John Roberts, Chief Justice of the United States (Feb. 13, 2012), available at <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/letter-to-supreme-court-2-13-12.pdf>; see also Editorial, *Judicial Ethics and the Supreme Court*, *supra* note 16, at A24; Aron, *supra* note 2.

courts.<sup>57</sup> The Murphy Bill has not been the subject of committee hearings or referred to the full House for a vote, but its contents have nonetheless inspired debate over Congress's power to regulate the Justices' ethical conduct.<sup>58</sup>

The Murphy Bill provides that the *Code of Conduct for United States Judges* "shall apply to Supreme Court justices to the same extent as it applies to circuit and district court judges." The Bill then delegates to the Judicial Conference the responsibility to "establish procedures modeled after the procedures set forth in [the Judicial Conduct and Disability Act of 1980]" for "review[ing] and investigat[ing]" a complaint that a Justice of the Supreme Court has violated the *Code of Conduct*, and then taking "further action, where appropriate . . . with respect to such complaints."<sup>59</sup>

The Bill also creates new procedures to govern the Justices' recusal decisions under Title 28, Section 455 of the United States Code. The Justices must publicly state their reasons for recusing themselves or, alternatively, their basis for denying a party's motion seeking recusal. The Bill also requires the Judicial Conference of the United States to "establish a process" by which a Justice's refusal to recuse is reviewed by "other justices or judges of a court of the United States"—a group that includes retired Justices and senior judges—who "shall decide whether the justice with respect to whom the motion is made should be so disqualified."<sup>60</sup>

The legislation is unusually open-ended, giving the Judicial Conference discretion to establish procedures for reviewing complaints regarding the Justices' conduct and Justices' refusal to recuse themselves. For example, theoretically the bill would allow the Judicial Conference to assign a single district court judge the power to "review" a Supreme Court Justice's refusal to recuse—an unseemly and potentially unconstitutional arrangement. On the other hand, it would also permit the Judicial Conference to delegate review of the recusal decision to the entire Supreme Court sitting *en banc*—a procedure on much stronger

---

57. Supreme Court Transparency and Disclosure Act of 2011, *supra* note 15.

58. *See, e.g.*, 2011 Year-End Report on the Federal Judiciary, *supra* note 1 (taking note of the pending legislation); Virelli, *supra* note 17, at 1205 n.140 (questioning the constitutionality of the pending legislation).

59. Supreme Court Transparency and Disclosure Act of 2011, *supra* note 15.

60. *Id.*

constitutional footing.<sup>61</sup> Thus, if the Murphy Bill were to become law as written, its constitutionality could turn on the Judicial Conference's methods of implementation.

#### B. CONSTITUTIONAL OBJECTIONS TO ETHICS LEGISLATION

The constitutionality of the ethics laws described above has never been addressed by the U.S. Supreme Court.<sup>62</sup> Although a few critics—including some of the Justices themselves<sup>63</sup>—have raised constitutional concerns about applying ethics laws to the Supreme Court, there has been no focused academic analysis of Congress's authority to regulate the Justices' ethical conduct.

No one doubts that Congress has constitutional authority to enact legislation regarding at least some aspects of judicial administration, including judicial ethics, under its Article I authority to make all laws "necessary and proper" to carry out its constitutional mandate.<sup>64</sup> But its powers are not unlimited. Congress must not legislate in ways that undermine the separation of powers, and in particular in ways that threaten judicial independence, both of which are constitutionally enshrined values.<sup>65</sup> Furthermore, Congress may be specially constrained when it comes to regulating the ethical conduct of U.S. Supreme Court Justices. Unlike the lower federal courts, the Supreme Court's existence is mandated by the Constitution, and it sits atop the judicial hierarchy.

---

61. See *infra* Part III.B.

62. Judge Stephen Chandler challenged the constitutionality of a similar disciplinary system in place in 1970 under which the Judicial Council of the Tenth Circuit barred him from hearing new cases, but the Court sidestepped the issue. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 77 (1970).

63. Justice Anthony Kennedy recently testified before Congress that Congress would encounter a "constitutional problem" were it to attempt to make the *Code of Conduct* binding on the justices because it would be "structurally unprecedented for district and circuit court judges to make rules that Supreme Court judges have to follow." See Malloy, *supra* note 54, at 2389; see also 2011 Year-End report on the Federal Judiciary, *supra* note 1, at 6–7.

64. U.S. CONST. art. I, § 8.

65. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

Congress therefore lacks the power to control the jurisdiction and structure the Supreme Court to the same degree it does the lower federal courts, and cannot alter the Court's position at the head of the judicial department. A few scholars argue that some of the provisions in the existing and proposed ethics legislation transgress these boundaries, and a few Justices have suggested that they share this view.

These constitutional questions regarding Congress's authority to regulate the Justices' ethical conduct are worthy of closer analysis than they have thus far received in the academic literature. Parts III and IV will address these issues, elaborating on them and responding to them with reference to the Constitution's text and structure, as well to the original understanding and longstanding practice.

### III. CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE THE SUPREME COURT JUSTICES' ETHICAL CONDUCT

The text of the Constitution is a useful starting point for thinking about Congress's power to regulate the Justices' ethical conduct, but it provides no easy answers. The Constitution is a remarkably spare document, and Article III, which establishes the federal judiciary, is no exception. The three short sections of that Article contain almost no discussion of how federal courts are to exercise the "judicial Power," leaving many gaps to be filled by reference to constitutional structure, original intent, and longstanding practice.

Section 1 of Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The second and final sentence of Section 1 provides that judges on both the "inferior" and "supreme" courts "shall hold their Offices during good Behavior" and prohibits Congress from reducing their compensation. Section 2 describes the subject matter jurisdiction of the "Cases" and "Controversies" that federal courts are empowered to hear. Section 2 then lists those few categories of cases that fall within the Supreme Court's original jurisdiction and states that the Supreme Court shall have appellate jurisdiction over all other categories of cases "with such Exceptions, and

under such Regulations as the Congress shall make.”<sup>66</sup> That is all Article III has to say about the structure and activities of the judicial branch.

Further information about the relationship between Congress and the courts can be found in Article I, which provides that Congress has the authority to “constitute Tribunals inferior to the supreme Court.”<sup>67</sup> Also relevant is Congress’s Article I power to make Laws “which shall be necessary and proper” for executing its powers.<sup>68</sup> Finally, Congress can remove federal judges, like other federal officers, through the impeachment process.<sup>69</sup>

As this brief overview suggests, the Constitution leaves many important questions unanswered about Congress’s power to enact legislation affecting the federal courts. Nonetheless, some textualist arguments can be marshaled in favor of Congress’s power to regulate the Justices’ ethical conduct, albeit within limits.

#### A. THE SOURCES OF CONGRESS’S CONSTITUTIONAL AUTHORITY TO REGULATE THE JUSTICES’ ETHICS

##### 1. NECESSARY & PROPER CLAUSE

Congress’s authority to enact ethics legislation, like its power over judicial administration more generally, is rooted in the Constitution’s implicit assumption that Congress would play a major role in effectuating the Supreme Court’s exercise of judicial power. In contrast to the executive and legislative branches, the judicial branch is not self-executing, and thus the political branches had to take action for it to come into being.<sup>70</sup> Article III leaves vital questions about the Supreme Court’s daily activities unanswered, such as the size of that Court and the dates of its sessions. As a textual matter, then, Congress’s power to manage the federal courts arises from the gaps in Article III, coupled with its Article I authority to “make all Laws which shall be necessary and proper for

---

66. The third and final section of Article III defines the crime of treason and describes how it shall be adjudicated, and thus is not relevant to the topic of this Essay.

67. U.S. CONST. art. I, § 8.

68. U.S. CONST. art. I, § 8.

69. U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6.

70. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20 (6th ed. 2009).

carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.”<sup>71</sup> These sources of authority justify a wide range of legislation concerning judicial administration, including the ethical conduct of the judges and Justices who serve on those courts.

The Constitution contains no information about how the Supreme Court would exercise the judicial power as a practical matter.<sup>72</sup> Nor does it explicitly give the federal courts the power to control their internal operating rules, as it does for the House and Senate.<sup>73</sup> Accordingly, the first Congress was constitutionally empowered—perhaps even obligated—to enact legislation settling these crucial logistical and administrative matters.<sup>74</sup> As Professor James Pfander has observed, Article III “leaves

---

71. U.S. CONST. art. I, § 8. Congress’s control over the lower federal courts is further bolstered by its Article I, section 8 authority to “constitute Tribunals inferior to the Supreme Court.” This provision, of course, cannot provide any constitutional authority for Congress’s regulation of the U.S. Supreme Court.

72. In contrast, the Constitution provides that Congress must “assemble at least once in every Year” on the “first Monday in December, unless they shall by Law appoint a different Day.” U.S. CONST. art. I, § 4. The Constitution also establishes that a majority of the members of each House must be present to constitute a quorum. U.S. CONST. art. I, § 5.

73. “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” U.S. CONST. art. I, § 5.

74. See EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 209 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978) (“Although a Supreme Court is provided for by the Constitution, the organization of the existing Court rests on an act of Congress.”); FALLON ET AL., *supra* note 70, at 20 (“The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system . . .”); JAMES E. PFANDER, ONE SUPREME COURT 2 (2009) (Article III “creates a framework for the federal judiciary and leaves Congress in charge of many of the details.”); Edward A. Hartnett, *Not the King’s Bench*, 20 CONST. COMMENT. 283, 284 (2003) (“Until an Act of Congress spelled out such specifics, there would be no Supreme Court . . .”); WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 25 (1995) (“[The] Constitution created only the bare bones of a federal judicial system and left many details to be fleshed out by the legislative, executive, and judicial branches.”).

If Congress had not enacted legislation establishing the Supreme Court, the Court might nonetheless have come into existence had the President nominated a Chief Justice who was then confirmed by the Senate. Thus, congressional legislation was perhaps not required to establish the Supreme Court, though such legislation was surely envisioned by the Framers, as evidenced by the First Judiciary Act.

Congress in charge of many of the details” necessary to implement federal judicial power, and “Article I confirms this perception of congressional primacy by empowering Congress to make laws necessary and proper for carrying into execution the powers vested in the judicial branch.”<sup>75</sup> In short, federal legislation brought the Supreme Court into being, and such laws must therefore be well within Congress’s power under the Necessary and Proper Clause.<sup>76</sup>

The first Congress readily assumed this authority when it enacted the Judiciary Act of 1789, which established the federal court system.<sup>77</sup> The Act created a Supreme Court consisting of a Chief Justice and five associate Justices, established a quorum of four, and provided that the Court would meet at the “seat of government” twice a year, commencing the first Monday in February and the first Monday in August.<sup>78</sup> It even covered mundane details of judicial administration, such as granting the Court the authority to hire a clerk of the Court.<sup>79</sup> Congress also mandated that Supreme Court Justices do double-duty as circuit court judges: In addition to meeting in the nation’s capital as the Supreme Court, each Justice was required to travel the country to hear cases in his dual capacity as circuit court judge. For more than 100 years, the Justices accepted Congress’s authority to force them to perform this onerous, and sometimes dangerous, task.<sup>80</sup>

---

75. PFANDER, *supra* note 72, at 2. See John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 532 (2000) (“Congress’s necessary and proper power is precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively.”).

76. See generally William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976).

77. See generally An Act to Establish the Judicial Courts of the United States, ch. 20, 1 STAT. 73 (1789). The First Judiciary Act has special constitutional significance because it was enacted by a Congress composed of the Framers’ contemporaries, including a number of the Framers themselves. Accordingly, that Act is “widely viewed as an indicator of the original understanding of Article III.” FALLON ET AL., *supra* note 70, at 21. If nothing else, then, the Act reveals that the First Congress assumed it had the constitutional authority to regulate the day-to-day operations of the Supreme Court.

78. *Id.*

79. *Id.*

80. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting a constitutional challenge to law obligating Supreme Court Justices to sit as circuit judges); see also

Congress continues to control by legislation most of the areas over which it initially assumed authority in 1789. For example, federal laws currently in place authorize the Justices to hire librarians, marshals, clerks, law clerks, and secretaries to assist them in their work.<sup>81</sup> The size of the Court,<sup>82</sup> quorum requirements,<sup>83</sup> dates of the Court's sessions,<sup>84</sup> and oath of office<sup>85</sup> all continue to be set by statute. A federal statute even purports to control the outcome of a case should the Court foresee the absence of a quorum for two Terms in a row. Under such circumstances, the Court must issue an order affirming the lower court's judgment, which shall "have the same effect" as an affirmance by an equally divided Court—that is, no precedential effect at all.<sup>86</sup> Almost everyone accepts Congress's broad authority to enact legislation affecting the day-to-day operations of the Court.

Congress's control over judicial administration generally provides important context for its authority over judicial ethics specifically. If the Constitution had spelled out the details of the Supreme Court's operation, or delegated to the Court the power to establish its own internal operating rules, then perhaps Congress would not have the authority to enact ethics legislation—or, for that matter, *any* legislation regarding judicial administration. But the Supreme Court is not an isolated institution intended to operate entirely free from the political branches; to the contrary, it has always depended on the political branches to lay out the parameters governing its exercise of judicial power. Ethics legislation is not *sui generis*, but rather is simply one particular category of legislation within the broader field of judicial administration—a field in which Congress has always played a major role. Congress's authority over judicial ethics is less surprising once one realizes that Congress has long

---

CASTO, *supra* note 72, at 55 (describing circuit riding as a "physically arduous task that [the Justices] found irksome"). However, the Justices' attendance declined over the nineteenth century, leaving district court judges as the sole judges on these courts. Cite.

81. *See, e.g.*, 28 U.S.C. §§ 671–675 (2012).

82. 28 U.S.C. § 1 (2012).

83. *Id.*

84. 28 U.S.C. § 2 (2012).

85. 28 U.S.C. § 453 (2012).

86. 28 U.S.C. § 2109 (2012). Congress's power over the rules of precedent is hotly debated. *See, e.g.*, Harrison, *supra* note 73.

assumed the power to regulate many important aspects of the Court's daily activities.

## 2. OBJECTIONS

Opponents of ethics laws might argue, however, that legislation setting the Court's size and the dates on which it is to hold its sessions are necessary for the Court to function, but laws regulating ethics are not. Although ethics rules might promote and enhance the Supreme Court's reputation, they are not as vital to the Court's exercise of judicial power as those regarding membership and meetings dates. Furthermore, once the Court was up and running, it could write its own code of ethics if it so chose, and thus Congress had no reason to take such action on the Justices' behalf.

The problem with these arguments is that they prove too much. Congress has enacted many statutes that are not essential to the Court's very existence—such as laws dictating the oath of office for new Justices<sup>87</sup> and the responsibilities of circuit Justices<sup>88</sup>—without any Justice raising a constitutional complaint. Furthermore, as soon as the first Supreme Court was confirmed and began to meet regularly it could have taken charge of *all* aspects of its administration, including its composition and the dates of its sessions, and yet no one argues that Congress's administrative authority over the Court began and ended with the Judiciary Act of 1789.<sup>89</sup> Accordingly, there is no reason to conclude that Congress lacks authority to regulate the Justices' ethical conduct just because the Justices could conceivably assume that responsibility for themselves.<sup>90</sup>

---

87. 28 U.S.C. § 453 (2012).

88. 28 U.S.C. §§ 42, 43 (2012).

89. *See, e.g.*, PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 20–21 (1st ed. 1973) (“The separation of powers doctrine could conceivably have provided the federal courts with a rationale for developing inherent plenary power over their own procedures and administration. But instead, judges and their allies looked then, and would continue to look, to Congress for enabling legislation.”). The Justices of course do exercise significant control over the procedures by which they hear cases. The point is not that the Court has no authority to manage its own internal operations, but rather that Congress has significant authority in this area as well.

90. U.S. CONST. amend. V. Furthermore, the Fifth Amendment provides an additional source of legislative authority over judicial ethics. Ethics statutes not only enhance the

Skeptics might also question whether Congress's authority under the Necessary and Proper Clause to regulate judicial administration supports more intrusive regulation of the Justices' ethical conduct. But a closer look reveals that even the more mundane housekeeping measures share the same purpose as the ethics legislation discussed in Part II: to ensure that the Court's exercise of judicial power is both effective and legitimate.<sup>91</sup> For example, the quorum requirement protects the Court as an institution from being co-opted by a small subset of Justices. Likewise, laws enabling the Justices to hire law clerks and librarians directly support the Justices' ability to research legal questions and write reasonable and just opinions resolving cases. Similarly, ethics legislation seeks to protect the quality of judicial decision-making, as well as the reputation of the judiciary itself, by mandating that the Justices avoid potential conflicts of interest.

Indeed, some laws long viewed as purely administrative seek to control judicial behavior in much the same way that ethics legislation does. For example, Congress requires all newly confirmed Justices to "solemnly swear" that they will "administer justice without respect to persons, and do equal right to the poor and to the rich" and "faithfully and impartially discharge and perform all the duties incumbent upon me" before taking their place on the Court.<sup>92</sup> The purpose of requiring the

---

reputation of the Court, they also protect litigants' Fifth Amendment right not to be deprived of life, liberty, or property without due process of law. An essential component of due process is the right to have one's case heard by an impartial decision maker. Rules restricting gifts and outside income, prohibiting the Justices from engaging in political activities, mandating disclosure of their finances, and requiring them to recuse from cases in which they have an actual or perceived bias directly serve these purposes.

91. See, e.g., Gordon Berman & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 45 MERCER L. REV. 835, 846 (1995) ("Settled constitutional practice demonstrates that [judicial] independence is consistent with Congress's exercise of its authorization, appropriation, and oversight powers, as well as its authority to regulate judicial rulemaking, internal disciplinary procedures, and general administrative operations.") (footnotes omitted); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 122 (1996) (noting that "[f]or most of our history the federal courts had no central organization and were dependent on the political branches not only for budget allocations but for administrative support," which, he argues, supports the constitutionality of legislation affecting the administration of the federal courts).

92. 28 U.S.C. § 453.

Justices to take this oath is to promote fair and impartial judicial decision-making, which is the same goal fostered by laws requiring recusal and restricting the Justices from accepting gifts and outside income. In other words, it is hard to argue that Congress lacks authority to enact laws concerning the Justices' ethical conduct and yet at the same time concede that Congress can control vital administrative matters such as the Court's staff size and the words of the oath, once one realizes that these laws all serve the same purposes and intrude in similar ways on the Court's exercise of judicial power.

More specifically, Congress's authority to mandate recusal procedures and standards for the Justices is supported by its uncontested power to establish both the total number of Justices who will sit on the Court and the number that constitutes a quorum of that Court. Some Justices and commentators have argued that the Supreme Court cannot, or should not, be subject to the same recusal standards as the lower courts because recused Justices cannot easily be replaced, leading to the possibility that a recusal will bar the Court from hearing a case because of a lack of quorum, or that the recusal will effectively operate as a vote against the Petitioner both at the certiorari stage and then on the merits.<sup>93</sup> Another concern is that recusal will lead to affirmance by an evenly divided court, preventing the Court from setting precedent on the matter. But these outcomes, even if not ideal, are surely *constitutional*. Congress initially

---

93. See, e.g., Statement of Recusal Policy (1993) (statement signed by seven of the Justices on the Court at the time, which outlined their policies regarding recusal and declared more generally that they should not recuse themselves “out of an excess of caution” because “[e]ven one unnecessary recusal impairs the functioning of the Court.”); *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915–16 (noting that possibility of a tie vote and the fact that recusal operates as a vote against petitioner); *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (memorandum of Rehnquist, J., denying motion to recuse) (“There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court, and thereby establish the law for our jurisdiction.”); 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 9 (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.”). But see Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81 (2011) (discussing the constitutional and policy concerns raised by a proposal to allow retired Justices to sit by designation in place of recused Justices).

staffed the Court with only six Justices, then expanded and contracted its membership over the next eighty years before finally settling on its present size of nine in 1869.<sup>94</sup> These changes in the Court's membership raise some of the same issues that a recusal of one of the nine would create today. Yet no one claims that Congress transgressed constitutional limits on its authority over the Court by altering the Court's size permanently, which provides support for the conclusion that Congress can require recusals for actual or perceived conflicts of interest.

Some scholars contend that even if Congress has the authority to regulate the ethics and recusal standards for lower the federal courts, that authority does not extend to the U.S. Supreme Court. (And Chief Justice Roberts appears to agree, though the statements in his 2011 Year-End Report were intriguingly cryptic on this point.<sup>95</sup>) Admittedly, Congress's authority to create or abolish the lower federal courts gives it more leeway over the structure and subject matter jurisdiction of those courts than it has over the Supreme Court, which is a constitutionally-required institution. That said, it is hard to see how this distinction strips Congress of power over the Justices' ethical conduct. As just discussed, the Necessary and Proper Clause enables Congress to enact legislation to facilitate the federal courts' exercise of judicial power. Ethics legislation protects the federal courts' reputation and the legitimacy, as well as the accuracy, of judicial decisions, and thus is a valid exercise of Congress's power. The fact that the Supreme Court is constitutionally required means that Congress cannot eliminate or disempower it completely, but does not strip Congress of the power to enact legislation enabling the Court to function effectively.

### 3. CONCLUSION

In sum, Article III's silence, coupled with Congress's authority under the Necessary and Proper Clause, empowers Congress to enact legislation to regulate judicial ethics, just as it enables Congress to enact legislation concerning the Court's size, meeting dates, and other vital administrative matters. That said, Congress's power over the Supreme Court's internal operations is not unlimited. As discussed further below, Congress's authority over the administration of the Court, including Justices' ethical

---

94. See FALLON ET AL., *supra* note 68, at 27.

95. See generally 2011 Year-End Report on the Federal Judiciary, *supra* note 1.

conduct, is limited by the need to protect the Court’s decision-making from external interference and preserve its position atop the judicial hierarchy.

#### B. LIMITS ON CONGRESS’S POWER TO REGULATE JUDICIAL ETHICS

Although Congress has constitutional authority to regulate judicial ethics, its powers are constrained by other constitutional values, such as the separation of powers and the need to preserve judicial independence. This Part describes the constitutional constraints on Congress’s powers to establish ethical rules for federal judges generally, and for Supreme Court Justices in particular.

##### 1. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

The terms “separation of powers” and “judicial independence” appear nowhere in the Constitution, but rather are implied by the Constitution’s text and structure. Although the boundaries between the three branches are far from clear, the judiciary must be free to exercise the “judicial Power” without undue inference from the political branches. The Constitution protects federal judges’ *decisional* independence—that is, their ability to issue judicial decisions free from fear that their compensation will be diminished or that they will be forced from office.<sup>96</sup> This principle is derived in part from the fact that the Constitution established three separate and co-equal branches of government. More specifically, Article III provides judges with life tenure and protection against reduction in compensation, and the only mechanism for removing federal judges is impeachment and conviction for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>97</sup> As Alexander Hamilton explained in Federalist No. 79, the purpose of these provisions is to ensure

---

96. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) (“Everyone agrees that we need ‘decisional independence,’ meaning judges’ ability to adjudicate facts and interpret law in particular cases ‘free from any outside pressure: personal, economic, or political, including any fear of reprisal.’”)(quoting Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996)).

97. U.S. CONST. art. II, § 4.

that judicial decision-making is insulated from political branch influence.<sup>98</sup> Accordingly, congressional regulation of judicial ethics must respect these boundaries.

However, the constitutional protection provided for judicial decision-making does not mean that the judiciary as an *institution* enjoys complete autonomy.<sup>99</sup> To the contrary, as previously discussed, Congress has significant authority under the Necessary and Proper Clause to regulate the federal judiciary's subject matter jurisdiction, budget, structure, size, and even the dates and locations of its sessions. Congress may exercise some control over the judiciary through these mechanisms, even if it must do so in ways that avoid interfering with judges' and Justices' decisions in specific cases.<sup>100</sup>

The ethics legislation described in Part II does not directly conflict with the Constitution's Good Behavior and Compensation Clauses. No such argument could reasonably be made with respect to financial reporting or limitations on outside gifts and income.<sup>101</sup> Nor are laws requiring judges to recuse themselves from specific cases in which they have a conflict of interest equivalent to permanent removal from the bench. The disciplinary measures permitted under the Judicial Conduct

---

98. See THE FEDERALIST No. 79, at 109 (Alexander Hamilton) (Edward Bourne ed., 1901).

99. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation*, 78 IND. L.J. 153, 160 (2003) (“[T]he judicial independence the Constitution gives to the third branch is counterbalanced by powers the Constitution delegates to the first branch to promote judicial accountability.”); Ferejohn & Kramer, *supra* note 96, at 975.

100. See Geyh, *supra* note 99, at 163 (describing the decisional independence/institutional dependence dichotomy).

101. Six federal judges challenged the constitutionality of the Ethics in Government Act's financial reporting requirements shortly after the law was enacted, in part on the ground that penalty for failing to file would unconstitutionally diminish their salary. The Fifth Circuit rejected all of their arguments, and the Supreme Court denied their petition for a writ of certiorari. See *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). The leading treatise on judicial ethics states, “Following this holding, the validity of financial disclosure statutes seems certain.” JAMES A. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 8.02A (4th ed. 2007).

and Disability Act, although serious, do not violate these textual limits on Congress's authority over the courts.<sup>102</sup>

But are such ethics statutes at odds with the *purpose* of the Good Behavior and Compensation Clauses, and with separation of powers principles generally? Conceivably, these facially-neutral laws could be administered so as to influence judicial decision-making, thereby undermining the Constitution's goal of ensuring judicial independence. For example, an appellate court might vote to disqualify a district court judge from a high-profile case because the appellate judges object to her judicial philosophy rather than because they believe she has any recusal-worthy conflict under Title 28, Section 455 of the United States Code. Or a committee of judges investigating an allegation of misconduct under the Judicial Conduct and Disability Act might penalize a judge for his votes in previous cases rather than because they found the judge had engaged in misconduct. If the Murphy Bill becomes law, some of those who are

---

102. There is some debate whether the provision permitting significant caseload suspensions might come close to an attempt to remove a judge without impeachment. The Judicial Conduct and Disability Act permits the circuit judicial council to order that no further cases be assigned to a judge for a "time certain" if the committee thinks it necessary to "assure effective and expeditious administration of the business of the courts." 28 U.S.C. §354(a). Judge Stephen Chandler challenged the constitutionality of the disciplinary system in place in 1970 under which the Judicial Council of the Tenth Circuit barred him from hearing new cases, but the Court sidestepped the issue. *See Chandler*, 398 U.S. at 77. Thus, the constitutionality of such indefinite suspensions remains an open question.

However, the Supreme Court's own practice supports the constitutionality of such suspensions. In 1975, seven of the Justices agreed that they would not assign the writing of any opinions to Justice William Douglas or issue a judgment in any 5-4 decision in which he was in the majority because they feared he had become mentally incompetent. *See Letter of Oct. 20, 1975, reprinted in DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 463-65 (Free Press 1998); see also See Ross E. Davies, The Reluctant Recusants, 10 GREEN BAG 79, 89-90 (2006)* (describing the incident and concluding that the "constitutionality of what amounts to collusive compulsory informal secret recusal is an open question, but the raw fact that the Court has engaged in this form of self-management is not") (internal footnote omitted).

Nonetheless, taking cases away from an Article III judge for any significant period of time comes uncomfortably close to the constitutional line. Thus, this provision of the Judicial Conduct and Disability Act should not be extended to the Supreme Court. Aside from this one provision, however, the ethics laws do not come close to conflicting with the letter of the Good Behavior and Compensation Clauses.

unhappy with the outcome of the Supreme Court's decisions are sure to file ethics complaints, without regard to whether the Justices violated their ethical obligations. Although Article III judges are less likely to manipulate ethics laws to influence judicial decision-making than their political branch counterparts,<sup>103</sup> it is certainly possible.<sup>104</sup> Does this risk of abuse place the constitutionality of these laws in doubt?

The answer must be no. The possibility that a neutrally-worded law could be administered in an unconstitutional manner is a problem that afflicts legislation regulating *any* aspect of the federal judiciary. As previously discussed, federal legislation controls many aspects of judges' and Justices' lives, ranging from the number of administrative assistants they can hire, to courtroom security, to the budget for office supplies. All of these laws are written in neutral terms and yet could conceivably be manipulated to penalize judges for their decisions. Surely Congress is not barred from enacting such legislation simply because it could be misused in this way.<sup>105</sup> Of course, Congress cannot seek to control the outcomes of cases in the guise of regulating judicial ethics. But as long as such legislation is neutral in its application—applying to all judges and Justices,

---

103. *See, e.g.*, RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 134–35, 174 (1973) (arguing that statutes providing for judicial self-regulation are constitutional because they do not give Congress power to sanction judges); *Shane, supra* note 21, at 240 (noting that the threat to judicial independence from judicial self-regulation is limited by the “traditions and training of the federal judiciary, as well as the institutional caution invariably exhibited in all systems of self-regulation”).

104. *See, e.g.*, Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1,76–77 (1989) (“[T]o be meaningful, article III’s [Good Behavior and Compensation Clauses] must protect judges not only collectively from other branches, but also individually from harassment by other judges.”); *see also Chandler*, 398 U.S. at 141–43 (Black, J., dissenting) (arguing that judicial self-discipline can be abused).

105. *Cf. Harrison, supra* note 73, at 540 (“To say that a power may be misused, however, is by no means to say that it does not exist. All power is subject to misuse, and virtually any government function can be carried out irresponsibly.”). *See Geyh, supra* note 99, at 160–61 (discussing the potential constitutional limits on Congress’s power to retaliate against federal judges’ for their decisions); *see also Martin H. Redish, supra* note 18, at 69, (discussing the potential constitutional limits on legislation reducing support staff or other judicial resources).

and to all litigation—it does not undermine the decisional independence protected by the Constitution.<sup>106</sup>

Finally, it is worth noting that separation of powers generally, and judicial independence in particular, are constitutional values that protect all Article III judges, not just the Justices on the Supreme Court.<sup>107</sup> Thus, any independence-based limits on Congress's authority to legislate regarding recusal and judicial misconduct apply equally to legislation affecting all three existing tiers of the federal judiciary. The conclusion that Congress is barred from regulating any aspect of judicial ethics is hard to square with the decades-old (and in some cases, centuries-old) ethics legislation.<sup>108</sup>

## 2. THE IMPEACHMENT CLAUSE

Applying the interpretive principle of *expressio unius est exclusio alterius*, the Constitution's express grant of the power of impeachment to Congress could be read as an implied bar on Congress's authority to use any other method to sanction Article III judges or remove them from individual cases.<sup>109</sup> If a Supreme Court Justice violates an ethical norm, such as sitting on a case in which she has a conflict of interest, some scholars argue that the Constitution provides one remedy—

---

106. Cf. Charles G. Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 919 (2006) (“Congress has traditionally afforded the courts considerably greater branch independence than the text of the Constitution requires and has rarely tested the limits of its power to hold the judiciary accountable as an institution.”).

107. See U.S. CONST. art. III, § 1; see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 (1985) (asserting that all Article III judges have “structural parity” because they all benefit from life tenure and protection against salary reduction).

108. See *infra* Part IV (discussing the history of congressional regulation of judicial ethics).

109. The Latin phrase *expressio unius est exclusio alterius* means the “expression of one is the exclusion of another.” This canon of interpretation is most often invoked in statutory interpretation, in which it is cited for the proposition that a legislature's decision to include specific items in a statute suggests that it meant to *exclude* items not mentioned.

impeachment—and nothing short of that is permitted.<sup>110</sup> The Framers may have hoped or assumed that the threat of impeachment would keep judges and Justices in line, allowing Congress to remove bad apples and at the same time barring Congress from interfering with the exercise of judicial power.<sup>111</sup>

Judicial discipline is not equivalent to impeachment, however. Publicly reprimanding a judge, or even temporarily suspending a judge from receiving new cases, is not equivalent to permanently removing a judge from the bench. Thus, the negative implication from the Impeachment Clause prohibits stripping judges of their judicial power permanently through any method short of impeachment, but should not be read to bar milder forms of discipline.<sup>112</sup>

In any case, it is worth noting that *expressio unius* arguments are often suspect, particularly in constitutional interpretation. The Constitution failed to spell out many aspects of the federal judiciary's organization and operation, and yet no one questions Congress's power to legislate on at least some matters that affect the day-to-day operations of the federal

---

110. Shane, *supra* note 21, at 220 (“[I]t is suggested that all politically controlled disciplinary mechanisms short of impeachment are precluded by implication because any such mechanisms would undermine the value of judicial independence that the [Good Behavior and Compensation Clauses] are intended to protect.”); *id.* at 223 (“A number of commentators assert that the arguments demonstrating the exclusivity of impeachment as a political device for judicial discipline exclude any possibility of judicial discipline through judiciary-dependent devices such as prosecution or judicial self-regulation.”); Virelli, *supra* note 17, at 1211 (“The constitutional principles at stake similarly support a literal reading of the Impeachment Clauses that would exclude unmentioned remedies like recusal.”).

111. See, e.g., *Chandler*, 398 U.S. at 141–42 (Black, J., dissenting) (“[N]o word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate.”). But see *McBryde v. Comm. to Review Cir. Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 64–65 (D.C. Cir. 2001) (rejecting Judge McBryde’s argument that the impeachment clause precludes all other methods of disciplining judges).

112. See, e.g., *McBryde*, 264 F.3d at 67 (“In short, the claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification . . .”).

courts, including the U.S. Supreme Court.<sup>113</sup> The Constitution is a broadly-worded document sketching out the framework of the United States government; it was never intended to address every question that could arise regarding the relationship between the branches. In other words, despite the Constitution's silence on these questions, it is understood that Congress must play an active role in the administration of the federal courts.<sup>114</sup> With this as the background rule, the impeachment clause should not be read as an implied bar to all legislation regarding judicial ethics.<sup>115</sup>

Furthermore, the impeachment-or-nothing argument is dangerous for jurists and for litigants, and thus it is hard to imagine that by including impeachment the Framers meant to prohibit all other forms of discipline. For example, a judge might commit a minor ethical violation—failing to report a spouse's employment, for example—which would be troubling, but would not rise to the level of serious misconduct for which impeachment has always been reserved.<sup>116</sup> If the only method of regulating judicial misconduct were impeachment, Congress might resort to this ultimate sanction more often than the Framers intended, and more often than would be healthy for judicial independence.<sup>117</sup> Alternatively,

---

113. See, e.g., Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 357 n.140 (2006) (“Congress is indisputably authorized to engage in some regulation of the federal courts.”)

114. See *supra* Part II.A.

115. See, e.g., *McBryde*, 264 F.3d at 65 (stating that the Impeachment Clause should not be read to bar methods of judicial discipline that fall short of removal).

116. See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 680 (2001) (“At both the federal and state level, impeachment has proved to be an unwieldy and insufficient method of disciplining judges.”); see also *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 95 (1970) (“But if one judge in any system refuses to abide by such reasonable procedures [regarding the effective administration of the courts] it can hardly be that the extraordinary machinery of impeachment is the only recourse.”); Edward D. Re, *Judicial Independence and Accountability: The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221, 253 (1981) (“That impeachment is cumbersome and unwieldy, and is no real deterrent to aberrant behavior, may perhaps be best demonstrated by our national experience.”).

117. Federal Judge John Pickering was impeached and convicted in 1804. Although Pickering was “hopelessly insane,” he had not committed “treason, bribery, or other high crimes and misdemeanors,” which are the only constitutional grounds for impeachment. As experts on federal judicial administration observed, “[Pickering’s] removal

Congress might refrain from taking any action, leaving judges free to engage in serious, but not impeachment-worthy, offenses without fear of consequences. Either way, the result would diminish the courts' legitimacy in the eyes of the public—a result at odds with the Framers' goals.<sup>118</sup>

Litigants would also suffer in a regime in which impeachment was the only method of disciplining a Justice. Due process demands an impartial judge<sup>119</sup>; impeachment is a *post hoc* remedy that will do nothing to alleviate the due process violation suffered by a litigant whose case was decided by a biased decision-maker. Recusal statutes are a means of removing biased or incompetent judges before harm is done, which impeachment cannot do.<sup>120</sup>

### 3. JUDICIAL HIERARCHY

The Constitution states that the judicial power “shall be vested in one supreme Court.” The creation of the lower federal courts is left to Congress’s discretion, and the Constitution declares that those courts are “inferior to” the Supreme Court. Thus, the Supreme Court is the only constitutionally required Court, and it sits atop the federal judiciary.

Arguably, the Court’s special status constrains Congress’s power to enact ethics legislation in two ways. First, Congress must show proper

---

foreshadowed the problem of having to rely solely on impeachment for judicial removal.” See Russell R. Wheeler & A. Leo Levin, *Judicial Discipline and Removal in the United States*, Federal Judicial Center Staff Paper 5 (1979), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judidisc.pdf/\\$file/judidisc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judidisc.pdf/$file/judidisc.pdf).

118. *But see* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1535-36 (2012) (arguing that Congress should use various indirect constitutional tools, such as impeachment, to “influence the Justices’ recusal practices”).

119. *See, e.g.*, *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972) (finding a violation of the Due Process Clause where the decisionmaker had a financial interest in the proceeding); *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970) (“[A]n impartial decisionmaker is essential.”).

120 Virelli suggests that litigants seek to recuse biased Justices pursuant to the Due Process Clause. *See Virelli, Congress, the Constitution, and Supreme Court Recusal, supra* note \_\_, at 1604-05. But the Court’s current practice is to allow each Justice to decide for him or herself whether recusal is required, which demonstrates that the Court has not been sensitive to the Due Process concerns raised by recusal requests.

respect for the Court's role at the head of a co-equal branch of government; and second, Congress cannot disrupt the constitutionally-required hierarchy that places the Supreme Court above the "inferior" courts.<sup>121</sup> For these reasons, some scholars have expressed doubts about Congress's power to regulate Supreme Court Justices' ethical conduct, particularly if such legislation would give lower federal court judges the power to discipline the Justices.<sup>122</sup>

#### a. Status

The Court's status does not pose an obvious obstacle to federal legislation regulating the Justices' ethical conduct as *individuals*. Most ethics regulation applies to the Justices' conduct off the bench, and not to the Supreme Court as an institution. For example, existing ethics legislation bars judges and Justices from engaging in political activity and from taking money or gifts from parties with matters before the court—that is, extra-judicial activities. Although these laws are intended to protect the legitimacy of judicial decisions, they do not directly regulate exercise of the judicial power.

Because these laws seek to regulate the behavior of judges and Justices off the bench, the Court's status would appear to be irrelevant. As a constitutional matter, Article III judges are treated alike, in that they all benefit from the same life tenure and compensation guarantees, and they all exercise the same "judicial Power." In fact, Justices can and do serve as judges on the lower courts on a regular basis. In other words, the Supreme Court's special constitutional status as an *institution* does not translate into special constitutional status for the Justices.

Unlike most other ethics legislation, recusal laws do apply to the Supreme Court Justices acting in their judicial capacity, and thus directly raise the question whether Congress can regulate the head of a co-equal branch of government. However, the Constitution does not bar Congress

---

121. A few scholars argue that the lower federal courts are not constitutionally required to be subordinate to the Supreme Court. For further discussion of this debate, *see infra* note 125.

122. *Cf. Shane, supra* note 21, at 236 (stating that the "argument for maximum judicial independence is fairly compelling at the Supreme Court level.").

from enacting legislation seeking to safeguard the executive and judicial branch's exercise of their constitutional authority. Rule of law concerns, and the principle that "no man is above the law," justifies legislation affecting all federal officials in all three branches of government. In fact, the financial disclosure requirements that apply to Supreme Court Justices also require annual disclosures by the President and Vice-President of the United States. Thus, there is no constitutional basis for concluding that Congress lacks the power to regulate the conduct of Supreme Court Justices simply because of their position at the head of the federal judiciary.

#### b. Hierarchy

Article III specifies that there shall be "one supreme Court and describes all other Article III courts as "inferior."<sup>123</sup> Most federal courts scholars conclude from this language that the lower courts must be subordinate to the Supreme Court and that Congress cannot enact legislation that would disrupt this relationship. For example, James Pfander argues that this language bars Congress from completely insulating lower federal court decisions from Supreme Court review.<sup>124</sup> Similarly, Evan Caminker contends that "inferior" courts are constitutionally obligated to follow the decisions of their superiors, rendering vertical *stare decisis* a constitutional requirement that cannot be

---

123. U.S. CONST. art. III, § 1. The Constitution also grants the Supreme Court "appellate Jurisdiction" to review the judgments of "inferior" courts, which places these inferior courts in a subordinate position to the Supreme Court on at least those matters over which the Supreme Court can review and reverse them. *See* James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518–19 (2001); *see also* JAMES E. PFANDER, *supra* note 72, at xii ("Apart from creating one 'supreme' court with supervisory authority, the Constitution takes care to ensure that all other adjudicative bodies remain inferior to that one court . . . Inferiority means that the courts and tribunals in question must remain subject to the oversight and control of the Supreme Court."). However, Congress's power to make "Exceptions" to the Supreme Court's appellate jurisdiction undermines the Supreme Court's power over the "inferior" courts. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 (1992) (stating that Article III's Exceptions and Regulations Clause "plainly diminishes the extent to which the Supreme Court is hierarchically dominant over the inferior courts.").

124. PFANDER, *supra* note 72, at xii.

overridden by federal legislation.<sup>125</sup> A few scholars disagree, however, asserting that the supreme/inferior dichotomy refers not to the lower courts' subordinate status, but rather to their restricted geographic and subject matter jurisdiction, which would allow Congress to elevate the lower courts over the Supreme Court on at least some matters.<sup>126</sup>

If the inferior courts must remain subordinate to the Supreme Court, then arguably Congress cannot assign the lower federal court judges a supervisory role over the Justices' ethics. The Murphy Bill could be problematic in that regard, because it delegates to the Judicial Conference of the United States the authority to "establish procedures" to "review" and "investigate" complaints against the Justices, and to take "further action where appropriate." It also gives the Judicial Conference the authority to "establish a process" by which a Justice's refusal to recuse herself is reviewed by "other justices or judges of a court of the United States." The Judicial Conference is chaired by the Chief Justice, but its membership consists of judges on the circuit and district courts. If one adopts the strictest reading of the supreme/inferior dichotomy by concluding that it requires that lower courts be subordinate to the Supreme Court, and that it bars judges on those courts from policing the Justices' ethical conduct, then the Murphy Bill's delegation of authority to the Judicial Conference is constitutionally problematic.<sup>127</sup> To avoid this result, and to avoid the

---

125. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 832–34 (1994).

126. See, e.g., David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457 (1991) ("The same legislative branch that pyramided the judiciary may refashion it however political wisdom directs, without doing violence to the Constitution."); Hartnett, *supra* note 72, at 314 (observing that the "supreme" and "inferior" language may not mean that the lower courts are subordinate to the Supreme Court, but rather may refer to "breadth of geographic and subject matter jurisdiction"); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1180 n.139 (1992) (noting that "supreme" and "inferior" were probably used to distinguish between courts "subject to narrow geographic and subject matter constraints" and those without such constraints). See also Barrett, *supra* note 113, at 344–53 (2006) (summarizing the academic debate on this question and concluding that the Constitution is unclear).

127. Justice Anthony Kennedy recently testified before Congress that Congress would encounter a "constitutional problem" were it to attempt to make the *Code of Conduct* binding on the justices because it would be "structurally unprecedented for district and circuit court judges to make rules that Supreme Court judges have to follow." See

oddity of allowing a lower federal court judge to discipline the Justices, the best practice would be for the Justices to sit in judgment of each other's alleged ethical violations.

However, the constitutionally-obligated hierarchy does not bar the Judicial Conference from playing a role in creating the ethics rules that the Justices would be required to follow. Although hierarchical purists might argue that the Judicial Conference has no authority to require the Justices to follow those rules because that would upset the subordinate position the Constitution intended for the inferior courts,<sup>128</sup> that view is hard to defend. The Judicial Conference is an administrative body, not a court, and it consists of judges from all three levels of the federal judiciary, including the Chief Justice who serves as its chair. Granting it authority to establish ethics rules for the Supreme Court should have no effect on the subordinate status of the inferior courts.<sup>129</sup>

#### 4. “ONE SUPREME COURT”

The first sentence of Article III states that the judicial power shall be vested in “one supreme Court.” Some interpret this clause to mean that one *indivisible* Supreme Court must decide all the cases and controversies that come before it,<sup>130</sup> which would raise constitutional doubts regarding

---

Malloy, *supra* note 54, at 2389; *see also* Shane, *supra* note 21, at 236 n.106 (arguing that it would be “incongruous” to “allow judges whose work is routinely reviewed by the Supreme Court . . . to discipline the justices reviewing them”).

128. *See* Malloy, *supra* note 54, at 2389 (reporting that Justice Kennedy testified before Congress that it would be constitutionally problematic to require the Justices to follow ethical rules created by district and circuit courts).

129. In fact, the Justices are already required to file annual reports disclosing their incomes and obligations to the Judicial Conference, which then bears the responsibility of reporting to the Attorney General if a Justice fails to file a report or files a report containing false information. 5 U.S.C. app. 4, § 104(b).

130. *See, e.g.*, Letter from Chief Justice Hughes to Senator Wheeler (Mar. 21, 1937), *reprinted in* 81 CONG. REC. 2813, 2815 (1937) (“The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.”); Ross E. Davies, *A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 680 (2006) (stating that “the Framers did indeed read ‘one supreme Court’ to mean ‘one [indivisible] supreme Court’—a single body consisting of all of its available and qualified members to conduct its business.”); *Cf.* 2011 Year-End Report of the Federal Judiciary, *supra* note 1, at 9 (asserting that there is “no higher court to review

any legislation that required outside review of a Justice's refusal to recuse him or herself.<sup>131</sup> For example, the Murphy Bill provides that the Judicial Conference must "establish a process" by which a single Justice's decision not to recuse him or herself would be reviewed by "other justices or judges of a court of the United States," including retired or senior justices, and then delegates to the Judicial Conference discretion over the composition of the panel. Such a two-tiered decision-making process—and one that results in the composition of a new "Supreme Court" for the purpose of reviewing the single Justice's recusal decision—violates a narrow reading of the Constitution's mandate that there be only one Supreme Court.

The "one supreme Court" language has never been the subject of litigation or even much close academic scrutiny, and thus its contours remains hazy.<sup>132</sup> Most commentators agree that it prohibits Congress from establishing multiple Supreme Courts populated by different sets of Justices, all empowered to issue decisions binding on the nation as a whole.<sup>133</sup> Far less clear is whether this language bars the Court from

---

a Justice's decision not to recuse in a particular case," which is a "consequence of the Constitution's command that there be only 'one supreme Court.'").

131. Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011) (stating that the "one supreme Court" requirement might bar review of a single Justice's recusal decision), *available at* [www.brookings.edu/research/papers/2011/11/28-courts-wheeler](http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler); Virelli, *supra* note 17, at 1205 n.140 (stating that proposals to allow lower court judges to review Supreme Court recusal decisions have "significant constitutional problems . . . including Article III's mandates that there be only 'one supreme Court,' and that Congress have power to create only 'inferior courts.'").

132. *See* Daniel M. Gonon, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1197 (2008) (Noting that the "one supreme Court" requirement suggests that there are limits on Congress's ability to structure the Court's decision-making, but further observing that the "constitutional text . . . neither indicates what the extent of the 'judicial power' is nor how much delegation of the Supreme Court's powers would go too far.") (internal footnote omitted).

133. *See, e.g.*, EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 2–3 (9th ed. 2007). *But see* Byron R. White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST L.J. 275, 281 (1982) ("Rather than one Supreme Court, there might be two, one for statutory issues and one for constitutional cases; or one for criminal and one for civil cases.").

breaking into subdivisions to decide cases or components of cases,<sup>134</sup> or whether it would prohibit the entire Court from reviewing the decision of one or more of the Justices, particularly on a matter that was separate from the merits (such as recusal).

In fact, the Court has a long history of empowering a single Justice to make decisions on preliminary or ancillary matters that continues to this day, suggesting that the Court itself has never read the “one supreme Court” requirement as an obstacle to this practice. For example, a single Justice can decide whether to grant an extension of time to file a petition for a writ of certiorari,<sup>135</sup> order a stay of a lower court’s decision,<sup>136</sup> issue a writ of habeas corpus,<sup>137</sup> or recuse him or herself.<sup>138</sup> These are all collateral issues, but they can nonetheless be significant to the litigants and to the outcome of a case.<sup>139</sup>

Although a single Justice’s decision often stands as the final word on the matter, a party may ask another Justice or the full Court to review the decision. Supreme Court Rule 22 provides that the “party making an application [to an individual Justice] . . . may renew it to any other Justice,

---

134. Tracey George and Chris Guthrie recently proposed doing just that to enable the Supreme Court to hear a greater number of cases, and they assumed that doing so would not violate the “one supreme Court” requirement. In their view, dividing the Court into panels would not create more than one Supreme Court, since each panel would be a stand-in for the full Court. They point out that the courts of appeals currently sit in three-judge panels to hear most cases, and yet each circuit is still viewed as a single court despite these congressionally-mandated subdivisions. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts of Appeals Image*, 58 DUKE L.J. 1439 (2009).

135. 28 U.S.C. § 2101(c).

136. 28 U.S.C. § 2010(f).

137. 28 U.S.C. § 2241(a) (“Writs of habeas corpus may be granted by the Supreme Court [or] any justice thereof . . . .”). In practice, however, individual Justices always refer matters regarding habeas to the full Court. *See* GRESSMAN ET AL., *supra* note 132, § 17.15 at 884–85, § 11.3 at 662.

138. *See* S. Ct. R. 22 (describing the process by which a party makes an application to a single justice).

139. *See* Gonen, *supra* note 131, at 1161. Moreover, in 1802 Congress assigned to a single justice the power to decide matters arising during the Court’s August session—a practice that continued for thirty-seven years without constitutional objection. Ross Davies gives fascinating discussion of this “rump” Court in his article, *A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678 (2006).

subject to the provisions of this Rule.”<sup>140</sup> When renewed applications do occur, they are usually referred to the full Court, perhaps to avoid the awkward situation in which one Justice essentially reverses the decision of a colleague.<sup>141</sup> Although it is rare for the full Court to overturn a single Justice’s decision, it is not unprecedented, particularly if there has been a change in circumstances.<sup>142</sup>

The long practice by which a single Justice makes decisions for the Court, which may then be reviewed by the *en banc* Court, is at odds with an interpretation of the “one supreme Court” language requiring that the Court make decisions as a single, indivisible entity. One way around the problem is to characterize the decision of a single Justice as tentative rather than a final decision by “the Court.” Today, when a Justice decides not to recuse him or herself, that decision is final, and thus is usually considered a decision by the Supreme Court itself. If the recusal question is reviewable by the rest of the Court, however, then the single Justice’s decision not to step aside should more accurately be viewed as a preliminary assessment rather than a final, binding decision of the Court.

---

140. S. Ct. R. 22.4. However, such renewals are “disfavored.”

141. *See, e.g.*, Holtzman v. Schlesinger, 414 U.S. 1316, 1316 (1973) (Douglas, J., in chambers) (stating that referrals of renewed applications to the full Court “is the desirable practice to discourage ‘shopping around’”). *Holtzman* involved just such a back-and-forth between individual Justices issuing conflicting in-chambers decisions. Congresswoman Elizabeth Holtzman filed suit seeking to enjoin the United States from bombing Cambodia. The district court issued an injunction, which was then stayed by the Second Circuit. Holtzman then appealed to Justice Marshall to vacate the stay, which he declined to do. *Holtzman*, 414 U.S. 1304 (Marshall, J., in chambers). Holtzman then renewed her application with Justice Douglas, who issued a stay, noting that “while the judgment of my brother Marshall is not binding on me, it is one to which I pay the greatest deference.” *Id.* at 1317. The Solicitor General then applied to Justice Marshall once again. Marshall again stayed the district court’s decision, and noted that he had been in communication with the other members of the Court, all of whom agreed with him. *Id.* at 1321, 1322 (Marshall, J., in chambers). Justice Douglas dissented from that decision, arguing that only a quorum of the Court had the power to reverse his decision and that “*seriatim* telephone calls cannot . . . be a lawful substitute.” *Id.* at 1323. These events are described in more detail in Gonen, *supra* note 131, at 1177–79.

142. *See also* Rosenberg v. United States, 346 U.S. 273, 286 (1953) (observing that although the court has “made no practice of vacating stays issued by single Justices . . . reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power”).

Thus, the one and only Supreme Court decision in the case would be that of the *en banc* Court. In fact, the leading treatise on Supreme Court practice describes *all* decisions by individual Justices in these terms, explaining that when an individual Justice grants or denies motions, those decisions are

[N]ot a final resolution of the merits of any case or controversy pending before the Court . . . [but rather] are merely preliminary steps toward invoking the ultimate power of the “one supreme Court” to resolve a case or controversy that is properly before the Court for final disposition.<sup>143</sup>

In short, the requirement that there be “one supreme Court” suggests that the *best* practice is to require that a single Justice’s decision not to recuse him or herself be open to review by the full Court.

Of course, another way to reconcile practice with the Constitution’s text is to conclude that the language should not be read so narrowly—a position taken by a number of scholars.<sup>144</sup> After all, we consider each federal court of appeals to be a single court, even though those judges decide most cases in three-judge panels that can then be reviewed by the entire court *en banc*.

Accordingly, the Judicial Conference would be on fairly safe constitutional ground were it to implement the Murphy Bill by delegating to the full Court the power to review a single Justice’s refusal to recuse him or herself from a pending case. Certainly, it would be difficult to argue that this practice violates the Constitution’s “one supreme Court” mandate when the Court’s own Rules permit applications to individual Justices followed by full Court review of that Justice’s decisions.<sup>145</sup>

The harder question is whether the Constitution would permit a panel that included lower federal court judges or retired Justices to review an individual Justice’s refusal to recuse, as the Murphy Bill would allow (but not require). Professors Michael Dorf and Lisa McElroy addressed a closely related problem in their article describing potential roles for retired

---

143. GRESSMAN ET AL., *supra* note 132, at 3.

144. See, e.g., George & Guthrie, *supra* note 133; see also McElroy & Dorf, *supra* note 91, at 111 (labeling such an interpretation as “highly formalistic”).

145. See S. Ct. R. 22.

Justices.<sup>146</sup> Although they do not read the “one supreme Court” language to prohibit retired Justices from substituting for recused Supreme Court Justices in specific cases, they point out that even if it did, Congress could get around that problem through legislation manipulating the Supreme Court’s appellate jurisdiction. Congress has the power under Article III to make “Exceptions” to the Court’s appellate jurisdiction, and thus it can take away matters that would permissibly fall within the Court’s subject matter jurisdiction, assigning those cases to lower courts.<sup>147</sup> The Constitution permits active and retired Justices to sit on lower courts.<sup>148</sup> Thus, Congress could enact a jurisdictional statute that eliminates most of the Supreme Court’s appellate jurisdiction and reassigns those cases to a new court made up entirely of active Supreme Court Justices.<sup>149</sup> (The same nine Justices would also continue to sit as the Supreme Court, but now the Supreme Court’s jurisdiction would consist only of those few cases over which the Constitution grants the Supreme Court original jurisdiction, and perhaps a small number of cases within their appellate jurisdiction to avoid any argument that the Exceptions Clause does not permit Congress to strip the Supreme Court of *all* of its appellate jurisdiction.) Because this new court would technically be an “inferior” court, the “one supreme Court” language would not bar review of a Justice’s refusal to recuse herself by a specially constituted recusal court that included lower court judges and retired Justices. Admittedly, this is an inelegant workaround, but it demonstrates that review of a Justice’s decision not to recuse herself by judges who are not currently sitting on the Supreme Court can be reconciled with even the narrowest interpretation of the “one supreme Court” language.

In short, legislation mandating that a Justice’s decision not to recuse herself be reviewed by other judges can be implemented in a variety of ways to satisfy the “one supreme Court” requirement. The safest course would be for Congress to assign the recusal question to the full Court to resolve, ensuring that a single Justice does not have sole discretion to

---

146. See McElroy & Dorf, *supra* note 91, at 109.

147. U.S. CONST. art. III, § 2, cl. 1.

148. In fact, a similar arrangement existed for many years when the Justices were required to sit on circuit courts whose decisions could be reviewed by the entire Supreme Court.

149. McElroy & Dorf, *supra* note 91, at 111.

decide that sensitive question. Whatever the policy implications of such a practice, it would pass constitutional muster.

#### C. CONCLUSION

The text of the Constitution does not speak directly to Congress's authority to regulate the Justices' ethical conduct. Nonetheless, the Constitution does provide the sources of Congress's constitutional authority to enact ethics legislation while suggesting important limits on that authority. Most of the ethics legislation summarized in Part II fits comfortably within Congress's authority under the Necessary and Proper Clause to establish the Court's structure and daily operations, including ethics rules. That said, there are a few provisions of the Judicial Conduct and Disability Act, as well as the Murphy Bill, which raise some constitutional questions, and thus their application to the Supreme Court should be avoided.<sup>150</sup> Moreover, Congress must take care to craft legislation that avoids undermining the Justices' constitutionally-protected independence, and the Court's status as the preeminent court in the federal judiciary.<sup>151</sup>

The Constitution's text and structure alone are not the last word on constitutional meaning, however. Longstanding practice also plays an important role in arriving at constitutional meaning. The history of Congress's regulation of the Justices' ethical conduct is addressed below in Part IV.

#### IV. THE HISTORY OF CONGRESSIONAL REGULATION OF JUDICIAL ETHICS

Congress has long assumed the power to regulate judicial ethics, including the ethical conduct of Supreme Court Justices. “[T]radition” is an “important source of constitutional insight”<sup>152</sup> and is frequently cited by courts and commentators as support for practices that otherwise lack a clear textual basis.<sup>153</sup> Accordingly, Congress's longstanding practice

---

150. See *supra* notes 64 to 150 and accompanying text.

151. See *supra* notes 64 to 150 and accompanying text.

152. See Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 178 (2003).

153. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of

regarding the regulation of judicial ethics is an essential element of the constitutional analysis.

Aside from the Murphy Bill, the legislation described in Part II has existed for many decades: Recusal statutes have been in place for over two-hundred years; judges have been required to publicly disclose their household finances for over thirty years; judges have been subject to gift and outside income limitations for over twenty years; and judges have been statutorily subject to investigations and sanctions for ethical violations for over thirty years.<sup>154</sup> Furthermore, criminal laws have long been applied to federal judges prior to, and even in the absence of, impeachment.<sup>155</sup> Federal judges, including Supreme Court Justices, can be convicted and incarcerated for committing crimes, and thus effectively removed from the bench, without first being impeached (though the two penalties typically go hand in hand).<sup>156</sup> As these statutes demonstrate,

---

the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by s. 1 of Art. II.”) (Frankfurter, J., concurring). Cf. Stephen B. Burbank, *The Architecture of Judicial Independence* 72 S. CAL. L. REV. 315, 320 (1999) (“[T]he verdict of history has confirmed some understandings about federal judicial independence that cannot fairly be imputed to the language of the Constitution alone.”).

154. See *supra* Part II.A.

155. Scholars debate whether the Constitution permits criminal prosecution in advance, or in lieu, of impeachment. Compare Shane, *supra* note 21, at 225–232 (concluding that “the founders probably did not intend impeachment and conviction to be prerequisites to criminal prosecution”) and Gerhardt, *supra* note 104, at 29, with Robert S. Katz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103, 116–18 (1986). Although the Supreme Court has not ruled in this issue, a number of circuit courts have concluded that a federal judge may be prosecuted without first being impeached. See, e.g., United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984) (“[T]he Constitution does not immunize a sitting federal judge from the process of criminal law.”); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.) (holding that life tenure does not immunize federal judges from criminal prosecution), *cert. denied*, 417 U.S. 976 (1974). There is also some evidence that the Framers did not view the power to impeach as a prohibition against criminal prosecution. In 1795, the House of Representatives chose not to impeach Judge George Turner after being informed by the Attorney General that the Judge would be prosecuted. See Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1217 n.43 (1991).

156. See Stephen B. Burbank & S. Jay Plager, *Forward: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1, 3 & n.13 (1993)

Congress has long assumed it has the authority to regulate the Justices' ethical conduct, and the Justices appeared to concur, at least until Chief Justice Roberts' 2011 Year-End Report raised new questions.

Over the decades that these laws have been in existence, the Justices have diligently filed their financial disclosure forms,<sup>157</sup> abided by income and gift restrictions, and written opinions in which they acknowledge being bound by the recusal statute,<sup>158</sup> all without questioning the constitutionality of these laws. On the relatively rare occasions when Justices have failed to meet the requirements of the law, they have subsequently corrected their mistakes rather than deny that Congress has authority to make them do so.<sup>159</sup> The longstanding existence of legislation regulating the Justices' ethical conduct, together with the Justices' compliance with these laws, supports the conclusion that this legislation is within Congress's constitutional authority.

Admittedly, however, Congress has hesitated to apply some of the more intrusive ethics and disability legislation to Supreme Court Justices. Congress first enacted legislation mandating recusal of lower federal court judges in 1792, but did not extend that statute to the Supreme Court

---

(describing criminal prosecutions of three federal judges in the 1980s); *see also* United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984) ("[T]he Constitution does not immunize a sitting federal judge from the process of criminal law.").

157. See Judicial Watch, <http://www.judicialwatch.org/courts/us-supreme-court/> (collecting the financial disclosure reports filed by the Supreme Court Justices) (last visited March 16, 2013).

158. See, e.g., 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 7 (referring to 28 U.S.C. § 455 as the "governing statute" for Supreme Court recusal determinations); Laird v. Tatum, 409 U.S. 824, 825 (1972) (Rehnquist, J., mem.) (referring to 28 U.S.C. § 455 as the "governing statute" for Supreme Court recusal determinations); Microsoft Corp. v. United States, 530 U.S. 1301, 1301 (2000) ("Title 28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices."); Cheney v. U.S. Dist. Court, 541 U.S. 913, 916, 923 (2004) (Scalia, J., mem.) (repeatedly referring to 28 U.S.C. § 455 as binding on Supreme Court Justices); Statement of Recusal Policy, reprinted in RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION, App. D, at 1101–03 (2d ed. 2007) (citing 28 U.S.C. § 455).

159. For example, when Justice Thomas filed an amended financial disclosure report in January 2011, he explained that he had "inadvertently omitted" information about his wife's employment for several years due to a "misunderstanding of the filing instructions." See Letter from Clarence Thomas, Justice, U.S. Supreme Court, to Committee on Financial Disclosure, *supra* note 37.

Justices until 1948.<sup>160</sup> The Judicial Conduct and Disability Act still does not apply to the Justices (though the Murphy Bill seeks to change that). Likewise, Congress authorized judges on the lower federal courts to set ethical standards for each other, but has not required the Supreme Court to follow the resulting *Code of Conduct*. One scholar contends that the historic exclusion of the Justices from some ethics and recusal legislation suggests that Congress lacks authority to regulate Supreme Court Justices as it does judges on the inferior courts.<sup>161</sup>

Congress has never acknowledged such a limit on its authority, however. Rather, Congress has explained its decision to exclude the Justices from some of its legislation regulating judicial ethics on policy grounds. For example, the House Report accompanying the Judicial Conduct and Disability Act states that the legislation does not apply to the Justices because the “high public visibility of Supreme Court Justices makes it more likely that impeachment can and should be used to cure egregious situations.”<sup>162</sup> In other words, the Report concluded that the Justices’ public prominence reduced the need for ethical oversight, but never suggested that Congress lacked the power to engage in such oversight if it wished.

The House Report further states that it would be “unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system” because doing so might “dilute[]” the “independence and importance” of the Supreme Court. Although the reference to judicial “independence” has constitutional overtones, Congress’s use of the term “unwise” suggests it was making a policy choice and not acknowledging a constitutional limit on its powers over the

---

160. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (2012)). Prior to 1948, the recusal laws applied only to district court judges. Nothing in the legislative history explains the reason for expanding the law to apply to appeals court judges and Supreme Court justices.

161. See Virelli, *supra* note 17, at 1200–02 (noting that Congress waited 150 years before extending the recusal statute to the Supreme Court Justices, and arguing that this delay has constitutional significance). Cf. Shane, *supra* note 21, at 236 n.106 (citing Congress’s exclusion of the Supreme Court from the Judicial Conduct and Disability Act in support of his conclusion that it would be constitutionally “incongruous” to allow lower court judges to play a role in disciplining Justices on the Supreme Court).

162. H.R. Rep. No. 96-1313, 96th Cong., 2d Sess., at 10 n.28 (1980).

Court. In any case, it is hard to see how the constitutionally-enshrined guarantee of judicial independence limits Congress's power to regulate the Justices' ethical conduct but not the conduct of lower court judges. As discussed in Part III, the judicial independence guaranteed by the Constitution's life tenure and salary protections covers all Article III judges; Supreme Court Justices have no special or additional claim to independence that does not apply to all.<sup>163</sup>

\* \* \*

Congressional regulation of the federal courts will always raise hard constitutional questions about the need to balance legislative power with judicial independence. Legislation concerning the Supreme Court Justice's ethical conduct is a particularly sensitive topic, and one that Congress should approach with caution. Chief Justice Roberts' Year-End Report has elevated these questions in importance, demanding that legislators, jurists, and academics think carefully about the limits on congressional authority to dictate the behavior of Supreme Court Justices. Hopefully, this Essay will contribute to that discussion.

## V. CONCLUSION

---

163. U.S. CONST. art. III, § 1. *See also* Amar, *supra* note 107, at 221 (asserting that all Article III judges have "structural parity" because they all benefit from life tenure and protection against salary reduction). *But see* Shane, *supra* note 21, at 236–38 (arguing that the Supreme Court merits greater independence because it is the only constitutionally required Court and because of its status as the head of the federal judiciary).

The Justices' relationship to the Judicial Conference, which is responsible for investigating and sanctioning unethical conduct under the Act, differs in important ways from that of lower federal court judges. The Judicial Conference is chaired by the Chief Justice, but the rest of its members are district and circuit court judges. Accordingly, the dilution of the Supreme Court's "independence and importance" that concerned the House Committee might stem not from congressional regulation of the Justices' ethical conduct *per se*, but rather from oversight by *lower* court judges. If so, the problem could be solved by allowing the Justices themselves to investigate and sanction each other, rather than delegating that task to the Judicial Conference. As noted earlier, this option is available under the Murphy legislation. For further discussion of the constitutional implications of allowing lower court judges to investigate and sanction Supreme Court Justices, *see supra* Part III.B.5.

This Essay concludes that Congress has broad, but not unlimited, authority to regulate the Supreme Court Justices' ethical conduct. The source of Congress's power is derived from the fact that Article III mandates the existence of a Supreme Court, but then leaves the creation of that Court up to Congress, triggering Congress's authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."<sup>164</sup> The Supreme Court came into existence through the enactment of federal legislation establishing its size and providing the dates of its sessions, among other vital matters. Ethics legislation should be viewed as part and parcel of Congress's power to establish, as well as to administer, the operation of the high Court. Congress' authority over the Supreme Court is cabined, however, by the judiciary's constitutionally enshrined judicial independence and by the need to preserve the Supreme Court's role at the head of the third branch of government. That said, Congress has considerable leeway to regulate the Justices' ethics, just as it has long exercised authority to decide other vital administrative matters for the Court.

---

164. U.S. CONST. art. I, § 8, cl. 18. Congress's control over the lower federal courts is further bolstered by its authority to "constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 9. But this provision of course cannot provide any constitutional authority for Congress's regulation of the U.S. Supreme Court.

## HEINONLINE

Citation:

Amanda Frost, Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal, 53 U. KAN. L. REV. 531 (2005).

Provided by:

Available Through: Pence Law Library, Washington College of Law

Content downloaded/printed from *HeinOnline*

Wed Jun 19 16:09:13 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

*Copyright Information*



Use QR Code reader to send PDF to your smartphone or tablet device

## Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal

*Amanda Frost\**

### I. INTRODUCTION

The laws governing judicial recusal are failing at one of their primary objectives: protecting the reputation of the judiciary. The problems with the recusal process were front and center during the recent controversy surrounding Justice Antonin Scalia's decision to sit on *Cheney v. United States District Court for the District of Columbia*<sup>1</sup> despite having vacationed with Vice President Richard Cheney shortly after the Supreme Court agreed to hear the case. Whatever one's opinion about whether Justice Scalia should have recused himself, most would agree that the manner in which the issue entered public debate and then was decided—beginning with front-page news stories about the trip, followed by Congressional inquiries, editorials calling for his recusal, a rash of political cartoons, and ending with Scalia's remarkable 21-page memorandum decision defending his decision to sit on the case—injured the reputation of the judiciary.

At the end of the day, two competing versions of the Scalia-Cheney vacation emerged. Those who think Scalia should have recused himself note that he and members of his family traveled together on the Vice President's plane, at government expense, and then spent several days in an intimate setting where the two would have had ample opportunity to discuss a case in which the Vice President's reputation was at stake. Those who think recusal was unwarranted point out that Scalia and his family bought round-trip airline tickets and thus did not save any money

---

\* Assistant Professor of Law, American University Washington College of Law. I wish to thank Richard Fallon, John Leubsdorf, Laura Rosenbury, John Sharretts, Brian Wolfman, and David Zaring, as well as the faculty at American University Washington College of Law, for helpful comments on drafts of this Article. I also note that I was an attorney at Public Citizen Litigation Group at the time that Alan Morrison, another Litigation Group attorney, served as counsel of record for Sierra Club in *Cheney v. United States District Court for the District of Columbia*. However, I did not participate in that litigation, and this Article reveals no confidential information and reflects no one's views but my own.

1. 541 U.S. 913 (2004).

by traveling with Cheney; note that the suit was brought against the Vice President in only his official, and not his personal, capacity; and rely on Scalia's assurances that the two never spoke about the case or even were alone together during the trip.

Central to the debate was not just whether Justice Scalia would in *fact* be biased in Cheney's favor as a result of their social contact, but also whether the trip would create the *appearance* that he might be. The federal law's requirement that a judge recuse himself when his "impartiality" might "reasonably be questioned" creates an objective standard for evaluating partiality, meaning that a judge should recuse himself not only in cases where he is actually biased, but also in cases where the facts and circumstances could create that appearance.<sup>2</sup> Congress intended judges to recuse themselves in such cases so that "justice satisfies the appearance of justice," which will in turn "promote public confidence in the integrity of the judicial process."<sup>3</sup> Appearances matter because the judiciary's reputation is essential to its institutional legitimacy—that is, to the public's respect for and willingness to abide by judicial decisionmaking. Indeed, scholars of the federal court system suggest that the public's perception of the judiciary's independence and integrity is the primary source of its legitimacy, and ultimately its power.<sup>4</sup>

The furor over whether Justice Scalia should have recused himself from the *Cheney* case demonstrates that recusal law has not succeeded in protecting the judiciary's reputation. This is not the first time that the judicial branch has been criticized for its application of the laws governing judicial recusal and disqualification.<sup>5</sup> On many occasions during the past 200 years the public has focused on a judge's questionable decision not

---

2. *Liteky v. United States*, 510 U.S. 540, 548 (1994) (Scalia, J.) ("[W]hat matters is not the reality of bias or prejudice but its appearance.").

3. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citing S. REP. NO. 93-419, at 5 (1973); H.R. REP. NO. 93-1453, at 5 (1974)); H.R. REP. NO. 93-1453, at 5 (stating that the goal of legislation is to "promote public confidence in the impartiality of the judicial process"); *see also United States v. Hollister*, 746 F.2d 420, 425–26 (8th Cir. 1984) ("Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself.").

4. For an interesting discussion of the difficulty of disentangling concerns over the "appearance of justice" from actual injustice, see Note, *Satisfying the "Appearance of Justice": The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708, 2710–21 (2004).

4. *See discussion infra* Part II.

5. The terms "recusal" and "disqualification" have slightly different meanings. "Recusal" refers to a judge's voluntary decision to remove himself from a case, while "disqualification" refers to a statutorily mandated removal of a judge. Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.5 (1978). However, the same standard governs recusal and disqualification under federal law. *Id.* The terms are used interchangeably in this Article.

to recuse and has found the laws governing that decision to be wanting.<sup>6</sup> Nor is it likely to be the last time that a judge makes an unpopular decision to remain on a case. Even before the debate over Justice Scalia's trip with the Vice President had died down, new concerns were being raised, both in the press and by members of Congress, about Justice Ruth Bader Ginsburg's connections to the National Organization for Women—an entity that frequently has cases before the Court.<sup>7</sup>

This Article does not seek to answer the specific question whether Justice Scalia should have recused himself from the *Cheney* case, but rather uses that particular incident to illuminate the method by which such decisions should be made to best further the goal of protecting the reputation of the judiciary. How should the facts and arguments in favor of or against recusal be discovered, particularly when it is usually the judge, not the parties, who has first-hand knowledge of the circumstances? Should the opinions of editorial writers, pundits, and political cartoonists be taken into account? If not, just whose opinion are judges supposed to consider when determining whether their impartiality might "reasonably be questioned"? Finally, who gets to decide whether a judge or justice must be disqualified from sitting on a case—the very judicial officer whose impartiality is being questioned, or a neutral decision-maker?

Rather than answer these process-oriented questions, the academic literature has mainly focused on reforming the substantive standard for judicial disqualification. With each new scandal or crisis has come a flurry of scholarship advocating an expansion of the grounds for disqualification,<sup>8</sup> and Congress has often responded by amending the

---

6. See discussion *infra* Part II.B.

7. Thirteen Republican members of Congress asked Justice Ginsburg to withdraw from all future cases concerning abortion after she agreed to loan her name and presence to the Justice Ruth Bader Ginsburg Distinguished Lecture Series, which is co-sponsored by the NOW Legal Defense Fund. *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004, at A18; see also Peter S. Canellos, *Outspoken Justices Cloud High Court's Appearance*, BOSTON GLOBE, June 15, 2004, at A3 (criticizing Justice Ginsburg for allowing NOW to use her name for lecture series).

8. See, e.g., Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213 (2002); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970); Paul G. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381 (1990); Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589 (1987); Note, *Disqualification of Federal District Judge for Bias—The Standard Under Section 144*, 57 MINN. L. REV. 749, 763–70 (1973) [hereinafter *The Standard*]; Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1446–47 (1966) [hereinafter *Bias in the Federal Courts*]; Brian P. Leitch, Note, *Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies*, 67 IOWA L. REV. 525 (1982).

recusal laws as suggested.<sup>9</sup> However, altering the substance of the recusal standard has proven to be an ineffective method of reforming this sensitive area of judicial self-governance. As discussed in more detail below, history shows that each time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves.<sup>10</sup> The very self-dealing that makes recusals necessary in the first place has operated to prevent disqualification statutes from being employed as fully and broadly as Congress intended.<sup>11</sup> Moreover, even when the recusal standards are vigorously applied, the ad hoc and informal processes by which the decision to disqualify is made undermines public confidence in the judiciary.

In any case, it would be troubling to broaden the substantive standard for recusal to require judges to step down every time the public questions their impartiality. In his memorandum defending his decision to remain on the *Cheney* case, Justice Scalia rejected the argument that he should recuse himself solely because dozens of editorial boards and political pundits had called for him to do so.<sup>12</sup> That seems right. Surely even unanimous cries for recusal by the media cannot govern such a politically sensitive question.

In part, this is because the media may not be an accurate proxy for public opinion. But even assuming that it could be demonstrated that the majority of citizens believed that a particular judge could not be impartial, it is not clear as a matter of constitutional law or even just good public policy that the judge should then automatically step aside. To give the public such control is antithetical to the role federal judges are intended to serve in the constitutional structure. Judges are given life tenure and salary protections not just so they can hold their own against the other two branches of government, but also so that they can take positions opposed by the majority of the public. As Robert Bork put it, “[f]ederal judges, alone among our public officials, are given life tenure precisely so that they will not be accountable to the people.”<sup>13</sup>

---

9. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 23.1, at 672 (1996) (noting the federal judicial disqualification statute was amended “on multiple occasions; in each instance Congress enlarged the enumerated grounds for seeking disqualification”).

10. See discussion *infra* Part II.A.

11. The same phenomenon has undermined efforts to curb judicial contempt power. See Eric Fleisig-Greene, Note, *Why Contempt is Different: Agency Costs and “Petty Crime” in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1251–52 (2003).

12. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 923 (2004).

13. ROBERT H. BORK, THE TEMPTING OF AMERICA 5 (1990). Bork’s point echoes that of Alexander Hamilton, who wrote that judicial independence is “an essential safeguard against the effects of occasional ill humors in the society.” THE FEDERALIST NO. 78, at 501 (Alexander Hamilton)

It is time to stop tinkering with the substantive standard for recusal, and instead to propose reforming the process by which the recusal decision is made. The solution I offer is to incorporate into recusal law the core tenets of adjudication identified fifty years ago by Legal Process theorists as essential to maintaining the judiciary's legitimacy—tenets that legal commentators continue to cite today as serving a vital legitimating function.<sup>14</sup> Chief among these are the adversarial system in which the parties present facts and arguments to an impartial judge, who then issues a reasoned explanation for her ruling.

These elements of adjudication were not invented by Legal Process theorists; rather, this school of legal scholars described the basic attributes of adjudication that had long existed and then explained why these qualities legitimized the judiciary's countermajoritarian role in a democracy. Even scholars who would not be described as Legal Process theorists have recognized the value of using procedures to cabin judicial discretion and improve the quality of judicial decisionmaking.<sup>15</sup> In addition, recent literature has observed that the traditional forms of adjudication described by the Legal Process school are also enshrined in the Constitution's description of the judicial role and reflect the judiciary's core competencies vis-à-vis the other branches of government.<sup>16</sup>

Furthermore, judges should be especially careful to adhere to the traditional forms of adjudication when addressing sensitive questions that will affect the reputation of the judiciary. Recusal laws are deeply concerned with protecting the integrity of the judiciary, which is an important element in maintaining the legitimacy of judicial decisionmaking.<sup>17</sup> Thus, it is particularly appropriate to seek their fix in Legal Process methodology, which itself arose as a defense against the Legal Realist

---

(Robert Scigliano ed., 2000). Hamilton further stated that the judiciary needed life tenure to ensure that it served as a bulwark against the vagaries of popular opinion:

Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges'] necessary independence. If the power of making them was committed . . . to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

*Id.* at 502.

14. See discussion *infra* Part III.

15. See discussion *infra* Part II.

16. Jonathan T. Motot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 32 (2003) (describing how the characteristics of the judicial role described by Lon Fuller are also incorporated into the constitutional framework and reflect the judiciary's institutional competence).

17. See *infra* notes 73–75 and accompanying text.

charge that adjudication is an undemocratic, and thus illegitimate, form of decisionmaking.<sup>18</sup>

Ironically, the recusal process is unique in the degree to which it has eschewed the basic procedural elements that have been viewed as indispensable to maintaining the legitimacy of adjudication.<sup>19</sup> Unlike almost any other area of the law, the process by which judges decide whether to recuse themselves ignores the systems usually employed to resolve disputes in a fair and impartial manner. As a general matter, the recusal process is usually not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision. Most importantly, the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself, even though that judge has an obvious personal stake in the matter. My contention is that it is this very ad hoc and informal process, rather than any problem with the substantive standards for recusal, which has led to the recurring dissatisfaction with the law.

Part II of this Article describes the evolution of federal judicial disqualification laws in the United States. For two centuries the substantive standards for disqualification have continually been amended by Congress in response to periodic controversial decisions by judges not to recuse themselves in high profile cases. However, these laws are then narrowly construed by the judges who apply the legal standards to themselves, undermining Congressional intent to protect the reputation of the judiciary. This history demonstrates that as long as judges decide recusal questions outside the boundaries of the traditional forms of adjudication, recusal law will not serve its intended legitimating function.

Searching for a solution, Part III describes the traditional forms of adjudication lauded by Legal Process scholars, among others, as essential to legitimizing judicial decisionmaking. At the core of the adjudicatory process is the conception that the parties must frame and present their dispute to a neutral decisionmaker who makes a reasoned decision cab-

---

18. Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 619 (1991); see also Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 970 (1994) (noting that the Legal Process school provided an answer to the problem of judicial subjectivity introduced by Legal Realism); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693-95 (1989) (reviewing PAUL M. BATER ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1988)) (describing Legal Process theory as a response to Legal Realists' critiques of judicial legitimacy).

19. John Leubsdorff, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) (noting that judges have more leeway to decide whether to recuse themselves than they have in other matters).

ined by existing law. This Part, which is the normative heart of the Article, explains how the presence of each of these elements legitimizes judicial decisionmaking.

Part IV describes how judicial disqualification operates in a procedural vacuum that has prevented the disqualification laws from protecting judicial integrity. To illustrate the problem, Part IV describes the process (or rather, the lack thereof) accompanying the public disclosure of the Scalia-Cheney vacation and Justice Scalia's decision to continue to sit on the *Cheney* case even after the respondent sought his disqualification. Using this recent controversy as its example, this Part explains how the absence of the traditional adjudicatory procedures in recusal law undermines the reputation of the judiciary.

Part V suggests reforms that would incorporate the traditional forms of adjudication into the recusal process. Putting the theory into practice, I then return to the *Cheney* case and describe how the reforms suggested in this Article would have operated in the context of that case to better protect the reputation of the judiciary.

## II. THE EVOLUTION OF JUDICIAL DISQUALIFICATION LAW

An impartial decisionmaker has always been considered an essential component of the Anglo-American legal system,<sup>20</sup> as well as the legal systems of many other cultures.<sup>21</sup> Yet despite this longstanding and

---

20. See Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 1 (1923) (describing the judicial obligation to recuse for bias or interest in medieval times). The concept of recusal for interest is found in the Code of Justinian, which incorporates references to judicial recusal dating back to 530 A.D. *Id.* at 3, 3 n.10. Putnam quotes the following passage (in translation) from the Code of Justinian:

It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges . . . . Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue joined, so that the cause go to another; the right to recuse having been held out to him . . . .

*Id.* at 3 n.10; see also Schultz, *A New Approach to Bracton*, 2 SEMINAR 41, 42–50 (1944) (providing a history of medieval recusal practices).

Lack of judicial independence was also one of the principal grievances listed in the Declaration of Independence, which complained that the king had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

21. For example, Roman Law adopted in Spain in the fourteenth century provided for recusal of judges for personal hostility. Putnam, *supra* note 20, at 5–6. The same law applied in the Spanish-speaking republics of South America. *Id.* For other cultural examples, see Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 662 (1985) ("One of the most fundamental and self-evident principles of any fair

near-universal principle, the rules establishing when a judge is disqualified for interest or bias from hearing a dispute have varied widely over time and across jurisdictions. Even today in the United States, recusal in the federal courts alone is governed by three overlapping statutes<sup>22</sup> and by the Code of Judicial Conduct,<sup>23</sup> all of which set out different standards and procedures for recusal.<sup>24</sup> So, even though all agree that judges must recuse themselves under some circumstances, no uniform rule or procedure for recusal exists.

#### *A. The Origins of Judicial Disqualification Laws in the United States*

The development of the law of judicial disqualification in the United States has followed a recognizable pattern. First, Congress sets the standard governing when judges must remove themselves from sitting on cases in which they are not able, or might not be able, to be impartial. That standard is then narrowly construed by the judges who must apply it to decide whether they themselves should be disqualified from a case. Eventually, a particularly egregious situation arises in which a judge sits on a case when most outside observers think that she should have stepped aside. The situation comes to the attention of the press, the public, and ultimately Congress, which amends the law to provide stiffer standards for recusal. And then the whole process begins anew.<sup>25</sup>

Although the concept of recusal was firmly established in English common law by the time the American judicial system was being developed, it was a pale version of the standard we embrace today. The rule that “[n]o man shall be a judge in his own case” had been recognized in

---

system of justice is that judges must be neutral and impartial.”); R. P. Lamond, *Of Interest as a Disqualification in Judges*, 23 SCOT. L. REV. 152, 152 (1907) (referencing English and Scottish cultures).

22. 28 U.S.C. §§ 47, 144, 455 (1998). Sections 144 and 455 are discussed in detail below. Section 47 of Title 28 provides simply that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” Because the application of this law has been straightforward and uncontroversial, it is not included in the discussion below.

23. CODE OF JUDICIAL CONDUCT CANNON 3 (1973). This Canon was adopted by the Judicial Conference of the United States in 1973. 69 F.R.D. 273, 277–79 (1975).

24. All states have recusal statutes as well, but again, those statutes differ as to when a judge should recuse herself and how that decision is to be made. A detailed discussion of the variations in state recusal laws is beyond the scope of this Article. For a description of some of the state practices, see generally FLAMM, *supra* note 9; Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 (1994).

25. See Leubsdorf, *supra* note 19, at 245 (alluding to this “vicious cycle”). Books and articles describing high-profile refusals to recuse and subsequent congressional response include: JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973) [hereinafter *Disqualification*].

English law since at least the seventeenth century,<sup>26</sup> but that potentially broad principle was limited in application, operating to disqualify judges from hearing only those cases in which they had a direct pecuniary interest.<sup>27</sup> Blackstone squarely rejected the idea that a judge should be prohibited from hearing a case in which he might have a bias unrelated to financial gain or loss,<sup>28</sup> and English courts followed Blackstone's lead—for example, by holding that a judge could sit on a case even though he was related to one of the parties.<sup>29</sup>

Federal judges have always been held to a higher standard than the bare minimum required by English common law. Within three years after the Constitution's ratification, Congress passed the first recusal statute. The Act of May 8, 1792, allowed federal district court judges to be disqualified if they had a financial interest in the litigation or had served as counsel to either party.<sup>30</sup> But other than these specific grounds for disqualification for interest, the statute did not prohibit judges from hearing cases in which they might have a bias or prejudice against or in favor of one of the parties.<sup>31</sup>

---

26. Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1608) (Lord Coke ruled that members of a board that determined physicians' qualifications could not both impose and personally receive fines.).

27. For example, the Mayor of Hereford was imprisoned for sitting in judgment in a cause where he had leased land from the plaintiff. Putnam, *supra* note 20, at 4.

28. 3 WILLIAM BLACKSTONE, COMMENTARIES \*361 ("the law will not suppose the possibility of bias or favor in a judge").

29. Brooks v. Rivers, 1 Hardres 503, 145 Eng. Rep. 569 (1668) (stating that a judge was not required to recuse himself in his brother-in-law's case, "for favour shall not be presumed in a judge"). For a more detailed history of the origins of recusal standards in English common law and early American law, see Frank, *supra* note 25, at 609–26, and Putnam, *supra* note 20, at 9–14.

30. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278–79 (1792). That statute provided:

*And be it further enacted, That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.*

*Id.*

31. Early standards for recusal were far more lax than they are today. Interestingly, *Marbury v. Madison* is an example of an early case in which a Justice chose not to recuse himself despite an obvious interest and involvement in the case. 5 U.S. 137 (1803). Chief Justice John Marshall had been the Acting Secretary of State who had failed to deliver William Marbury's commission to serve as Justice of the Peace. Thus, in sitting on the case, Marshall judged the legality of a commission that he had authorized while a cabinet official, and which he admitted responsibility for failing to deliver. MACKENZIE, *supra* note 25, at 1.

In reviewing the multiple instances in which Justices ran for office, negotiated treaties, and committed themselves to other non-judicial tasks, one commentator wrote: "This is not a part of our history that guides us by its ethical example; it is a part that dramatizes how different we have be-

The 1792 recusal statute was construed narrowly from its inception.<sup>32</sup> In defining improper judicial “interest,” courts adopted the restricted English common law standard and applied it sparingly.<sup>33</sup> For example, in 1872 a federal judge presided over bankruptcy proceedings despite being a creditor of the bankrupt.<sup>34</sup> Although the judge admitted that the matter raised a “question of delicacy” and put him in an “embarrassing position,” he nonetheless declined to recuse himself because he was “wholly unconscious of any bias” that could “warp [his] judgment.”<sup>35</sup> Courts also limited the 1792 Act’s requirement that a judge disqualify himself when he had previously represented a party, concluding that it applied only when the judge had been counsel *in the very same case*.<sup>36</sup>

In the first of many amendments attempting to broaden the law’s scope, the statute was altered in 1821 to mandate more generally that a judge recuse himself if he is “so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action.”<sup>37</sup> Congress altered the statute again in 1911, adding that a judge should recuse himself if, “in his opinion,” his relationship with any attorney made it improper for the judge to sit on the case.<sup>38</sup> In 1948, the provision was recodified as 28 U.S.C. § 455, where it remains today. The 1948 amendments eliminated the requirement that a party

---

come.” *Id.* at 5–7.

32. Frank, *supra* note 25, at 627–28; *Disqualification*, *supra* note 25, at 740 (“Courts have tended to construe narrowly the mandatory grounds of section 455.”).

33. Frank, *supra* note 25, at 627.

34. *In re Sime*, 22 F. Cas. 145, 146 (C.C.D. Cal. 1872) (No. 12,861).

35. *Id.* at 146–47.

36. See Frank, *supra* note 25, at 627 (citing *Carr v. Fife*, 156 U.S. 494 (1895)) (“‘Has been of counsel’ was soon limited by addition of the phrase ‘in this case’ . . . .”).

37. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. That statute provided:

That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the state; and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognisance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed, as were cognisable in the district court from which the same was removed.

*Id.*

38. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (codified as amended at 28 U.S.C. § 20 (1992)).

first seek a judge's disqualification, transforming the statute from a challenge-for-cause provision to a self-enforcing disqualification provision that places the onus on the judge to determine whether he should recuse himself.<sup>39</sup>

Judges applying the amended statute to themselves once again found ways to limit its reach. "The specific mandatory grounds for disqualification were narrowly construed" by courts.<sup>40</sup> In addition, judges created the "duty to sit" doctrine—that is, an obligation to remain on any case to which they had been assigned absent statutory grounds for recusal—that nowhere appears in the statute.<sup>41</sup> Theoretically, the "duty to sit" does not conflict with the statutory requirement that judges recuse themselves under certain specific circumstances. But the statutory standard for disqualification is vague, leading to ambiguous situations in which reasonable people can differ about whether the judge has a disqualifying interest. Because the legal obligation to recuse is not always clear, the "duty to sit" doctrine encouraged judges to remain on cases from which they arguably should have recused themselves.<sup>42</sup>

Early dissatisfaction with the law spurred Congress to enact a second recusal statute in 1911 that for the first time provided a means for litigants to seek disqualification of a judge not just for a conflict of interest, but also for more general bias or prejudice that might prevent the judge from serving as a neutral decisionmaker.<sup>43</sup> Although the new law—

---

39. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (1992)). The statute provides:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

*Id.*

In addition to eliminating the requirement that a party seek disqualification, the 1948 amendments added the word "substantial" before interest—one of the only occasions in which Congress narrowed a recusal statute.

40. Littenecker, *supra* note 5, at 239.

41. *Id.* Laird v. Tatum, 409 U.S. 824, 837 (1972) (noting that the courts of appeals had unanimously concluded that judges have "a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified").

42. Idaho v. Freeman, 507 F. Supp. 706, 717 (D. Idaho 1981) (noting that "duty to sit" doctrine led to judges refusing to recuse in "difficult" cases); Littenecker, *supra* note 5, at 239 (same).

43. Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1087, 1090. The statute provided:

Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not

codified today as 28 U.S.C. § 144—established a more liberal standard for recusal, it applied only to district court judges and thus could not be used to disqualify judges on the courts of appeals or the Supreme Court, as § 455 can.

In addition to creating a broader standard for recusal of trial judges, the statute sought to limit judicial discretion about when to recuse. Section 144 permits either party to force the disqualification of a federal district judge by filing an affidavit alleging facts from which the judge's bias or prejudice reasonably may be inferred.<sup>44</sup> The legislative history explains that judges are to be automatically disqualified from any case in which such an affidavit is filed, even if they disagree with the claimed basis for disqualification.<sup>45</sup> Specifically, the statute provides:

Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to

---

less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

*Id.*

44. *Id.* The affidavit must be from the party him or herself and must be accompanied by a certificate from counsel that it has been made in good faith. Parties are limited to one affidavit per case and must file it within a specified period of time. Although as originally written the law appeared to apply to all judges, early on it was construed as applying only to trial courts. *See Kinney v. Plymouth Rock Squab Co.*, 213 Fed. 449, 449 (1914) (stating that the statute "is so framed that evidently it does not apply to an appellate tribunal").

45. *See FLAMM, supra* note 9, § 25.2.1, at 721 ("On its face § 144 appears to be a peremptory disqualification provision, and there is little doubt that it was originally intended to be one." (footnote omitted)).

During debate over the legislation, Rep. Cullop of Indiana was asked whether district courts had discretion under the statute to determine whether affidavits were sufficient to justify their disqualification.

Mr. Cullop: No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

Mr. Cox: [S]uppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

Mr. Cullop: No, it expressly provides that the judge shall proceed no further.

46 CONG. REC. 2627 (1911).

the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter.<sup>46</sup>

Despite this clear language, judges consistently adopted a narrow definition of “bias and prejudice” and then reviewed affidavits to determine whether the allegations met that standard—a practice that essentially permitted judges to pass on the sufficiency of the allegations against them.<sup>47</sup> The Supreme Court’s decision in *Berger v. United States*<sup>48</sup> affirmed this trend, thereby “effectively eviscerat[ing] [§ 144’s] peremptory intent.”<sup>49</sup>

The defendants in *Berger*, some of whom were of German descent, were accused of espionage. They petitioned for the trial judge’s recusal on the ground that the judge was biased against German Americans, attesting by affidavit that the judge had stated, among other things, that “[o]ne must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty.”<sup>50</sup> The judge had refused to recuse himself and had presided at the trial at which the defendants were convicted, and then had sentenced each defendant to twenty years in prison.<sup>51</sup> Although the Supreme Court concluded that the trial judge could not himself decide the truth of allegations of bias, it did allow that the judge had the authority to review the affidavit and application for disqualification to ensure they were legally sufficient before being required to recuse himself.<sup>52</sup> To be legally sufficient, the Court held that the affidavit “must give fair support to the charge of a [judge’s] bent of mind that may prevent or impede im-

46. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (codified as amended at 28 U.S.C. § 20 (1911)).

47. Bassett, *supra* note 8, at 1224, 1224 n.58 (2002) (“[D]espite the clear intentions of both the bill’s sponsor and the statute’s language, a series of judicial decisions quickly eradicated the peremptory challenge intent behind the statute.” (footnote omitted)); Bloom, *supra* note 21, at 666 (“[T]he courts consistently construe the statute narrowly, which makes disqualification difficult.”); Frank, *supra* note 25, at 629, 626 n.98 (“Frequent escape from the statute has been effected through narrow construction of the phrase ‘bias and prejudice.’”); *Disqualification*, *supra* note 25, at 238–39 (noting that § 144 was limited in application by judicial decisions narrowing its scope).

48. 255 U.S. 22 (1921).

49. FLAMM, *supra* note 9, § 23.4.1, at 675; *see also* Idaho v. Freeman, 507 F. Supp. 706, 715 (D. Idaho 1981) (“Although from the face of section 21 and from its legislative history it appears that the section was designed to create a fully peremptory approach to disqualification where bias or prejudice is alleged, the United States Supreme Court chose not to give the section such a broad reading.”); Ernest J. Getto, *Peremptory Disqualification of the Trial Judge*, 1 LITIG. 22, 23 (1975) (stating that the Supreme Court’s decision in *Berger* encouraged the federal courts to construe § 144 as narrowly as possible).

50. *Berger*, 255 U.S. at 28.

51. *Id.* at 27.

52. *Id.* at 36.

partiality of judgment.”<sup>53</sup> Hence, *Berger* gave trial judges considerably more discretion in deciding whether to disqualify themselves than Congress had intended.

Courts have freely exercised that discretion. The leading treatise on judicial disqualification states that it is now “well established that the challenged judge has the prerogative, and may even have the duty, to pass on the timeliness and legal sufficiency of the §144 challenge in the first instance.”<sup>54</sup> To be successful, the affidavit must contain specific facts and circumstances demonstrating bias; allegations based on hearsay, opinion, or inferences are disregarded.<sup>55</sup> Moreover, only allegations of a judge’s “personal bias” are sufficient. That is, the bias must arise from an “extrajudicial source,” and not simply develop during the judge’s participation in the case.<sup>56</sup> Finally, courts strictly construe the procedural requirements of form, timeliness, and legal sufficiency against the party seeking disqualification.<sup>57</sup> Altogether, the judicial gloss on § 144 has meant that even though “the procedural requirements for obtaining judicial disqualification under § 144 would appear to be extremely easy to satisfy in a great many instances . . . disqualification under this statute has seldom been accomplished.”<sup>58</sup>

---

53. *Id.* at 33–34.

54. FLAMM, *supra* note 9, § 25.4, at 727.

55. See, e.g., *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (“[T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient.”); *United States v. Haldeman*, 559 F.2d 31, 135, 135 n.317 (D.C. Cir. 1976) (en banc) (per curiam) (noting that some courts do not permit an affidavit to contain hearsay); *see also*, e.g., FLAMM, *supra* note 9, § 25.7.2, at 733.

At least one court has criticized this standard, commenting that the policy of disallowing an affiant’s conclusions and inferences undermines the requirement that courts accept the affidavit as true. *United States v. Platshorn*, 488 F. Supp. 1367, 1368–69 (S.D. Fla. 1980); *see also* *Litteneker*, *supra* note 5, at 238 n.8 (commenting that it is “difficult to reconcile” the “no-hearsay” rule with the requirement that affidavits be accepted as accurate because the “fact that the allegation is supported by hearsay should make no difference since it need not be supported by evidence at all”).

56. See *Liteky v. United States*, 510 U.S. 540, 550–51 (1994) (discussing the “extrajudicial source” doctrine as it applies to both §§ 144 and 455 of Title 28 and concluding that a judge will not be required to recuse himself except in rare cases of “pervasive bias”—that is, bias “so extreme as to display clear inability to render fair judgment”); *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (stating that the alleged bias “must stem from an extrajudicial source” and not from “what the judge learned from his participation in the case”).

57. For example, the Tenth Circuit has stated that “the affidavits filed in support of recusal are strictly construed against the affiant and there is a substantial burden on the moving party to demonstrate that the judge is not impartial.” *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992); *see also* *Winslow v. Lehr*, 641 F. Supp. 1237, 1241 (D. Colo. 1986) (stating that “the procedural requirements are strictly construed”); FLAMM, *supra* note 9, § 25.8, at 737 (stating that “courts have generally construed § 144’s procedural requirements quite strictly”).

58. FLAMM, *supra* note 9, § 25.8, at 737–38 (stating that “§ 144’s disqualification mechanism has proven to be essentially ineffectual”); CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3541, at 551 (2d ed. 1992) (“actual disqualifications under [§ 144] were rare”).

*B. Recent Amendments to the Judicial Disqualification Laws*

In the 1970s, highly publicized controversies regarding several judges' failures to disqualify themselves in questionable cases inspired a new round of reforms to disqualification laws.<sup>59</sup> Among these were the revelations during Judge Clement Haynsworth's unsuccessful 1969 Supreme Court confirmation hearings that he had sat on five different cases in which he had a small financial interest. Also influential was the Senate's rejection of Justice Abe Fortas's nomination to the position of Chief Justice, due in part to his habit of serving as counselor to President Johnson even while serving on the Court.<sup>60</sup> During Senate confirmation hearings, Fortas admitted attending White House conferences concerning the most sensitive and important matters facing the administration, such as the escalation of the Vietnam War and the response to the Detroit riots.<sup>61</sup> Even after his nomination failed, Fortas's troubles were not over. The next year, *Life* magazine published an article on Fortas's dealings with convicted financier Louis Wolfson, and Fortas was forced to resign under intense media pressure.<sup>62</sup> Finally, Justice (now Chief Justice) William Rehnquist's refusal to recuse himself in *Laird v. Tatum*<sup>63</sup> further spurred Congress to take action.

*Laird v. Tatum* involved a constitutional challenge to the Army's surveillance of civilian political activity. While serving in the Department of Justice, Rehnquist had appeared as an expert witness at Senate hearings on that subject, and he had commented on the application of the law to the facts of the *Laird* case, which was then pending in a lower court. After losing in the Supreme Court 5-4, the respondents in *Laird* filed a motion asking that Rehnquist recuse himself and that the case be reheard with eight Justices.

Justice Rehnquist refused to recuse himself, and he took the unusual step of issuing a memorandum explaining why.<sup>64</sup> He stated that in the

---

59. *Idaho v. Freeman*, 507 F. Supp. 706, 717 n.12 (D. Idaho 1981); FLAMM, *supra* note 9, § 23.6.1, at 678-79; Leubsdorf, *supra* note 19, at 245 n.45.

60. *Freeman*, 507 F. Supp. at 717 n.12 ("Because of the problem raising from these cases a move to amend section 455 began to grow."); MACKENZIE, *supra* note 25, at 67-94 (citing as examples of the controversies leading to § 455's amendment the indictment of Seventh Circuit Judge Otto Kerner, the Senate's rejection of Justice Abe Fortas's nomination to Chief Justice, and the Senate's rejection of Judge Clement Haynsworth's nomination to the Supreme Court).

61. MACKENZIE, *supra* note 25, at 24.

62. *Id.* at 71-76. For a more detailed discussion of these events, see LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 370-73 (1990).

63. 409 U.S. 824 (1972).

64. In the first paragraph of that memorandum, Justice Rehnquist commented that he was the first Justice to issue such an explanation for a recusal decision. *Id.* at 824.

course of preparing his Senate testimony he was given some information about the *Laird* case, but he insisted that he had "no personal knowledge" of the case.<sup>65</sup> Accordingly, Rehnquist concluded that he was not required to recuse himself under 28 U.S.C. § 455 because he had not been "of counsel" in the case or even substantially involved in it.<sup>66</sup> Nor did he think his public statements and opinions on the law should lead him to recuse himself under § 455's discretionary provision.<sup>67</sup>

Justice Rehnquist admitted that the question whether he should recuse is "a fairly debatable one," and he "concede[d] that fair-minded judges might disagree about the matter."<sup>68</sup> Nonetheless, he came down on the side of remaining on the case and cast the decisive vote in a decision that resolved the case in the manner consistent with his previously articulated views that the Army's intelligence gathering was constitutional. Key to his decision was his belief that he had a "duty to sit" in any case in which he did not find clear grounds for recusal.<sup>69</sup> Rehnquist noted that the courts of appeals had unanimously concluded that federal judges "ha[ve] a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified," and he found this duty to be even more compelling in the Supreme Court, where there is no substitute for a recused Justice, and where recusal would lead to the possibility of affirmation by an equally divided Court.<sup>70</sup>

Reacting to these controversies, the American Bar Association appointed a special committee charged with revising the Canons of Judicial Ethics to provide more guidance for judges about when to recuse themselves. The Committee developed a new canon, Canon 3C, that fleshed out the standard for judicial disqualification.<sup>71</sup> Most notable was the Canon's creation of an objective "appearance of justice" standard that required a judge to recuse himself whenever "his impartiality might reasonably be questioned."<sup>72</sup>

In 1974, Congress followed the ABA's lead and amended § 455 to broaden and clarify the grounds for judicial disqualification,<sup>73</sup> using the ABA's Canon 3C as its model.<sup>74</sup> Congress explained that the goal of the

---

65. *Id.* at 827.

66. *Id.* at 828.

67. *Id.* at 830.

68. *Id.* at 836-37.

69. *Id.* at 837

70. *Id.*

71. MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1990).

72. *Id.*

73. H.R. REP. NO. 93-1453 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6351.

74. *Id.* at 2, 5 *reprinted* in 1974 U.S.C.C.A.N. 6351, 6354-55.

legislation was to “promote public confidence in the impartiality of the judicial system,”<sup>75</sup>—confidence that had been shaken by the Haynsworth, Fortas, and Rehnquist controversies.

Like Canon 3C, the amended § 455 established an objective “appearance” standard that replaced the original § 455’s subjective standard permitting a judge to reference his own “opinion” when deciding whether to recuse himself.<sup>76</sup> In the House Report, Congress stated explicitly that it intended the objective standard to eliminate the “so-called ‘duty to sit.’”<sup>77</sup> In addition, the amended version of § 455 defined a financial interest as any legal or equitable interest, “however small,”<sup>78</sup> thereby eliminating the vague “substantial interest” requirement that had been such a problem for Judge Haynsworth. The new § 455 also addressed the situation faced by Justice Rehnquist in *Laird v. Tatum* by requiring that a judge or Justice be disqualified if he or she had expressed an opinion concerning the merits of a case while serving as a government lawyer.<sup>79</sup> Another important change was the inclusion in § 455 of the more general “bias and prejudice” standard<sup>80</sup> that had previously been found only in § 144. Because § 455 applies to all Justices, judges, and magistrates, and not just to district court judges as § 144 does, these broad substantive standards for recusal suddenly had much wider application.

### C. Judicial Disqualification Laws Today

Today, §§ 455 and 144 together govern disqualification in the federal courts.<sup>81</sup> Although the two provisions contain different standards and procedures, they substantially overlap, and the relationship between the two is confusing.<sup>82</sup>

75. *Id.* As Justice Scalia subsequently described the new standard, “what matters is not the reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540, 548 (1994).

76. Act of Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609; *see also* H.R. Rep. No. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6354-55.

77. H.R. REP. NO. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

78. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, 1610.

79. *Id.* at 1609.

80. *Id.*

81. A third recusal statute provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” 28 U.S.C. § 47 (2000). This statute is straightforward, narrow in application, and has been implemented without problem, and thus will not be discussed further.

82. FEDERAL JUDICIAL CENTER, RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, 1 (2002) (noting that “the relationship between [28 U.S.C. §§ 455 and 144] has been a source of some confusion”); *see also* Idaho v. Freeman, 507 F. Supp. 706, 713 (D. Idaho 1981) (“The inter-

As some courts have commented, § 455 “does not provide the procedure for its enforcement.”<sup>83</sup> Judges are expected to recuse themselves under § 455 *sua sponte*. If they do not, parties have to invent the procedures for seeking disqualification as they go along. Judges also have no statutory guidance as to how to analyze and resolve the question of whether they are too biased or interested in the subject matter to sit on the case.

In contrast, § 144 does provide some procedures to guide litigants. That statute requires the filing of a timely motion to disqualify along with an affidavit and a certificate of good faith by counsel.<sup>84</sup> But, as discussed above,<sup>85</sup> § 144 did not explicitly provide the standards by which courts were to review such motions, and courts have used this procedural gap to give themselves a great deal of leeway when reviewing motions and affidavits for “legal sufficiency.”

Courts continue to narrowly interpret the amended statutes. In *Liteky v. United States*,<sup>86</sup> the Supreme Court again read an “extrajudicial source” requirement into § 455, holding that in most cases a judge could not be disqualified based on views derived from her participation in the legal proceedings.<sup>87</sup> Yet, as the concurrence pointed out, nowhere in § 455 did Congress indicate that the *source* of judicial bias or prejudice mattered when determining whether the judge was, or appeared to be, so biased as to create the appearance of partiality.<sup>88</sup> Consistent with *Liteky*, courts of appeals rarely order disqualification when the basis for a claim of bias occurred during the legal proceeding itself. For example, the Tenth Circuit upheld a district court judge’s refusal to recuse himself despite his pretrial statement that “the obvious thing that’s going to hap-

---

relation between section 144 and section 455 has been subject to various interpretations and has caused some confusion.”).

As one commentator described it, after 1948 the law of disqualification “consisted of two wholly independent statutes, one of which, § 455, was intended to be self-enforcing but rarely was, and the other, § 144, which was intended to be peremptory but never was.” FLAMM, *supra* note 9, § 23.6.1, at 678.

83. *See, e.g.*, Fong v. Am. Airlines, Inc., 431 F. Supp. 1334, 1335 (N.D. Cal. 1977).

84. 28 U.S.C. § 144 (2000).

85. See discussion *supra* Part II.A.

86. 510 U.S. 540, 554 (1994). For a discussion of *Liteky*’s impact on judicial integrity, see Lawrence J. Hand, Jr., Note, *Liteky v. United States—Jeopardizing Judicial Integrity*, 40 LOY. L. REV. 995, 1009–10 (1995) (commenting that the Court’s decision in *Liteky* “may sacrifice, or at least erode, judicial integrity”).

87. *Liteky*, 510 U.S. at 554.

88. *Id.* at 558 (Kennedy, J., concurring). The extrajudicial source doctrine has been criticized by commentators as “incompatible with the language of section 455(a) and the goals of the 1974 amendments.” *See, e.g.*, Littenecker, *supra* note 5, at 252.

pen . . . is that [the defendant's] going to get convicted . . . ."<sup>89</sup> The Tenth Circuit first noted that the judge had not based his opinion on knowledge gained outside the courtroom and then concluded that the judge's comment "does not show that the judge could not possibly render fair judgment."<sup>90</sup>

The duty-to-sit doctrine also remains alive despite Congress's expressed intent to abolish it. In 1993, seven Supreme Court Justices issued a "Statement of Recusal Policy" announcing their views regarding recusal when a relative was involved in a case before them.<sup>91</sup> In the course of describing their policy for recusal in such cases, these Justices declared more generally that they should not recuse themselves "out of an excess of caution" because "[e]ven one unnecessary recusal impairs the functioning of the Court."<sup>92</sup> This policy reflects the unique nature of the U.S. Supreme Court, in which a recusal would create the possibility of a tie vote that would leave a legal issue unresolved.<sup>93</sup> In his memorandum defending his decision to sit on the *Cheney* case, Justice Scalia again noted this problem and commented that a decision to recuse is "effectively the same as casting a vote against the petitioner."<sup>94</sup> As the Statement of Recusal Policy and Scalia's memorandum demonstrate, the duty-to-sit doctrine continues to guide recusal decisions by at least some of the Justices of the Supreme Court.<sup>95</sup>

Although they do not face the same personnel problem, circuit courts have also made statements suggesting that they continue to adhere to the duty-to-sit doctrine. For example, the Second Circuit recently declared that "where the standards governing disqualification have not been met,

---

89. *United States v. Young*, 45 F.3d 1405, 1414 (10th Cir. 1995).

90. *Id.* at 1415.

91. See 1993 STATEMENT OF RECUSAL POLICY, available through the Supreme Court clerk's office. The seven Justices who signed the Statement of Recusal Policy—Justices Rehnquist, Stevens, Scalia, Thomas, O'Connor, Kennedy, and Ginsburg—all had "spouses, children, or other relatives within the degree of relationship covered by 28 U.S.C. § 455 who are or may become practicing attorneys." *Id.*

92. *Id.*

93. However, the Court was originally established with an even number of Justices (six), and it has sat for significant periods during its history with an even number of Justices—suggesting that tie votes are not of overriding concern to Congress. See *Bias in the Federal Courts*, *supra* note 8, at 1446–47. Finally, certain Justices frequently recuse themselves from cases because they own stock in one of the parties. See generally Tony Mauro, *Furor Over Scalia-Cheney Trip Casts Light on Murky World of Recusals*, 175 N.J. LAW J. 732 (2004). If avoiding ties was truly a priority, these Justices would have divested themselves of the stock that frequently requires their recusal.

94. 541 U.S. 913, 916 (2004).

95. Justice Ginsburg also cited the problem of tie votes in her response to a call by thirteen members of Congress for her to withdraw from all future cases concerning abortion because of her affiliation with NOW Legal Defense Fund. See *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004, at A18.

disqualification is not optional; rather, it is prohibited.<sup>96</sup> As one commentator observed, “[d]espite the clarity of the congressional purpose to eliminate the duty to sit, many courts have continued to find some version of such a duty.”<sup>97</sup>

#### *D. Calls for Reform of Judicial Disqualification Laws*

As a result of the controversy over Justice Scalia’s refusal to recuse himself from the *Cheney* case, judicial disqualification laws are again under scrutiny. If history is any guide, this public attention may lead to a new round of amendments in an effort to ensure that the laws serve the intended goal of protecting the judiciary’s reputation and serving the litigants’ interests.

Calls for reform can already be heard. The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct is currently considering revisions to the Code, and several of the comments it has received refer explicitly to the Scalia-Cheney trip and suggest changes to the rules to address similar future situations.<sup>98</sup>

Although Congress has not taken any specific action yet, members have called for amendments to the disqualification laws in the wake of the Scalia-Cheney controversy. On February 6, 2004, Reps. John Conyers, Jr. and Howard L. Berman, two Democrats on the House Judiciary Committee, called for hearings into “possible gaps in federal laws” that would allow Justice Scalia to sit on a case after vacationing with one of the litigants. In a letter to the Committee’s Republican leaders, the Democrats complained that “the recusal laws contain no process for potential conflicts to be reviewed by other judges.”<sup>99</sup> In March 2004, Sen. John Kerry, the Democratic presidential nominee, issued a statement in response to the controversy. He asserted that “[t]here is absolutely no question that when judges accept vacations and gifts from the parties be-

---

96. *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001).

97. Littenecker, *supra* note 5, at 241 n.26 (citing cases); *see also* FLAMM, *supra* note 9, § 20.10.2, at 615–18.

Despite Congress’ clear intent to abolish the duty to sit rule as a restriction on a judge’s discretion when confronted with a judicial disqualification motion and despite the recognition of some federal courts that a judge has no duty to sit whatsoever in any case, a number of federal courts have continued to invoke the duty to sit as a rationale for retaining cases in certain circumstances.

98. *See* ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, *available at* [www.abanet.org/judicialedethics](http://www.abanet.org/judicialedethics).

99. *House Democrats Call for Hearings on High Court Conflicts of Interest*, L.A. TIMES, Feb. 7, 2004, at A14.

fore them it erodes public trust in the courts.”<sup>100</sup> Thus, it is possible that Congress will seek to amend judicial recusal laws again in the near future.

#### *E. Lessons to Be Learned from Historical Experience*

That judicial recusal laws are amended by Congress in response to periodic crises does not make them unusual; laws often arise from various public scandals, catastrophes, or other high-profile events that prod Congress into action. Reform of the recusal statutes differs, however, because those amendments are designed to limit the authority of the very institutions (and individuals) responsible for construing them. Because judges apply the statutes to themselves in cases in which they may have an improper personal interest, they have an incentive to narrowly construe them. Thus, despite Congress’s best efforts to craft disqualification laws that protect the reputation of the judiciary, the laws are inevitably narrowed through interpretation to the point where they no longer serve the intended purpose.

The recusal statutes will fail to protect the reputation of the judiciary as long as they are implemented in an ad hoc fashion, without the procedural protections that normally govern adjudication. For as long as they have existed, the recusal statutes have operated in a procedural vacuum.<sup>101</sup> The laws do not provide for appropriate disclosure of relevant facts, an adversarial presentation of the issues, or a neutral decisionmaker who issues a reasoned opinion on the question of disqualification. For the reasons discussed in Part III, without these procedural protections, the judicial recusal laws will not fulfill their goal of promoting public confidence in the impartiality of the judicial system. If these protections were in place, however, the laws might finally be interpreted as Congress intended, and applied in a manner that strengthens public confidence in the judiciary.

Perhaps it should not be surprising that Congress has hesitated to dictate procedures for courts to follow in such a sensitive area as judicial disqualification. The legislative and executive branches may feel that it is inappropriate to dictate the minutiae of procedures to be followed when litigants seek to remove a judge from a case, preferring to leave it

---

100. Josh Gerstein, *Kerry Has Pressed a Long Campaign to Rein in Judges*, N.Y. SUN, July 14, 2004, at 1.

101. *See Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1334, 1335 (N.D. Cal. 1977) (noting that although “[s]ection 455 provides a substantive test for disqualification, it does not provide the procedure for its enforcement”).

to the judiciary to clean its own house.<sup>102</sup> And Congress has good reason to tread lightly in this area. Whenever Congress regulates the courts, it must keep in mind the need to maintain the separation of powers and to protect the judiciary's independence. In accordance with these principles, judges should not be forced to recuse themselves simply because they have expressed opinions and preferences that are at odds with those of the public or even just the parties before them.<sup>103</sup>

Unfortunately, the judiciary has failed to step in and fill the procedural void left by Congress. Judges applying disqualification laws to themselves have no incentive to formalize the process, just as they have no interest in broadly construing the substantive recusal standards. Judges who wish to maintain collegial relations with one another hesitate to set in stone recusal procedures that might be viewed as disrespectful of their fellow judges. This concern is particularly evident at the U.S. Supreme Court, where the nine active Justices must sit on all cases together and seek to forge coalitions from term to term. Perhaps for this reason, the Justices have established the practice of referring recusal motions to the very Justice whose impartiality is being questioned, rather than deciding the issue collectively.<sup>104</sup>

In conclusion, the lesson learned from the troubled history of judicial disqualification is that better procedures, rather than stricter substantive standards, are needed to govern the law's application. Whether those procedures are imposed by Congress, by professional associations such as the American Bar Association, or by the judiciary itself is not significant. What matters is that procedures be developed so that disqualification laws fulfill their goal of promoting public confidence in the justice system.

### III. PROCEDURE AS A SOURCE OF JUDICIAL LEGITIMACY

As described in Part II, one of Congress's main objectives in enacting judicial disqualification laws is to promote public confidence in the

---

102. *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988) (noting that § 455 does not prescribe any particular remedy for its violation and commenting that "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation"); Mauro, *supra* note 93 (describing Congress's reluctance to regulate the Supreme Court).

103. See Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1202 (1992) (discussing the "confusion about bias, impartiality, knowledge, and experience" in the context of selecting judges and juries).

104. See *infra* note 207–09 and accompanying text.

federal court system by ensuring that judges are not only impartial in fact, but also that they maintain the appearance of impartiality.<sup>105</sup> The judiciary has more riding on its institutional reputation than the other two branches of government. As Alexander Hamilton observed, the judicial branch, possessing “no influence over either the sword or the purse,”<sup>106</sup> must take care to foster the public trust that serves as the main source of its authority.<sup>107</sup> The Supreme Court has also explicitly recognized the importance of maintaining the trust of the people, declaring the need to “preserve both the appearance and reality of fairness,” which “generat[es] the feeling, so important to a popular government, that justice has been done.”<sup>108</sup>

The recent controversy over whether Justice Scalia should have recused himself from the *Cheney* case exemplifies how thoroughly recusal laws have failed to protect the reputation of the judiciary. Although reasonable people can differ about whether Justice Scalia should have recused himself, most would agree that the process by which the issue was raised and decided—through front page articles, outraged editorials, political cartoons, late-night talk show host humor, criticism by members of Congress, and, finally, a defensive memorandum by Scalia justifying his decision to remain on the case—has had a negative effect on the public’s perception of the judiciary. And as described in Part II, the *Cheney* case is just one of a long series of cases in which the debate over recusal has itself impugned the reputation of the judiciary, and it is unlikely to be the last.<sup>109</sup>

Some commentators have sought to put an end to the controversy by advocating an expansion of the grounds for judicial disqualification.<sup>110</sup>

---

105. See discussion *supra* Part II.A (describing Congress’s intention to protect the reputation of the judiciary through judicial disqualification laws).

106. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974); *see also* *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).

107. *See* *Bloom*, *supra* note 21, at 663 (“Public confidence is essential to effective functioning of the judiciary because, ‘possessed of neither the purse nor the sword’ the judiciary depends primarily on the willingness of members of society to follow its mandates.”).

108. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)); *see also* *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (stating that maintaining the public’s confidence is important); *In re Murchison*, 349 U.S. 133, 136 (1955) (stating that an impartial judge is one way the judicial system maintains fairness); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (stating that “justice must satisfy the appearance of justice”); *Ex parte McCarthy*, 1 K.B. 256, 259 (1923) (stating that “Justice should not only be done, but should manifestly and undoubtedly be seen to be done”).

109. *See* discussion *supra* Part II.E.

110. *See, e.g.*, *Bassett*, *supra* note 8; *Frank*, *supra* note 8; *Leitch*, *supra* note 8; *The Standard*,

Congress has often followed these suggestions; Congress has amended disqualification laws on five occasions, each time broadening their scope.<sup>111</sup> As described in Part II, legislative solutions have proved ineffective because judges have interpreted the laws narrowly when applying them to themselves.<sup>112</sup> In any case, it is not clear that the substantive standards for disqualification should be lowered so far as to force judges to withdraw from cases simply because editorial writers or late-night talk show hosts suggest that they do so. The question whether a judge can sit on a case should not be decided solely in the court of public opinion. Indeed, to require judges to remove themselves whenever they are the subject of criticism would be antithetical to the judiciary's role as a bulwark against the vagaries of public opinion.<sup>113</sup>

To improve the law of judicial disqualification so that it serves to protect the judiciary's reputation, it is first necessary to identify the sources of the public's faith in the judiciary that the laws seek to preserve. Unelected judges regularly countermmand the decisions made by elected officials, and yet for the most part the public abides by, and respects, the judiciary as an institution. In other words, judicial decision-making is viewed as legitimate, despite its countermajoritarian nature. Volumes have been written seeking to locate the source of the public's respect for, and adherence to, countermajoritarian judicial decisionmaking.<sup>114</sup>

Political scientists and legal theorists have recognized that procedures serve an important legitimating function for institutions in which the decisionmakers are appointed and/or given life tenure rather than elected and accountable to the constituents they govern.<sup>115</sup> Probably the

---

*supra* note 8; *Bias in the Federal Courts*, *supra* note 8.

111. See discussion *supra* Part II.B.

112. See discussion *supra* Parts II.B-E.

113. See *supra* note 13.

114. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986) (describing the "counter-majoritarian" nature of the judicial system); PHILIP BOBBITT, CONSTITUTIONAL FATE 3-5 (1982) (discussing judicial review of legislation); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-12 (1980) (discussing conflicts between judicial review and democracy); JOHN HART ELY, DEMOCRACY AND DISTRUST 11-12 (1980) (discussing the role of interpretivism in the judicial system); Erwin Chemerinsky, *The Supreme Court 1988 Term—Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46 (1989) (noting that for decades the scholarly literature about judicial review has been primarily concerned with resolving the counter-majoritarian difficulty). See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (discussing the evolution of the countermajoritarian debate).

115. BORK, *supra* note 13, at 2 ("The democratic integrity of the law . . . depends entirely upon the degree to which its processes are legitimate."); John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 682 (1994) (describing how "[m]any procedural elements found in judicial and administrative adjudication perform a surrogate legitimization function");

most influential of these schools of thought in law has been Legal Process theory<sup>116</sup>—a procedurally oriented view of what it is courts should do that was formulated and presented by Henry Hart, Albert Sacks, and Herbert Wechsler in Hart and Wechsler's casebook *The Federal Courts and the Federal System*<sup>117</sup> and in Hart and Sacks's equally influential book *The Legal Process*.<sup>118</sup> Legal Process scholarship responded to attacks on the judiciary by Legal Realists<sup>119</sup> by defining the “boundaries and purposes” of federal judicial power in an effort to demonstrate that judicial decisionmaking is both “legitimate[] and restrained.”<sup>120</sup>

Legal Process theorists were certainly not the first to turn to procedure as a source of judicial legitimacy,<sup>121</sup> and their scholarship has spawned many second- and third-generation process theorists who have elaborated upon and developed their ideas.<sup>122</sup> While much remains contested about the sources of judicial legitimacy, most participants in the discussion agree on several essential procedural components of adjudication that legitimize it as a method of decisionmaking in a democratic society. As described in detail below, I extract from this literature the following five procedural components of adjudication that are universally considered essential to the legitimacy of the final product: (1) litigants,

---

Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 315 (1997). See generally Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3; Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

Some of these scholars deeply disagree with one another about the role of procedure in legitimating judicial decisionmaking. For example, Professor Peters disagrees with Professor Bork's view that the judiciary must follow certain procedures to avoid engaging in the type of “law-declaring” that only the legislature legitimately may do. Professor Peters argues instead that appropriate procedures can legitimate adjudicative lawmaking. However, for the purposes of this Article the relevant point—and one on which all these scholars agree—is that adjudicative procedures legitimate judicial decisionmaking.

116. The influence and longevity of Legal Process methodology has been frequently remarked upon. See, e.g., Amar, *supra* note 18 at 693–95; Fallon, *supra* note 18, at 970–71.

117. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

118. HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

119. See *supra* note 18 and accompanying text.

120. Amar, *supra* note 18, at 694; see also Fallon, *supra* note 18, at 964 (“[M]ost of us, Hart and Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions.”).

121. See Amar, *supra* note 18, at 693 (noting that many of the ideas and perspectives enunciated in Hart's, Wechsler's, and Sacks's work “had been gestating for years”); Fallon, *supra* note 18, at 963 (“Taken individually, most of Hart and Wechsler's doctrinal and policy questions were not original even in 1953. Similar questions have been raised at least since Congress addressed the question of how to allocate judicial power in the first Judiciary Act.”).

122. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

not courts, initiate disputes; (2) the disputes are presented through an adversarial system in which two or more competing parties give their conflicting views; (3) a rationale must be given for decisions; (4) decisions must refer to, and be restricted by, an identifiable body of law; and (5) the decisionmaker must be impartial.<sup>123</sup> Although scholars of the federal court system may not agree on *why* these particular procedural elements legitimize adjudication, the list is nonetheless a generally accepted description of the attributes of judicial decisionmaking considered essential to good (i.e. legitimate) adjudication.<sup>124</sup>

Furthermore, not only are these procedural elements generally agreed by scholars to be essential to judicial legitimacy on a theoretical level, they also are justified by reference both to the institutional competences of the courts as well as to the Constitution's articulation of the scope of judicial power. These procedures are thus legitimating not only because they provide a theoretical justification for the exercise of judicial power in a democracy, but also because they serve to further the Framers' in-

---

123. See discussion *infra* Part III.A.

124. See, e.g., Allison, *supra* note 115, at 682 ("Procedures that require published rules, party participation, reasoned decisions, and communicated rationales have the intended and actual effect of enhancing public perceptions of legitimacy."); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13–14 (1979):

The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: (a) Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore. (b) Judges do not have full control over whom they must listen to. They are bound by rules requiring them to listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

....

The judge is required to listen and to speak, and to speak in certain ways. He is also required to be independent. This means, for one thing, that he not identify with or in any way be connected to the particular contestants. He must be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision.

*See also* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1341–42 (2001):

Ideally, the adversary system allows each contending party to argue his or her case to an open-minded and disinterested judge who will reach a decision only after having heard and properly weighed all the relevant evidence presented as well as after having duly considered the conflicting interpretations of relevant legal precedents advanced by each of the contenders. .... At the very least, [], such a judge promotes the rule of law by reaching an unbiased (in the sense that he or she has no reason to favor any party before the court over any other), legally-grounded, and procedurally fair decision that, by and large, should make dispute resolution through law preferable to other alternatives for a vast majority of the citizenry.

tended role for the courts in our constitutional structure.

Finally, the list of procedures described below is not merely normative or aspirational, but also descriptive; most disputes are presented to and decided by judges in accordance with these procedures. One of the few exceptions is the process (or lack thereof) that governs judicial recusals. As discussed in Part IV, recusal law's abandonment of these traditional forms of adjudication has led to its failure to perform its intended legitimating function.

#### *A. Litigants Initiate and Frame Disputes*

Federal courts do not initiate litigation. They wait for third parties to bring conflicts to them for resolution. In the U.S. model of adjudication, courts do not have agenda-setting powers and do not conduct their own investigations. Instead, they are confined to responding to the disputes initiated by injured parties.

As Professor Christopher Peters has observed, one source of adjudicative legitimacy comes from the participation of the litigants in framing and presenting disputes for courts to resolve.<sup>125</sup> By participating in the judicial process, the parties—winner and loser alike—have consented to the outcome, and consent of the governed has always been viewed as essential to legitimizing forms of government decisionmaking.<sup>126</sup> And solely from an instrumental perspective, participation of the bound parties improves decisionmaking by ensuring that those with the most to gain (and lose) have provided their insights and views to the decision-maker.<sup>127</sup>

That courts must wait for parties to bring disputes to them is fitting in light of the judiciary's institutional limitations. The third branch does not have the manpower and resources needed to investigate and commence disputes. Judges are generalists, meaning that they do not have the expertise to identify and investigate specific societal problems in

---

125. Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 20 (2001) (observing that a "court case is initiated not by the court but by one of the parties," and noting that it is the participation of the litigants that lends legitimacy to judicial decision-making).

126. *Id.*

127. See, e.g., JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927), reprinted in 2 JOHN DEWEY: THE LATER WORKS, 1925–1953, 235, 364 (Jo Ann Boydston ed., 1984); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), reprinted in UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 187, 224 (H.B. Acton ed., 1972) (noting that "each is the only safe guardian of his own rights and interests").

need of adjudication.<sup>128</sup> Furthermore, because federal judges are not elected and have no constituency they can plausibly claim to represent, they lack the mandate to create their own agenda. Thus, the affected parties are usually the best-situated to bring forward and frame their disputes for judicial resolution, because they have firsthand knowledge of the problem at issue and can best decide when, if, and how to frame that dispute.<sup>129</sup>

The Framers intended to limit judges to resolving disputes raised by others, and that view is reflected in Article III of the Constitution. Judges must wait until a "case" or "controversy" is brought to them; nothing in the text of Article III empowers courts to manufacture cases for themselves.<sup>130</sup> The Framers did not foresee the need for the legions of judges that would have been required were the judiciary to be assigned the task of investigating cases and initiating litigation. Accordingly, the Constitution did not mandate the creation of hundreds of new judicial officers, but rather vested the judicial power in "one Supreme Court" and "in such inferior courts as the Congress may from time to time ordain and establish."<sup>131</sup>

Although not explicitly prohibited by the Constitution's text, it would be constitutionally suspect for judges to take over the investigation and prosecution of cases. First, such tasks would interfere with the ability to carry out the primary task of judging; second, engaging in these activities would impermissibly mix the judicial function with that of the executive;<sup>132</sup> and third, permitting courts to choose which issues to address and when to address them would vest too much power in the hands of the government. The Framers preferred that the people retain the ability to choose which cases to bring to the courts for resolution.<sup>133</sup>

---

128. *See generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 31–36 (1938).

129. For discussion of the judiciary's institutional limitations in this regard, see Molot, *supra* note 16, at 60.

130. *Id.* at 64–65.

131. U.S. CONST. art. III, § 1.

132. Alexander Hamilton explicitly discussed the danger to liberty if the judicial branch were to take on the powers of the other branches as well:

For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . .

THE FEDERALIST NO. 78, at 497 (Robert Scigliano ed., 2000) (quoting 1 BARON DE MONTESQUIEU, SPIRIT OF LAWS 181 (1748)).

133. *See* Molot, *supra* note 16, at 66–67 (describing the Framers' mistrust of the judiciary and relatively greater confidence in litigants and juries to play key roles in the judicial process).

*B. Adversarial Presentation of Disputes*

The adversarial presentation of disputes is another basic component of the traditional adjudicatory model.<sup>134</sup> Under an adversary system, opposing parties have an opportunity to present their conflicting arguments to a relatively passive decisionmaker. In his seminal article “The Forms and Limits of Adjudication,” Lon Fuller declared that the parties’ responsibility for presenting “reasoned arguments” in support of their respective positions was the “essence” of adjudication.<sup>135</sup> It is the parties who conduct investigations, choose which issues to pursue in litigation, and prepare and present arguments and evidence to the factfinder.<sup>136</sup> Although courts will occasionally raise issues or arguments on their own, these instances are rare and usually have to be justified by other limitations on judicial power, such as the court’s inability to decide questions outside of its jurisdiction or its interest in avoiding pronouncements on constitutional questions. This system is in sharp contrast to the inquisitorial systems of many other countries, in which state agents control litigation.<sup>137</sup>

Party control over case-presentation is legitimating for much the same reasons that party control over case-initiation is legitimating. Again, it is important symbolically that the parties who will be bound to the decision have a role in persuading the decisionmaker of their point of view.<sup>138</sup> And the fact that the litigants will be the most directly affected by the decision has instrumental value, for it improves the quality of their

---

134. See, e.g., Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) (“[T]he hallmark of American adjudication is the adversary system.”).

135. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364–65 (1978).

136. Peters, *supra* note 125, at 21 (commenting that “judges in our model of adjudication typically do not rely upon evidence outside the record, or engage in their own investigative efforts, or even rely on legal arguments other than those advanced by the parties”).

137. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380–82 (1982). Mirjan Damaska has observed that inquisitorial legal systems tend to spring from political regimes that are less concerned with citizen participation in government decisionmaking. MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 154–73 (1986). That the United States has adopted a litigant-centered rather than judge-centered model of adjudication thus speaks not only to the qualities the citizens of the United States value in adjudication, but also the qualities they value in government decisionmaking more generally. See also Peters, *supra* note 125, at 22 (“Adjudication in the Anglo-American common-law tradition thus draws legitimacy from the same source as majoritarian political decisionmaking in the western democratic tradition. That source is the meaningful participation of the governed in the making of decisions that will bind them.”).

138. Fuller, *supra* note 115, at 19 (stating that the adversary model respects the dignity of the individual by affording those “affected by the decisions which emerge . . . [a] formally guaranteed opportunity to affect those decisions”).

participation and thus the quality of the final decision.<sup>139</sup> As Professor Peters has argued, the role of the parties in framing and arguing their own cases serves a legitimating function similar to that of reasoned deliberation in the legislative sphere.<sup>140</sup> Participation by the interested parties ensures that “a greater diversity of interests [are] represented in the decisionmaking process” than would occur were the court to decide without litigant input, just as deliberation adds voices and perspectives to Congress’s decisionmaking.<sup>141</sup> By bringing in the most interested parties to make arguments and present facts, the process of adjudication assures that the decisionmaker has as much relevant information as possible before her when making a decision.

Institutionally, American judges are not well suited to engage in factual investigations of social problems because they lack the resources and the public mandate to do so. Courts do not have large staffs to gather and sift through evidence for them and, even if they did, they do not make good representatives of a constituency because they do not engage in dialogue with their constituents or otherwise attempt to remain in tune with the wishes of the general population that they serve.

Finally, limiting the judicial role to that of decisionmaker, rather than investigator, is in keeping with the Framers’ intent that the judiciary be separate from the executive, and that the people maintain power and control over adjudication.<sup>142</sup>

### *C. Reasoned Decisionmaking*

Reasoned decisionmaking—“the explicit act of offering a justification or explanation for the result reached”<sup>143</sup>—is a hallmark of the legal process.<sup>144</sup> In his article “Giving Reasons,” Professor Frederick Schauer observed that the practice of providing reasons for legal decisions is “central to what makes the legal enterprise distinctive.”<sup>145</sup> Justifying

---

139. R.L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807, 817 (1977) (“[T]he common law method has salutary procedural consequences in that it brings into the legal decisionmaking process precisely those person who bear the impact of a decision.”).

140. Peters, *supra* note 125, at 356.

141. *Id.* at 358.

142. See discussion *supra* Part II.A.

143. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 636 (1995).

144. HART & SACKS, *supra* note 118, at 143–52; Fallon, *supra* note 18, at 966 (“Reason and reasoned elaboration are the stuff of the judicial process.”).

145. Schauer, *supra* note 143, at 634.

decisions is widely viewed as a vital source of legitimacy for judicial decisionmaking.<sup>146</sup>

As Professor Schauer noted, the need to give reasons is a sign of the weakness of the decisionmaker.<sup>147</sup> Those in positions of unquestioned authority over subordinates—such as teachers, army officers, and parents—do not need to explain their decisions before their subordinates will comply with their commands. Only those whose authority is more tenuous must justify their rulings. As Schauer puts it, “reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important.”<sup>148</sup>

That the judiciary ordinarily gives reasons for its conclusions is thus both a sign of its weakness as well as a means of bolstering its legitimacy.<sup>149</sup> Congress, which gains its legitimacy through periodic elections, enacts statutes in the form of commands without justification. The judiciary cannot act with the same assumption that its orders will be followed without question.<sup>150</sup> Rather a judge must explain and justify his

---

146. Peters, *supra* note 125, at 20–21; CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 16 (1999); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 775–76 (1995) (quoting former D.C. Circuit Judge Patricia Wald’s statement that reasoned opinions “lend decisions legitimacy, permit public evaluation, and impose a discipline on judges,” and concluding that reasoned decisions “thus promot[e] public confidence in the integrity of the courts”); Resnik, *supra* note 137, at 378 n.13 (“When ruling, judges are obliged to provide reasoned explanations for their decisions . . .”); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 42 (1979); Fuller, *supra* note 135, at 367; Alexander M. Bickel, *Is the Warren Court Too “Political”?*, N.Y. TIMES, Sept. 25, 1966, § 6, at 30 (“The Court must be able to demonstrate by reasoned argument why it thought the action right or necessary . . . An action for which there is no intellectually coherent explanation may be tolerable . . . but it is for the political institutions to take, not for the Court.”).

147. Schauer, *supra* note 143, at 637.

148. *Id.*

149. Of course, reasons do not always accompany judicial decisions. Motions are often decided without explanation, and the Supreme Court’s denials of certiorari almost never come with reasons. However, the fact that these more marginal decisions are issued without justification only serves to illustrate that the norm for final, binding decisions on the merits of a question of law are usually accompanied by an explanation.

Appellate courts increasingly issue summary affirmances without decision. However, cases unaccompanied by a written decision are usually unanimous decisions on questions that the court has addressed and previously answered with a reasoned explanation. And yet even in such cases the practice has been criticized in part because it undermines judicial legitimacy. See, e.g., Anne Coyle, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 FORDHAM L. REV. 2471, 2491 (2004); Dragich, *supra* note 146, at 787, 797–802.

150. Schauer, *supra* note 143, at 658 (“[W]hen decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they eman-

decisions, which serves the dual purposes of proving that the judge has heard the litigants' arguments and demonstrating to the loser that the decision was not arbitrary or based on illegitimate preferences.<sup>151</sup>

In addition, reasons legitimize judicial decisions by committing the court to a general principle that controls a category of cases, which forces it to look beyond personal biases regarding the parties or emotional reactions to the facts in the specific case before it.<sup>152</sup> “[T]o provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.”<sup>153</sup> Reason-giving thus serves as a constraint on judicial power, cabining judicial discretion through the act of articulating general principles that will serve to bind the judge in future cases. A related benefit is that explaining and justifying judicial decisions forces the decisionmaker to slow down, guarding against a gut reaction to a case or a party that cannot be justified by a general principle.<sup>154</sup> Finally, because courts publicly declare reasons for their decisions, they cannot deviate too far from the mores and values of the community they serve. For example, a federal judge could not justify the outcome of a case simply by citing the race of the litigants, because race is not a legitimate ground for decisionmaking by the United States government.

Institutionally, courts are well suited to the task of reasoned decisionmaking. The act of giving a reason for a decision is best done by one or a small number of individuals, rather than a large group that might find it difficult to reach a consensus even on an outcome, and nearly impossible to articulate a single rationale for that outcome. Reasoned decisionmaking is also a valuable means of communication with the other

---

nate from an authoritative source, then giving reasons becomes a way to bring the subject of the decision into the enterprise.”).

This very principle was expressed by Justice Anthony Kennedy and Rep. Jose Serrano (D-N.Y.) during Kennedy's testimony in March 2004 defending the Court's proposed budget. In the course of a tense discussion in which Serrano commented that he was still “trying to figure out what you folks did in the 2000 election to pick a president,” Kennedy stated, “We are the only branch of government that must give reasons for what we do. They are in the opinions.” Representative Serrano responded, “We give reasons, too. It is called re-election.” Tony Mauro, *Courtside: When Planets Collide*, *LEGAL TIMES*, Mar. 29, 2004, at 10.

151. Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978). In describing and defending the Legal Process methodology, Professor Richard Fallon explained “[w]hat seems crucial to the notion of reasoned elaboration is that the value judgments occur within a process of legal reasoning, rather than being imposed from the outside as a judge's personal, dictatorial preferences.” Fallon, *supra* note 18, at 973 n.85.

152. Schauer, *supra* note 143, at 652–53.

153. *Id.* at 641.

154. *Id.* at 656–57.

two branches of government about the acceptable limits of their powers. For example, Congress will know by reading a court's decision striking down a statute whether it is free to amend the law to overrule that decision or whether the Constitution itself prohibits the goal Congress wished to accomplish. By giving reasons, courts also set out a road map for litigants and judges to follow in the future. Citizens can better accord their conduct with the law when they are given reasons for a particular decision in a particular case.

Explanations are essential for courts to perform the tasks assigned to them under the Constitution. Reason-giving is necessary to "reconcile[]""clashing" statutes, as courts must do to fulfill their role as "interpreters of the law."<sup>155</sup> Likewise, the Framers did not intend courts to strike down laws enacted by Congress without first explaining how they conflict with the Constitution.<sup>156</sup> Finally, the multi-tiered structure of the federal courts systems require reasoned decisionmaking so that appellate courts can review lower courts' pronouncements.

#### *D. Reference to Governing Body of Law:*

Yet another core principle of adjudication is that judges are not to decide cases based solely on their own personal views, but rather must constrain themselves to applying and interpreting a recognized body of law.<sup>157</sup> Chief Justice John Marshall first articulated that limitation on federal judicial power in *Marbury v. Madison*.<sup>158</sup> "[C]ourts may act only when there is law, based on precedent, to apply. Courts do not possess authority to assert their own will."<sup>159</sup> The view that judges are con-

---

155. THE FEDERALIST NO. 78, at 499 (Alexander Hamilton) (Robert Seigleman ed., 2000).

156. *Id.* at 500.

157. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989) ("The notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems."); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1465 (2003) ("Judges are supposed to decide cases according to the law, and this practice may be essential to the legitimacy of the judiciary."); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L. J. 353, 506 (1989) ("As long as courts cultivate the perception that they are constrained and distinguishable from the political branches, their legitimacy will remain intact.").

Although common law cases are decided without reference to a written body of law, they are nonetheless bounded by the judicial precedent. In deciding common law cases, courts make references to the principles in these decisions and, at least in theory, justify application of the principle to the new fact situations before them. Judges are not free to simply disregard the body of decisions in this area just because there is no written, codified rule in place.

158. 5 U.S. 137, 165 (1803).

159. Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 55 (1995); see also Kathleen M. Sullivan, *The Supreme Court*,

strained by a body of law—whether that be statutory law or judge-made precedent—is by now a firmly established procedural limitation on judicial decisionmaking.

In attempting to legitimate judicial power, Legal Process theorists declared that courts must not simply read their own personal preferences into law, but should instead decide cases by referring to principles and policies that are deeply embedded in society as a whole.<sup>160</sup> The Legal Process school's primary concern was to respond to Legal Realist criticism by demonstrating that the judiciary was constrained in its choices, and was not simply deciding cases based on personal preferences, as an elected legislator might do.<sup>161</sup>

In more recent academic literature, commentators have noted that the common law method of reasoning by analogy promotes judicial legitimacy by ensuring that adjudication operates as interest representation.<sup>162</sup> Under the common law method, judicial decisions are binding only on those that are similarly situated to the original parties. This process ensures that litigants serve as vicarious representatives because their legal arguments will influence the outcome only for those future litigants that share their same interests.

Adherence to precedent not only cabins judicial discretion, it also promotes fairness and predictability in judicial decisionmaking.<sup>163</sup> If like cases must be decided alike, then judges are less free to reach outcomes based on their personal attitudes toward the litigants or the causes they promote. Requiring all judges to follow the same precedents helps to standardize decisionmaking and minimize inconsistency in judicial decisions, which in turn strengthens the credibility of those decisions and of the judiciary as an institution.<sup>164</sup>

The Framers of the Constitution also intended that the judiciary make decisions in accord with an identifiable body of law. Alexander Hamilton articulated that presumption in Federalist No. 78, explaining: "To avoid an arbitrary discretion in the courts, it is indispensable that

---

1991 Term—Foreword: *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64–65 (1992) ("Courts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others.").

160. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 160 (tentative ed. 1957).

161. Professor Fallon stated that a basic assumption of Legal Process Theory is that the judicial role "is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers." Fallon, *supra* note 18, at 966.

162. Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 203 (1992); Brilmayer, *supra* note 139, at 817; Peters, *supra* note 125, at 366–68.

163. Schauer, *supra* note 143, at 595–98.

164. *Id.* at 600.

they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>165</sup>

#### *E. Impartial Decisionmaker*

An impartial decisionmaker is essential to the legitimacy of any system of adjudication. The significance of an unbiased judge has been recognized in such varied and historical sources as the Old Testament,<sup>166</sup> the Code of Justinian,<sup>167</sup> and Shakespeare’s Henry VIII,<sup>168</sup> and has been described as the most basic requirement of due process.<sup>169</sup> In the Legal Process theorists’ conception of adjudication, the judge must be “thoughtful and dispassionate”<sup>170</sup> in reviewing the facts and arguments presented, and must bring to the case an “uncommitted mind.”<sup>171</sup> A decision by a judge lacking such an open mind would not be worthy of the respect ordinarily due judicial pronouncements.

An impartial decisionmaker also serves the instrumental value of improving the accuracy of judicial decisionmaking. A judge who is free from bias or prejudice is more likely to reach the correct result than one who is not.

Like all the procedural elements of adjudication discussed thus far, independent decisionmakers also serve the important non-instrumental value of protecting the reputation of the adjudicatory process by “generating the feeling, so important to a popular government, that justice has

---

165. THE FEDERALIST No. 78, at 496 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974).

166. See, e.g., *Devarim Deuteronomy* 16:18–20 (“Judges and officers shall you appoint in all your cities ... and they shall judge the people with righteous judgment. You shall not pervert judgment, you shall not respect someone’s presence, and you shall not accept a bribe, for the bribe will blind the eyes of the wise and make just words crooked. Righteousness, righteousness shall you pursue....”).

167. See *supra* note 20.

168. WILLIAM SHAKESPEARE, KING HENRY THE EIGHTH act 2, sc. 4 (Queen Katherine of Aragon refuses to permit Cardinal Wolsey to sit as judge in her case because he was her “most malicious foe” and thus would not be a “friend to truth” in her case).

169. *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970) (“[A]n impartial decisionmaker is essential.”); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986) (“[U]se of an ‘independent adjudicator’ is a sine qua non of procedural due process.”); see also discussion *supra* Part II (describing historical background of impartial decisionmaker requirement).

170. Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 124 (1959).

171. Fuller, *supra* note 135, at 386.

been done.”<sup>172</sup> When the decisionmaker appears to have a personal interest in the outcome of the litigation, the legitimacy of the final decision is in question. “Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors.”<sup>173</sup>

An impartial judge is also a value enshrined in the Constitution. Article III requires that federal judges be given life tenure and prohibits diminution of judicial salaries.<sup>174</sup> Alexander Hamilton explained that such protections were necessary to ensure judicial independence, commenting that “a power over a man’s subsistence amounts to a power over his will.”<sup>175</sup> In addition, the Constitution’s allowance for federal jurisdiction in cases between parties from different states is yet another protection against actual or apparent judicial bias, because it arose from a concern that state court judges might be partial to their own citizens.<sup>176</sup> Finally, the Supreme Court has held that an unconflicted decisionmaker is an “essential” element of the “due process” guaranteed by the Fifth and Fourteenth Amendments.<sup>177</sup>

#### IV. JUDICIAL DISQUALIFICATION’S DEPARTURE FROM TRADITIONAL FORMS OF ADJUDICATION AND THE RESULTING LOSS OF LEGITIMACY

The five essential elements of adjudication described in Part III are not just normative ideals, they are descriptive of the processes followed in most American adjudication. As a general matter, the parties frame disputes that are decided by an impartial judge who issues a reasoned decision that references an established body of law. On rare occasions when courts stray from this traditional model of adjudication—as they tend to do when overseeing class actions or pre-trial practice, for exam-

---

172. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

173. Redish & Marshall, *supra* note 169, at 483.

174. U.S. CONST. art III, § 1.

175. THE FEDERALIST NO. 79, at 504 (Alexander Hamilton) (Robert Scigliano ed., 2000). More recently, the Supreme Court has also cited the importance of these protections in ensuring judicial independence. *See, e.g.*, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (stating that the judiciary was designed “to guarantee that the process of adjudication itself remained impartial”).

176. U.S. CONST. art III, § 2.

177. *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972) (finding a violation of the Due Process Clause where the decisionmaker had a financial interest in the proceeding); *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970) (“[A]n impartial decisionmaker is essential.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

ple—they are subject to criticism.<sup>178</sup>

This Part describes how the process by which a judge decides whether to recuse herself is one of the few areas in which judges consistently abandon these traditional forms of adjudication. Commentators have paid little attention to the procedural void in recusal law, perhaps because the question of judicial disqualification is such a sensitive one that it appears to be *sui generis*, and to be appropriately outside of the traditional model of adjudication. However, as discussed in Part III, the basic procedural elements that govern most adjudication serve a vital legitimating function. Disqualification laws have failed to protect the reputation of the judiciary because judges do not follow these traditional forms of adjudication when deciding whether they must recuse themselves.

*A. The Law of Judicial Disqualification Has Deviated from the Traditional Forms of Adjudication*

1. It Is Difficult for Litigants to Seek Judicial Disqualification

Section 455 of Title 28 does not outline any procedures by which parties may seek disqualification; rather, the judge is supposed to consider whether to recuse himself on his own volition. The very absence of statutorily prescribed procedures discourages lawyers from moving for disqualification and makes recusal motions all the more ad hoc and exceptional. In contrast, § 144 does contain clear procedural requirements for seeking judicial disqualification. However, because § 144 requires recusal only upon the more difficult showing of actual bias, rather than the “appearance” standard in § 455, and because it applies only to district courts, it is far less frequently cited as the basis for a disqualification motion.<sup>179</sup>

The absence of statutory procedures exacerbates the difficulties inherent in seeking a judge’s disqualification. A lawyer might reasonably hesitate to make such a motion, fearing that it will anger the judge before whom he will have to try the case if he loses. Even if the issue is clear-cut and the motion is sure to succeed—if not before the challenged

---

178. See, e.g., Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (noting that litigants may be better satisfied when disputes are framed by parties and judges’ decisions are based on an identifiable body of law); Molot, *supra* note 16, at 59 (“[W]hen judges stray from their traditional adjudicative role, they trigger questions regarding the effectiveness and legitimacy of their actions.”); Resnik, *supra* note 137, at 424–31.

179. FEDERAL JUDICIAL CENTER, *supra* note 82, at 48–49.

judge, then at least on appeal—a lawyer might still be concerned that the motion would annoy a judge before whom he expects to appear regularly.<sup>180</sup> Such fears are not unfounded. For example, a district court judge stated that he found the motion for his disqualification to be “offensive” and he asserted that it “impugn[ed his] integrity.”<sup>181</sup>

A more basic problem is that the parties often lack the factual information necessary to make such a motion.<sup>182</sup> A party or his lawyer may hear rumors about a relationship between a judge and the opposing party, but unless that information can be corroborated, the party and his lawyer will hesitate to ask the judge to recuse himself on the basis of speculation or gossip.<sup>183</sup> Indeed, affidavits based on hearsay are considered legally insufficient to justify recusal.<sup>184</sup> Nor are there any procedures establishing how a party can investigate such rumors to determine whether there is any truth to them. Judges are generally not required to disclose information about relationships, bias, or conflict of interest that they do not

---

180. See ALAN J. CHASET, *DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE* 58 (1981) (noting that “[j]udges, like other persons, are likely to resent charges of bias”); FLAMM, *supra* note 9, § 1.10.5, at 25 (commenting that “[j]ust as judges generally do not like to admit having committed legal error, they are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality”); Bassett, *supra* note 8, at 1244 (noting that “many judges approach recusal decisions with a presumption of participation and with a touch of defensiveness”); Leubsdorf, *supra* note 19, at 244 (observing that judges often take a defensive tone in their opinions denying disqualification motions); Litteneker, *supra* note 5, at 260 (“Counsel who would face a particular judge many times in his career would be hesitant to charge the judge with bias or to refuse a judge’s request that he waive his right to disqualify.”).

For similar reasons, lawyers rarely file complaints against judges under the Judicial Conduct and Disability Act. Although attorneys are in the best position to observe and evaluate judicial behavior, they were responsible for filing only six percent of the complaints between 1980 and 1991. Jeffrey N. Barf & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 45 (1993). In a 1993 report, the National Commission on Judicial Discipline and Removal stated that “testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint. This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers.” Report of the National Commission on Judicial Discipline and Removal 100 (1993). Lawyers report a reluctance to make even informal complaints against judges. Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 256–59 (1993).

181. *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996).

182. See DAVID G. KNIBB, *FEDERAL COURT OF APPEALS MANUAL: A MANUAL ON PRACTICE IN THE UNITED STATES COURT OF APPEALS* § 5.2, at 27–28 (2d ed. 1990) (“[T]he lawyer will probably have insufficient information to feel comfortable in asserting without reservation that the judge should have been disqualified.”).

183. Although federal judges are required to disclose gifts and honoraria received, those forms are filed only once a year—which may come far too late for a party to determine whether the judge has accepted gifts from a party or litigant in a pending case. 5 U.S.C. app. 4 §§ 101–11 (2003). In any case, a judge may have a close relationship with a lawyer or litigant that might prejudice the judge in that individual’s favor even though no gifts are exchanged.

184. See *supra* text accompanying note 52.

perceive as disqualifying.<sup>185</sup> For all these good reasons, parties rarely seek disqualification, waiting instead for the court to do so on its own motion.

## 2. Adversarial Presentation Is Absent Under Current Disqualification Procedures

Even when one party seeks the judge's recusal, the opposing party in litigation may remain silent on the recusal question. In many cases, the other party may not have any grounds to oppose the motion because that party has no idea whether the judge has a bias or financial interest that would justify disqualification. As one commentator noted, the challenged judge is the one "most familiar with his own conduct,"<sup>186</sup> and thus the most appropriate party to respond to a disqualification motion. Yet the judge does not respond—at least not in a traditional adversarial manner—because she is responsible for deciding the legal question of whether her conduct merits disqualification.

## 3. Judges Often Do Not Give a Reasoned Explanation for Recusal

Judges who recuse themselves rarely issue a decision explaining why. When Justice Frankfurter recused himself *sua sponte* from *Public Utilities Commission v. Pollak*,<sup>187</sup> he wrote a separate opinion discussing his reasons for doing so and declared that judges should publicly state the grounds for recusal decisions.<sup>188</sup> However, this practice has generally not been followed. One commentator has even referred to disqualification as "typically a quiet, almost invisible, legal issue."<sup>189</sup>

The process is particularly mysterious when a judge recuses herself *sua sponte*. But even when a judge is asked to step aside by one of the parties, it is often not clear whether the judge's decision to do so is based on bias-in-fact or simply concern that remaining on the case would create the appearance of impartiality. The lack of transparency exists even at the highest levels of the federal court system. For example, many of the sitting Justices have recused themselves from hundreds of cases, almost

---

185. However, the Eleventh Circuit has stated that judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995).

186. Litteneker, *supra* note 5, at 266.

187. 343 U.S. 451 (1952).

188. *Id.* at 466–67.

189. Bassett, *supra* note 8, at 1214.

always without explanation.<sup>190</sup> Presumably they own stock or have some other financial position that might be affected by the litigation, but because they do not issue explanations, their reasons for withdrawal are unknown.<sup>191</sup>

#### 4. The Precedent on Disqualification Is One-Sided

The federal statutory standards for recusal are vague. Section 455(a) of Title 28 requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Courts have struggled with the meaning of "impartial" and have differed over whose viewpoint to adopt when deciding whether it would be "reasonable" to question a judge's impartiality. For instance, some courts have suggested that the "reasonableness" standard should be viewed from the perspective of an objective judge because a non-judicial observer is "less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be."<sup>192</sup> In contrast, others have concluded that the standard should be based on a "reasonable person" with knowledge of all of the relevant facts.<sup>193</sup> Moreover, even when applying the same standards, courts will differ over when the language of the statute requires recusal.

Normally, ambiguous statutory text is clarified by a body of judicial precedent developed by judges applying the language to the specific cases before them. In the area of recusals, however, the judicial precedent is noticeably lopsided. Judges are more likely to publish opinions when denying a motion to disqualify than when granting one, meaning that the majority of published judicial decisions elaborate the reasons why a judge should continue to sit, and relatively few address circumstances justifying recusal.<sup>194</sup> Justice Scalia's recusal decisions this term alone are illustrative of the problem. When he recused himself in *Elk Grove Unified School District v. Newdow* (concerning a challenge to the recitation of the pledge of allegiance in the public schools),<sup>195</sup> he did so

---

190. Mauro, *supra* note 93. There is a wide disparity in the rates of recusal. Justice Breyer recuses himself most often, averaging forty-two times a year, while Chief Justice Rehnquist and Justice Ginsberg recuse themselves seven times a year, the lowest average.

191. See Bloom, *supra* note 21, at 690 n.172 (noting that Justices rarely state their reasons for disqualifying themselves).

192. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).

193. *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998).

194. Other commentators have noted this problem. See Leubsdorf, *supra* note 19, at 244-45 ("[A] judge who withdraws usually writes no opinion. Published opinions, consequently, form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

195. 540 U.S. 945 (2003). Justice Scalia did not issue a public statement or ruling announcing

without explanation, while he published a twenty-one page memorandum justifying his decision to sit on the *Cheney* case.

##### 5. The Challenged Judge Is Not an Impartial Decisionmaker

The Catch-22 of the law of judicial disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case. Although precedent does exist for referral of disqualification motions to a neutral judge,<sup>196</sup> it is rare.<sup>197</sup> As one commentator has noted, the “policy against automatic transfer [of a motion to disqualify] is [] firmly embedded in court practice.”<sup>198</sup>

Exacerbating this problem is the deferential standard of appellate review of a trial court’s denial of a motion to disqualify. Circuit courts review such decisions only for abuse of discretion. One court opined that its review is deferential because a “judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion”—a view that simply ignores the possibility that a judge’s refusal to recuse might be affected, consciously or unconsciously, by the very bias that is claimed as the basis for recusal. Litigants seeking recusal bear an even heavier burden if they seek to bring

---

that he was recusing himself. Instead, the Court’s order granting the petition for a writ of certiorari was accompanied by the statement that “Justice Scalia took no part in the consideration or decision of these motions and this petition.” Interestingly, Justice Scalia made his first public statement about his recusal in *Newdow* in his memorandum in *In re Cheney*, when he stated that “recusal 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. I have recused for such a reason this very Term.” *In re Cheney*, 541 U.S. 913, 916 (2004).

196. See, e.g., *In re Lieb*, 112 B.R. 830, 837 (Bankr. W.D. Tex. 1990); *Bradley v. Milliken*, 426 F. Supp. 929 (E.D. Mich. 1977); *Rademacher v. City of Phoenix*, 442 F. Supp. 27 (D. Ariz. 1977); *United States v. Zagari*, 419 F. Supp. 494, 497 (N.D. Cal. 1976).

197. See, e.g., *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (holding that a motion to disqualify is usually heard by the challenged judge); *In re Demjanjuk*, 584 F. Supp. 1321, 1322 n.1 (N.D. Ohio 1984) (stating that most federal courts resolve recusal motions themselves); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (recusal motions normally first ruled upon by the judge who is the subject of the motion); see also FLAMM, *supra* note 9, § 17.5.1 at 513–17 (explaining that a judge challenged by a judicial disqualification motion usually decides the motion him or herself). However, some states have made such a transfer mandatory, either through statute or court rule. See *id.* § 17.5.3, at 521 (stating that in some jurisdictions “the challenged judge must either recuse himself or transfer the motion to another judge”); Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1465 (1981) (stating that in one case “judges on a court collectively disqualif[ied] one of their benchmates”).

198. Litteneker, *supra* note 5, at 266. The United States Court of Appeals for the District of Columbia Circuit has discouraged transfer. *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976) (en banc) (per curiam).

199. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988).

the issue to the court of appeals before the merits of the case are decided,<sup>200</sup> even though immediate appeal of the disqualification decision is the only meaningful avenue for obtaining an impartial judge's review of a refusal to recuse.<sup>201</sup>

But at least there *is* review of a district court's refusal to recuse. Litigants seeking to remove an appellate judge have a slim chance of getting an impartial decisionmaker to review the challenged judge's decision to remain on the case. At both the circuit and Supreme Court levels, the challenged judge decides for himself whether to recuse. Theoretically, a circuit court judge's refusal to recuse could be reviewed by the en banc court or by the Supreme Court, but such review is so rare as to have little practical effect. The Supreme Court has adopted the practice of letting an individual Justice decide a motion asking him or her to recuse, and there is no system in place for the full Court to review that decision if the Justice refuses to step down.<sup>202</sup>

#### *B. The Cheney Case: The Consequences of Flawed Recusal Procedures*

The process leading up to Justice Scalia's decision not to recuse himself from the *Cheney* case illustrates how far the recusal process has deviated from the traditional model of adjudication described in Part III.

##### 1. Background

The fact that Justice Scalia and Vice President Cheney went on vacation together after the Supreme Court had granted certiorari in the *Cheney* case was not disclosed to the public or the parties by either Scalia or Cheney. It only came to national attention when reported in the *L.A. Times* on January 17, 2004.<sup>203</sup> The story was quickly picked up by other papers. Then, in early February, the *L.A. Times* reported in a front-page

---

200. As the Second Circuit explained:

[W]e must bear in mind not only the standards governing recusal, but we must also consider the extraordinary showing required to obtain the issuance of a writ of mandamus . . . . [P]etitioners must "clearly and indisputably" demonstrate that the district court abused its discretion. Absent such a showing, mandamus will not lie.

*In re Aguinda*, 241 F.3d 194, 200 (2d Cir. 2001) (citing *Drexel Burnham Lambert*, 861 F.2d at 1312–13).

201. FLAMM, *supra* note 9, § 31.2, at 973 ("[F]or a court's decision on disqualification to be meaningfully reviewed, it usually must be appealed immediately.").

202. *See generally* Bassett, *supra* note 8.

203. David G. Savage, *Trip With Cheney Puts Ethics Spotlight on Scalia*, *L.A. TIMES*, Jan. 17, 2004, at A1.

story that Justice Scalia had traveled on Air Force Two as “an official guest” of Vice President Cheney.<sup>204</sup> On the heels of this story came a wave of editorials proclaiming that Justice Scalia should recuse himself because his vacation with Cheney created at the very least the appearance that he could not be impartial when deciding the case.<sup>205</sup> Accompanying the news stories were a large number of political cartoons, and jokes about the trip were included in the monologues of late-night comedians.<sup>206</sup>

During this time, Justice Scalia did not make any public statement. He did issue a short written response to inquiries by an *L.A. Times* reporter confirming that he and Vice President Cheney had gone on a duck-hunting trip in Louisiana together after certiorari was granted in the *Cheney* case. He concluded with a two-sentence statement about why he believed that this social contact did not obligate him to recuse himself from the case:

I do not think my impartiality could *reasonably* be questioned. Social contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity.<sup>207</sup>

---

204. David G. Savage & Richard A. Serrano, *Scalia was Cheney Hunt Trip Guest*, *L.A. TIMES*, Feb. 5, 2004, at A1.

205. See, e.g., Editorial, *Duck-Blinded Ethics; Scalia Puts Supreme Court Integrity at Risk*, SAN DIEGO UNION-TRIB., Feb. 6, 2004, at B8; Editorial, *One Case Scalia Should Skip*, *L.A. TIMES*, Jan. 22, 2004, at B16; Editorial, *Scalia Should Recuse Himself*, SEATTLE POST-INTELLIGENCER, Feb. 9, 2004, at B5; Editorial, *Scalia, Use Good Judgment; Bow Out of Cheney Case*, ATL. JOURNAL-CONSTITUTION, Jan. 29, 2004, at 14A; Editorial, *Scalia's Apparent Conflict*, B. GLOBE, Feb. 7, 2004, at A14; Editorial, *Scalia's Conflict of Interest*, DENV. POST, Jan. 26, 2004, at B7; Editorial, *Scalia's Not-So-Excellent Journey; Hunting Trip with Cheney Was Highly Inappropriate*, BUFFALO NEWS, Feb. 4, 2004, at C4; Editorial, *Sit This One Out*, CHI. SUN-TIMES, Feb. 8, 2004, at 35; Editorial, *Too Close for Comfort*, S.F. CHRON., Jan. 26, 2004, at B6; Editorial, *Too Close for Comfort*, COLUMBUS DISPATCH, Jan. 23, 2004, at 10A.

206. See Mot. to Recuse, *Cheney v. United States Dist. Ct. for D.C.* 124 S. Ct. 2576 (2004) (No. 03-475).

207. Letter from Justice Antonin Scalia to Reporter David Savage (Jan. 16, 2004) (on file with author) (emphasis in original). Prior to his March 18, 2004, memorandum, Justice Scalia commented publicly on the matter on just one other occasion. When asked about the controversy while speaking at Amherst College on February 10, 2004, Justice Scalia responded that he did not need to recuse himself, because the lawsuit involved Cheney in his official and not personal capacity, and he repeated that it is “acceptable practice” for Justices to socialize with members of the executive branch. He finished his comment by declaring, “That’s all I’m going to say for now. Quack, quack.” Associated Press, *Scalia Says He’ll Stay on Cheney Court Case*, *L.A. TIMES*, Feb. 12, 2004, at A30.

Scalia provided no details about travel arrangements, allocation of expenses, lodgings, other attendees, or when the joint trip had been planned.

As the press attention increased, members of Congress began to weigh in on the matter. On January 22, Senator Patrick Leahy, ranking Democrat on the Judiciary Committee, and Senator Joe Lieberman, ranking Democrat on the Governmental Affairs Committee, jointly wrote to Chief Justice Rehnquist questioning whether Justice Scalia should sit on the case: "When a sitting judge, poised to hear a case involving a particular litigant, goes on a vacation with that litigant, reasonable people will question whether that judge can be a fair and impartial adjudicator of that man's case or his opponent's claims."<sup>208</sup> The two senators asked the Chief Justice to clarify the rules Justices follow in deciding whether to remove themselves from cases and inquired as to "whether mechanisms exist . . . for review of a justice's unilateral decision to decline to recuse himself."<sup>209</sup>

In his reply, Rehnquist stated that "[t]here is no formal procedure for court review of the decision of a justice in an individual case. That is so because it has long been settled that each justice must decide such a question for himself." He then chastised the senators for expressing their views that Scalia should recuse himself from the *Cheney* case: "Anyone at all is free to criticize the action of a justice—as to recusal or as to the merits—after the case has been decided. But I think any suggestion by you or Senator Lieberman as to why a justice should recuse himself in a pending case is ill-considered."<sup>210</sup>

The parties remained silent on the matter for several weeks. Then, on February 13, Judicial Watch, the conservative public interest law firm that is co-plaintiff on the *Cheney* case with the Sierra Club, publicly stated that it "does not believe the presently known facts about the hunting trip satisfy the legal standards requiring recusal."<sup>211</sup>

---

208. This letter was reported in news stories. *See, e.g.*, David G. Savage, *High Court Won't Review Scalia's Recusal Decision*, L.A. TIMES, Jan. 27, 2004, at A12.

209. *Id.* Democratic Representatives Henry A. Waxman (D-Cal.) and John Conyers Jr. (D-Mich.) also wrote to Chief Justice Rehnquist urging him to establish a procedure for "formal review" of Justices' ethical conflicts. The two argued that Justice Scalia had failed to recuse himself despite precedent in lower courts requiring recusal in such situations. They wrote: "It is no exaggeration to say that the prestige and power of the Vice President are directly at stake in the case." David G. Savage, *2 Democrats Criticize Scalia's Refusal to Quit Cheney Case*, L.A. TIMES, Jan. 31, 2004, at A26.

210. Savage, *supra* note 208.

211. *In re Cheney*, 541 U.S. 913, 914 (2004).

The Sierra Club disagreed, and on February 23 it took the unusual step of filing a motion asking Justice Scalia to recuse himself from the case. The motion was submitted to the full Court, and the Sierra Club intended that all nine Justices address it just as they would any other question of law. David Bookbinder, the Sierra Club's Washington legal director, stated: "Obviously, this is an issue for each of the nine justices to consider, since the integrity of the entire court is being called into question."<sup>212</sup> Nonetheless, the full Court did not address the motion. The docket entry for the motion stated: "In accordance with its historic practice, the Court refers the motion to recuse in this case to Justice Scalia."<sup>213</sup>

As is typical when one party asks a judge to recuse himself, the opposition did not respond to the motion. Indeed, the government never commented on the issue either in legal filings or in the press.

More than three weeks passed before Justice Scalia issued a twenty-one page memorandum decision denying the motion. Before he did so, it was not clear that Justice Scalia would respond at all. The Justices normally do not issue statements about decisions to recuse. For example, when the respondent in *Newdow* asked Justice Scalia to recuse himself earlier the same term because he had commented on the merits of the question presented, Justice Scalia had not issued any formal response. The public and the parties learned that he had recused himself from the case only because the Court's order granting a writ of certiorari in the case was accompanied by the statement that "Justice Scalia took no part in the consideration or decision of . . . this petition."<sup>214</sup>

Thus, the length and detail of Justice Scalia's response was surprising. To ask a Supreme Court Justice to recuse himself is rare; for the Justice to respond at length is almost unprecedented. During the Court's long history, the only comparable explanation for a denial of a motion to disqualify came from Justice Rehnquist in *Laird v. Tatum*, who began his memorandum by stating that he did not "wish to suggest" that providing such an explanation was "desirable or even appropriate" in most cases.<sup>215</sup>

---

212. David G. Savage, *Sierra Club Asks Scalia to Step Aside in Cheney Case*, L.A. TIMES, Feb. 24, 2004, at A17.

213. Docket statement (02-5354, 02-5355, 02-5356), 541 U.S. 913 (2004).

214. 540 U.S. 945, 945 (2003).

215. 409 U.S. 824 (1972). In his memorandum explaining his decision not to recuse, Rehnquist stated that "neither the Court nor any Justice individually appears ever to have" provided a similar justification for remaining on a case. He added, "I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here." *Id.* Rehnquist provided a much shorter explanation of his decision to sit on the Microsoft antitrust litigation despite the fact that Microsoft had hired the firm at which his son was a lawyer. See Mi-

Justice Scalia's memorandum was thus a significant departure from past practice.

In the memorandum, Justice Scalia revealed facts about circumstances and logistics of the trip that previously had been unknown to the general public and to the Sierra Club, and then he made a persuasive case for why he should not be required to recuse himself. Nonetheless, his response did not settle the matter. In a second wave of editorials, the same newspapers that had called for Justice Scalia to recuse himself criticized his rationale for remaining on the case, and some also condemned a recusal process that left the final decision in the hands of the very individual whose judgment was under question.<sup>216</sup>

## 2. The Handling of the Recusal Question in the *Cheney* Case Undermined the Reputation of the Judiciary

The *Cheney* case well illustrates the problems created by the lack of formal procedures governing judicial disqualification. The dispute was difficult for the parties to frame. At first, the Sierra Club could not have raised the recusal issue because it was unaware of the trip. Justice Scalia was not required by law to inform the parties about his social relations with a litigant in a case before him. Thus, without the benefit of sharp-eyed journalists, the Sierra Club would never have learned that a Justice had recently vacationed with its opponent.

Even after the Sierra Club formally filed its motion, there was no adversarial presentation of the dispute. The government did not weigh in on the question whether Justice Scalia should sit on the case. The only "adversary" was Justice Scalia. Although not required to do so, Justice Scalia eventually did respond at length, revealing the facts and circumstances of the trip that had hitherto been known only to him and the others on the trip. He also attempted to frame the dispute in terms of the law governing judicial recusals, although he admitted that precedent was sparse.<sup>217</sup> But although Scalia provided an opposing view, he did not do

---

crosoft Corp. v. United States, 530 U.S. 1301, 1301 (2000).

216. See, e.g., Paul Campos, Editorial, *Scalia Ducking the Issue*, ROCKY MTN. NEWS, Mar. 30, 2004, at 31A (criticizing Justice Scalia for turning the "reasonable observer" test "into what might be called the 'I'm a reasonable observer, and I didn't observe anything that makes me question my impartiality' test"); Editorial, *New Rules Needed on When Justices Should Step Aside*, DET. NEWS, Mar. 29, 2004, at 10A (urging the Court to adopt a new rule requiring the whole Court to determine whether a justice should step aside because the current practice is "eroding public confidence in the court").

A smaller number of editorialists defended Scalia's decision to remain on the case. See, e.g., Ronald D. Rotunda, Commentary, *Duck Hunting Benchmarks*, WASH. TIMES, Mar. 28, 2004, at B4.

217. *Cheney v. United States* Dist. Ct. for D.C., 541 U.S. 913, 924 (2004).

so as part of the adversarial process but rather in his role as final decisionmaker.

As a result of this procedural vacuum, the question of whether Justice Scalia should recuse himself from the *Cheney* case entered the public discourse in a manner that undermined the public's faith in the judiciary. Because news of the Scalia-Cheney trip was first publicly "broken" by a journalist, rather than revealed by the Justice himself, it created a perception that the Justice had something to hide—even though, as Justice Scalia later made clear, he did not perceive the trip as inappropriate in any way. Moreover, details about the trip continued to leak slowly, rather than being fully disclosed at once, which generated a series of news stories that kept the issue in the public eye and heightened the perception that the trip had been improper. For example, shortly before the story was reported, Justice Scalia confirmed by letter with an *L.A. Times* reporter that he had gone on the trip with Vice President Cheney. But Scalia did not disclose that he had traveled with the Vice President on Air Force Two, which became the subject of a second front-page story once the press learned of it from other sources.

The press is certainly capable of generating controversy where none exists, and a Justice cannot be expected to anticipate and deflate every negative news story about his or her activities. Nevertheless, that Justice Scalia and members of his family traveled with Vice President Cheney on a government plane was newsworthy; it strongly suggested that they saved themselves the price of the trip, which would not only be grounds for recusal but would also potentially violate the Ethics Reform Act of 1989.<sup>218</sup> Therefore, the revelation about Justice Scalia's travel arrangements could reasonably be expected to generate a follow-up story. Yet it was a detail that could just as easily have been revealed up front by Justice Scalia at the same time that he confirmed taking the trip.

Moreover, as Justice Scalia eventually disclosed in his memorandum, neither he nor his relatives "saved a cent" by traveling with the Vice President because they had all purchased round-trip airline tickets for the return trip home.<sup>219</sup> Because this is the kind of information that only Justice Scalia could know, and because the information is directly relevant to the question whether Justice Scalia could properly sit on the case, it should have been revealed as soon as the trip itself became public. Immediate disclosure of the information might have prevented pub-

---

218. 5 U.S.C. § 7353 (1996) (prohibiting gifts to, among others, federal judges from any person "seeking official action from, doing business with, . . . or whose interest may be substantially affected by the performance or nonperformance of the individual's official duties").

219. *Cheney*, 541 U.S. at 921.

lication of some of the news stories and editorials that tarnished Justice Scalia's reputation, and, by extension, the Court's.

Because of the absence of formal procedures for filing recusal motions, the public debate about whether Justice Scalia should recuse himself dragged on for two months. The Sierra Club did not file a motion seeking his disqualification until five weeks after the story first broke. Section 455 contains no procedures for filing such a motion, and thus it provides no time limit that would have forced the Sierra Club to act earlier. The Sierra Club had good reason to wait. The more editorials, cartoons, and jokes on late-night talk shows, the stronger its argument that Justice Scalia's impartiality might "reasonably be questioned." Ironically, § 455's lack of procedural requirements, coupled with the objective standard for recusal that takes account of public appearances, actually encourages parties to wait to seek recusal until the press has repeatedly reported on, and criticized, a Justice for sitting on a case—leading to the negative public perception of the judiciary that the law was designed to prevent.

Finally, because the process was not an adversarial one, no one gave the press or the public the other side of the story or defended the propriety of taking such a trip. Instead, for two months the public heard only one version of the story: Justice Scalia took a vacation with Vice President Cheney, at government expense, shortly after the Court agreed to hear Cheney's case, which many thought created at least the appearance that Justice Scalia could not be impartial.

Eventually, Justice Scalia spoke up in his own defense. In his memorandum decision, Scalia asserted heretofore unknown facts about the trip to rebut the arguments of his sharpest critics. Most relevant were the following: (1) Scalia's invitation to Cheney to join him on a duck-hunting trip, and Cheney's acceptance, came before the petition for certiorari was filed in the *Cheney* case,<sup>220</sup> (2) Scalia and his family members did not save any money as a result of traveling with the Vice President because they all bought round-trip plane tickets;<sup>221</sup> (3) the trip was attended by thirteen hunters as well as various staff and, of course, security for the Vice President, and thus was not, in Scalia's view, an "intimate setting";<sup>222</sup> (4) Scalia "never hunted in the same blind with the Vice

---

220. *Id.* at 914.

221. *Id.* at 912–13.

222. *Id.* at 915.

President" and was never alone with him at any time during the trip;<sup>223</sup> and (5) Scalia and Cheney did not discuss the case.<sup>224</sup>

Justice Scalia then complained that many of the newspaper editorials calling for his recusal had their facts wrong.<sup>225</sup> He pointed out that some of the editorialists exaggerated the length of the trip, misidentified who paid for the travel and who was the guest of whom, and, most importantly, suggested that he had been alone with the Vice President during the trip and had an opportunity to discuss the case with him.<sup>226</sup>

Although some of these inaccuracies are indeed significant (one wonders just who was editing these editors), Justice Scalia could have prevented them from ever being put into print if he had simply disclosed the relevant facts himself. Significantly, Justice Scalia did not deny that certain details about the trip were relevant to the question whether he should have recused himself, and thus were proper topics to be shared with the public. To the contrary, in defending his decision not to recuse himself, he repeatedly asserted that he was never alone with the Vice President and never had the opportunity to discuss the case with him.<sup>227</sup> Yet he, along with the Vice President, chose to remain silent about these significant details of the trip even as they were being inaccurately reported in the media.

Justice Scalia began the memorandum by stating that "[t]he decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported."<sup>228</sup> But that is arguable. On the one hand, the media's ignorance of the facts should not force recusal where it is unjustified. But on the other hand, the facts as "reported" are the ones that the public first read. They shape the public's impressions of the propriety of a Justice's actions and ultimate decision to sit on a case. If appearances matter—and the recusal laws say they do—then the public's perception of the facts, even an inaccurate perception, can damage the judiciary's reputation in the very ways that the recusal laws intended to prevent. Accordingly, to protect the judiciary's reputation from harm, judges should take some responsibility to ensure that the facts are accurately presented to the public from the beginning.

---

223. *Id.*

224. *Id.*

225. *Id.* at 923.

226. *Id.*

227. *Id.* at 913, 923 (stating that his impartiality could not "reasonably be questioned" where he "never hunted with [Cheney] in the same blind or had other opportunity for private conversation").

228. *Id.* at 914.

In his memorandum decision, Justice Scalia noted that the Sierra Club was "unable to summon forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here."<sup>229</sup> The absence of precedents supporting recusal can be partly explained by the fact that judges and Justices usually do not give reasons for their recusals. Supreme Court Justices have recused themselves in 500 cases during the last five years, but only very rarely have they given the public any inkling as to why.<sup>230</sup> Perhaps some of those recusals were because the Justice had a personal relationship with a litigant or lawyer, and thus would have served as precedent for Scalia's recusal from the *Cheney* case. There is simply no way to know. And the dearth of motions to recuse may also be explained by the many procedural and psychological hurdles that discourage litigants from seeking recusal in the first place.<sup>231</sup>

The memorandum did not put the matter to rest, in part because Justice Scalia was the sole judge of his own partiality. Several editorials criticized the Supreme Court's system of allowing the challenged justice to decide whether to recuse him or herself and called on the Court to change its rules so that all nine Justices will have to decide such questions in the future.<sup>232</sup>

Exacerbating the problem was the defensive and sarcastic tone of the memorandum,<sup>233</sup> which read more like an opposing brief than a legal decision. Justice Scalia appeared to be pained by the press coverage of the trip, noting that he had received "a good deal of embarrassing criticism and adverse publicity" about the matter.<sup>234</sup> He commented somewhat bitterly that, as the Sierra Club has "cruelly but accurately" pointed out, he had become "fodder for late-night comedians."<sup>235</sup> At different points throughout the memorandum he acknowledged being aware of which newspapers had criticized him, and, in what appeared to be retribution, he very specifically stated which papers reported which facts incor-

---

229. *Id.* at 924.

230. See, e.g., Mauro, *supra* note 93.

231. See discussion *supra* Part II.B.

232. See, e.g., Campos, *supra* note 216; Editorial, *New Rules*, *supra* note 216 (urging the Court to adopt a new rule requiring the whole Court to determine whether a Justice should step aside because the current practice is "eroding public confidence in the court").

233. See, e.g., Opinion, *Scalia's Blind Justice*, INT'L HERALD TRIB., Mar. 23, 2004, at 6 (describing the memorandum as "angry," "defensive," and "sarcastic").

234. *Cheney*, 541 U.S., at 929.

235. *Id.* Justice Scalia's comment about the Sierra Club's "cruelty" may have been a joke, if a bit of a wry one. My point here is that, whatever Justice Scalia's actual mental state, the memorandum created the impression that he was angry and defensive.

rectly.<sup>236</sup> In short, the memorandum is the product of a man who unquestionably has a personal stake in the matter and appears angry and defensive.<sup>237</sup>

Justice Scalia is known for his acerbic opinion writing, and thus this decision might not be so far from the tone he would take in a dissent. But he was oblivious to the impression that such vituperative rhetoric creates when employed in defense of his ability to be detached, neutral, and impartial.

#### V. INCORPORATING TRADITIONAL FORMS OF ADJUDICATION INTO THE LAW OF JUDICIAL DISQUALIFICATION

A primary goal of judicial disqualification is to promote the appearance of justice and the reputation of the judiciary. Thus, it is ironic that the disqualification process has strayed so far from the traditional forms of adjudication that Legal Process theorists, among others, have concluded are essential to maintaining the public's faith in the decisions of unelected judges.

In this Part, I suggest ways in which the core characteristics of adjudication discussed in Part III can be incorporated into the law of recusal.<sup>238</sup> As I do so, I try to balance the need for procedures that guarantee both the appearance and reality that each presiding judge is an impartial decisionmaker against concerns for maintaining a speedy and efficient justice system—qualities that are also necessary to maintain the judiciary's reputation. In addition, I acknowledge the potential for judge shopping, and so reject certain procedures that are likely to be abused. Finally, putting theory into practice, I describe how the suggested reforms would have changed the way in which the recusal question was disclosed and resolved in the *Cheney* case.

---

236. *Id.* at 923–24.

237. For example, Justice Scalia stated that he thought counsel for Sierra Club was being hypocritical. Scalia explained that two days before the brief in opposition to the petition in the case was filed, counsel for the Sierra Club wrote to Justice Scalia inviting him to come to speak to one of his Stanford Law School classes the following year. Scalia then pointed out that “[j]udges teaching classes at law schools normally have their transportation and expenses paid.” *Id.* at 928. In describing this incident, Scalia attempted to equate the invitation to lecture at Stanford—a business trip to be paid for by Stanford in return for the benefits Stanford students would gain from his visit—with a vacation with a litigant that was paid for by that litigant.

238. I do not specify whether these reforms should come from Congress or the courts themselves because I do not think the source of the obligation is significant.

*A. Proposals for Reform*

## 1. Enable Litigants to Frame the Recusal Question

The recusal laws should be amended to provide a straightforward means by which litigants can seek judicial disqualification. Section 455 is intended to be self-enforcing, meaning that the recusal issue is supposed to be raised first by the judge and not the parties. Although it is now well established that litigants can file motions to disqualify under § 455, the absence of procedural guidelines for making such a motion compounds the awkwardness any litigant encounters in taking that step. Accordingly, § 455 should be amended to provide that the parties have a right to seek a judge's recusal by motion filed within an appropriate amount of time after obtaining information that suggests that the judge could not be impartial or that his impartiality might "reasonably be questioned."<sup>239</sup> By providing an officially sanctioned method to seek judicial disqualification, the law would normalize disqualification and make it psychologically easier for lawyers and parties to contemplate asking for it.

In addition, § 455 should be amended to include a mandatory disclosure provision that would require judges to inform the parties of any financial interests in the case, personal relationships with litigants or their lawyers, or knowledge of the facts of the specific case before them that the judge might have. The disclosure should be required even when a judge does not think that the information establishes grounds for her recusal.<sup>240</sup>

The Ethics in Government Act already requires federal judges, along with members of Congress and senior executive branch officials, to file financial disclosure reports,<sup>241</sup> but those disclosures come too infrequently to be of much use to litigants in pending cases. Disclosures are made only on an annual basis, meaning that a trip taken with a litigant

---

239. Of course, § 455 should still provide that the judge is free to recuse herself on her own motion.

240. Although not required by federal statute, such disclosure is already encouraged by the commentary to the ABA Model Code of Judicial Conduct, which states that a "judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." MODEL CODE OF JUD. CONDUCT, Canon 2.12, cmt. 2J (Draft May 2004). The Model Code is not binding, however, and judges frequently have not disclosed facts that they did not think justified their recusal. Indeed, Justice Scalia did not feel obligated to disclose his duck hunting trip with Vice President Cheney, and he commented on the trip only after it was reported in newspapers.

241. Ethics in Government Act of 1978, 5 U.S.C. app. 4, §§ 101–111 (1996).

might not be revealed for months or even a year. Moreover, anyone wishing to obtain a copy of these reports must send a written request to the Administrative Office of the Courts, which takes an average of ninety days to respond to requests. In addition, the judge who is the target of the request will be informed of the requester's identity. As a result, only seventy-six members of the public requested these disclosure reports in 2002.<sup>242</sup> Lawyers and litigants explain that they hesitate to request such information knowing that their identities will be revealed to the judge whom they are investigating.<sup>243</sup> The proposal discussed here takes this disclosure requirement significantly further by requiring the judge to provide directly to litigants in pending cases any information that might be considered to have an impact on the judge's partiality.

Understandably, judges might object to mandatory disclosure of the intimate details of their social lives. Loss of privacy is indeed a significant price to pay, but it is one that most political figures willingly accept in return for their positions of authority and public trust. Judges have no more right to total privacy in their personal lives than any other public servant.<sup>244</sup> And it is important to remember that even under a mandatory disclosure regime, judges will not be obligated to report all details of their private lives; they will only be required to disclose to the parties in cases before them significant extrajudicial contacts with the lawyers or parties involved in pending litigation.

## 2. Provide for an Impartial Decisionmaker

The judge who is the subject of a disqualification motion should not be placed in the untenable position of deciding that motion. As a Federal Judicial Center report observed, a "judge wishing to remove any doubt about his or her objectivity may be tempted to have another judge decide the recusal question."<sup>245</sup> Nothing in the law would prevent that. The First Circuit recently commented that "a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a dif-

---

242. Joe Stephens, *U.S. Judges Getting Disclosure Data Deleted*, WASH. POST, Aug. 5, 2004, at A4.

243. *Id.* Moreover, judges may request redaction of some or all of the material from their financial disclosure forms on the ground that disclosure would endanger them or their families. Members of Congress and the executive branch do not have this option. It appears that a significant number of judges have made use of this redaction procedure, and most of their requests are granted. *Id.* Judges made 661 requests to redact information from financial disclosure reports between 1999 and 2002; nearly ninety percent of those requests were granted. *Id.*

244. See Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1996) (weighing privacy interest against public interest in disclosure).

245. FEDERAL JUDICIAL CENTER, *supra* note 82, at 44.

ferent judge.”<sup>246</sup> Yet the court went on to observe that “no reported case or accepted principle of law compels [the judge] to do so . . .”<sup>247</sup> Currently, “the norm” is for “the challenged judge to rule on a recusal motion.”<sup>248</sup>

That practice is unfortunate, and the laws governing judicial disqualification should require that motions to disqualify go to a disinterested judge unless the judge who is the target of the motion agrees to recuse himself.<sup>249</sup> At the trial court level, this would mean simply referring the motion to another district court judge. At the appellate level, the motion could be decided by a motions panel made up of three other members of that circuit court. And in the United States Supreme Court, the motion should be decided by the other eight Justices.

Providing for an impartial decisionmaker on the question of recusal serves both to prevent actual injustice and the appearance of injustice. Ensuring that the decision is made by a neutral decisionmaker would protect the integrity of the challenged judge and the judiciary as a whole in those cases where disqualification is not justified.<sup>250</sup> Even more so, referral to a neutral judge would protect the judiciary’s reputation and the parties from harm in those rare cases where a judge is so biased in favor of one party that, if the decision were his alone, he would choose to remain on the case even when he clearly cannot be impartial.

Transfer is particularly important in cases where the challenged judge needs to defend or explain her conduct. As discussed below, the

---

246. *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted); *accord* *United States v. Heldt*, 668 F.2d 1238, 1271–72 (D.C. Cir. 1981) (same).

247. *United States*, 158 F.3d at 34.

248. FEDERAL JUDICIAL CENTER, *supra* note 82, at 44; *see, e.g.*, *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992); *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162 (5th Cir. 1982); *Heldt*, 668 F.2d at 1271 (D.C. Cir. 1981); *United States v. Azhocar*, 581 F.2d 735, 737–38 (9th Cir. 1978).

249. In 1961, the Judicial Conference of the United States passed a recommendation that motions under § 144 be transferred to a different judge to rule on the sufficiency of the affidavit. Judicial Conf. of the United States Ann. Rep. 68–69 (1961). The American Law Institute recently approved Principles Governing Transnational Civil Procedure. Rule 10, which was appended to the rules though not formally adopted by the ALI, concerns the impartiality of the decisionmaker. Rule 10.3 explicitly states that a judge should not be responsible for deciding his or her impartiality: “A challenge of a judge must be heard and determined either by a judge other than the one so challenged or, if by the challenged judge, under procedures affording immediate appellate review or reconsideration by another judge.”

250. A few courts and commentators have expressed the view that transfer of a disqualification motion to a neutral decisionmaker would better serve the goal of the statute to promote public confidence in the judicial process. *See Hawaii-Pac. Venture Capital Corp. v. Rothbard*, 437 F. Supp. 230, 236 (D. Haw. 1977) (suggesting transfer when the judge thinks “that by [transferring the motion] he might better assist in the promotion of public confidence in the impartiality of the judicial process”); *Littenecker, supra* note 5, at 265–67 (advocating “transfer in all cases except where the danger of delay and disruption is substantial”).

challenged judge should be given an opportunity to refute the challenger's allegations or otherwise explain and justify her conduct.<sup>251</sup> Yet once a judge is in the position of defending herself against a claim of bias, she cannot fairly serve as the ultimate decisionmaker on the question of whether her explanation is sufficient to justify remaining on the case.<sup>252</sup>

Some courts have criticized the idea of transferring recusal motions to another judge on the grounds that it would be disruptive, and have expressed the fear that counsel might use such motions strategically to delay proceedings.<sup>253</sup> However, transfer to an impartial judge should not cause significant delay; any judge addressing the motion would have to read the motion papers and issue a final decision on the matter.<sup>254</sup> Although the challenged judge would be more familiar with the facts suggesting bias or interest than an impartial judge,<sup>255</sup> this familiarity is the *very reason* why the challenged judge should not be permitted to issue the final ruling on the motion. Moreover, as one commentator has noted, even if the transferee judge is slower to issue a ruling, a challenger would be less likely to appeal a decision not to recuse issued by an impartial judge, resulting in an overall speeding-up of the recusal process.<sup>256</sup>

A more significant problem with this proposal is that judges might not be any more willing to disqualify their colleagues than they are to recuse themselves.<sup>257</sup> Judges might find it difficult to grant a motion to

---

251. See discussion *infra* Part V.A.3.

252. See *Commonwealth v. Cherpes*, 520 A.2d 439, 446-47 (1987) (relying on previous court holdings that a trial judge should recuse if he feels it necessary to explain his conduct).

253. See *In re Swift*, 126 B.R. 725, 728 (Bankr. W.D. Tex. 1991) ("The law is well-settled that the judge whose recusal is sought is ordinarily the judge who rules on the motion, lest such motions be used as tools of delay . . ."); FLAMM, *supra* note 9, § 17.5.2, at 517-20 (discussing arguments in favor of allowing a challenged judge to rule on the motion).

254. Certainly, if the motion is granted then proceedings might be delayed while a new judge gets up to speed with the facts and background of the case. The disruption that would arise from switching judges is a reason to require that motions to recuse be filed immediately after a party learns of facts that would justify disqualification, but it is not grounds for preventing a neutral judge from making the decision in the first instance.

255. See FLAMM, *supra* note 9, § 17.5.2, at 518 (noting that some courts have argued that the challenged judge should decide a recusal motion because that judge is most familiar with his own conduct).

256. Bloom, *supra* note 21, at 697.

257. In a survey of state court judges, the judges responded that they would be more likely to disqualify themselves than recommend a colleague be disqualified under similar circumstances. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1 (1995). However, the result of a survey posing a hypothetical recusal situation might not be the best proxy of whether judges are actually willing to recuse themselves when they have a potential conflict and are asked to do so by one of the litigants. In fact, the authors of the survey themselves noted that judges reported high levels of ambivalence about when to recuse themselves, and recommended that "serious consideration should be given to the

disqualify, fearing it would offend a fellow judge.<sup>258</sup> Although legitimate, this concern does not outweigh the benefits of transferring the recusal decision away from the interested judge. First, transfer would put an end to the worst cases, in which judges insist on presiding even when they have an obvious conflict of interest, because even the most respectful of colleagues would have to remove a fellow judge under such circumstances. Second, even if judges are just as reluctant to remove colleagues as they are to remove themselves from cases, the simple fact that a neutral judge is deciding the issue would create a better public impression than permitting the potentially conflicted judge to decide his own fate. Thus, the appearance of justice will be better served, even if the actual rate of recusal remains unchanged.

In any case, experience shows that judges are willing to risk offending one another when obligated to pass judgment in the course of fulfilling their judicial duties. Judges regularly take public positions opposing each other's views. When judges sit on panels, one judge will often write an opinion that conflicts with the decision of the others. Appellate judges frequently reverse lower courts, and en banc courts often reverse their own colleagues. Judges have grown accustomed to these sorts of judicial disagreements, and it is reasonable to think that the same professionalism would allow judges to take on the task of deciding recusal motions without fear of offending one another.<sup>259</sup>

Admittedly, disagreements over the merits of a case are not as personal, or as sensitive, as requiring a colleague to remove himself from a case over his objection. But these types of decisions do show that judges take opposing positions as a regular part of their job and suggest that judges would also be capable of making the hard choice to require a colleague's recusal were that required of them. Indeed, appellate courts occasionally order the disqualification of district court judges, even under the current deferential standard of review. For example, a panel of D.C.

---

issue of whether to adopt a rule allowing or requiring another judge to pass on disqualification motions . . ." *Id.* at 2.

258. *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988) (commenting that judges may find it "difficult" to "pass[] upon the integrity of a fellow member of the bench").

259. Proof that judges have the stomach for such tasks can be found in their impressive record under the Judicial Conduct and Disability Act. 28 U.S.C. § 372(c) (1996). Studies conducted on behalf of the National Commission on Judicial Discipline and Removal concluded that chief judges take the complaint process seriously and reach the right result in the great majority of cases. *See* Richard L. Marcus, *Who Should Regulate Federal Judges, and How?*, 149 F.R.D. 375, 377 (1993) (stating that "[a]lthough there are individual cases that cause uneasiness, by and large the results look appropriate"); Barr & Willging, *supra* note 180, at 51 (stating the results of chief judges' review of complaints).

Circuit judges required a district court judge to disqualify himself from the highly publicized Microsoft case—a decision that was undoubtedly made even harder by the fact that all the judges involved work in the same courthouse in Washington, D.C.<sup>260</sup> The key is to make the question of whether to disqualify a colleague obligatory and standard—part of the normal judicial routine—rather than the unusual and ad hoc decision it is today.<sup>261</sup>

Some commentators have suggested going further than transferring just the recusal motion, and have advocated instead for a system of peremptory disqualification.<sup>262</sup> Under these proposals, the entire case would automatically be transferred to a new judge upon the claim that the assigned judge is not impartial, without requiring the challenger to prove these allegations. Each party would be given just one opportunity to challenge a judge for interest or bias. Advocates of peremptory disqualification argue that this system ensures that the litigant has an impartial judge and avoids the problem of judges being asked to decide their own partiality.<sup>263</sup>

Peremptory disqualification is less efficient, however, and is more prone to abuse than are automatic transfers of just the recusal motion to an impartial judge. Peremptory disqualification slows down the litigation because a new judge will have to become familiar with the case. It can also serve as a method of judge-shopping, and may be used by litigants to remove judges whose judicial philosophies are hostile to the litigants' claim. Finally, automatic transfer does not permit a judge to refute the allegations of bias, and thus may create the public impression that more judges are biased, or have conflicts of interest, than is actually the case.<sup>264</sup> In short, peremptory disqualification might injure the reputation of the judiciary, thereby undermining the goals of recusal.

---

260. *United States v. Microsoft Corp.*, 253 F.3d 34, 116 (D.C. Cir. 2001).

261. Although it would clearly be awkward for eight Justices to decide whether the ninth should be forced to step aside, it is also unseemly for the eight Justices to, in essence, recuse themselves from deciding whether their colleague is permitted to sit on a case, necessitating that this question of law be decided by the one Justice with a personal stake in the matter.

262. See, e.g., Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49, 58 (1988); Helena Kempner Kobrin, Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612, 633 (1976). Several states have enacted peremptory disqualification statutes. See, e.g., ALASKA STAT. § 22.20.022 (Michie 2004); CAL. CIV. PROC. CODE § 170.6 (Supp. 2005).

263. See, e.g., Baron, *supra* note 262; Kobrin, *supra* note 262.

264. FLAMM, *supra* note 9, §§ 3.4–3.5, at 62–66.

3. Encourage the Challenged Judge to Respond to a Motion to Disqualify

In conjunction with the requirement that a recusal motion be transferred to an impartial judge, § 455 should be amended to provide that the challenged judge be encouraged to file evidence refuting facts asserted in the recusal motion, and perhaps also an explanation of why disqualification is not justified. As described above, most motions to disqualify are filed by one party and are not responded to by the other, depriving the judge of the benefit of an adversarial presentation of the issue. The challenged judge is the most natural party to respond to a motion to disqualify. He will be familiar with the facts cited by the moving party and is best able to put those facts in context for the decisionmaker. Indeed, the judge will likely do a far better job of responding to the motion than the other litigants, who may not have any knowledge of the circumstances that inspired the motion in the first place.

In the past, a handful of judges have responded to disqualification motions by including in the record refutation of the evidence against them. In *McGuire v. Blount*,<sup>265</sup> for example, the plaintiffs filed a motion asking the judge to recuse himself on the ground that the judge's wife had acquired an interest in the property that was the very subject of the litigation. The plaintiffs did not provide a sworn affidavit or any other evidence to support this claim. The judge denied the motion, stating that his wife had no interest in the property. But he noted for the record that she had been offered the deed to the property, which she had declined to accept. The judge then took the precaution of placing in the file an affidavit of a real estate agent attesting to these facts.<sup>266</sup> The Supreme Court cited approvingly to the judge's inclusion of an affidavit supporting his version of the events, noted there was no evidence to refute it, and refused to require that the judge recuse himself.<sup>267</sup>

More recently, in *United States v. Morrison*,<sup>268</sup> the Second Circuit reviewed the district court judge's refusal to recuse herself after investigating the facts underlying a recusal motion. The defendant sought to disqualify the district court judge based on an alleged adverse business relationship between the defendant, the judge's husband, and a friend of the judge's. The judge asked her husband and the friend to review the

---

265. 199 U.S. 142 (1905).

266. *Id.* at 143.

267. *Id.* at 143-44.

268. 153 F.3d 34 (2d Cir. 1998).

materials submitted with the defendant's motion. They both responded that the allegations were false and denied any relationship with the defendant. The judge then declined to recuse herself. Reviewing the procedure, the Second Circuit stated "it was not irregular for [the judge] to ascertain her husband's and friend's possible involvement with the defendant simply by asking them, in a reasonable effort to confirm that [defendant's] incredible claims were indeed not factual."<sup>269</sup>

Thus, although judges typically do not provide evidence to refute a motion to disqualify, reviewing courts have commented favorably on the practice in the rare cases when they have done so. Responses by the challenged judge might become more common if recusal motions were routinely referred to neutral judges, which would then free the challenged judge to defend her conduct with the knowledge that a neutral third party would ultimately decide the matter.

#### 4. Require Judges to Give Reasoned Explanations for Recusal Decisions

Too often, judges recuse themselves without any explanation of why they are choosing to do so. Judges might feel that it is unnecessary to announce their reasons for voluntarily bowing out, and the parties in those cases usually have no interest, and certainly have no right, to insist that the judge explain herself. In contrast, judges who refuse to recuse themselves are much more likely to publish an opinion explaining why. Thus, the body of law supporting the decision to remain on a case in the face of a potential conflict outweighs the minimal precedent explaining when a judge should step aside.

To alleviate this problem, judges should give reasons for deciding to remove themselves (or, if the motion is transferred to a new judge, that judge should articulate the basis for his decision). The explanations need not be long or detailed, particularly in straightforward cases. These decisions will fill the void left by silent recusals, especially in cases where a judge decides to step down merely because his impartiality might "reasonably be questioned," and not because that judge thinks he is biased or incapable of acting as a neutral decisionmaker. Decisions articulating grounds for recusal will provide a body of precedent to guide judges facing such decisions in the future.<sup>270</sup> If nothing else, a judge considering

---

269. *Id.* at 48 n.4.

270. Cf. Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 99 (1995) (suggesting that district courts should publish their review of magistrate judges' pretrial management decisions to provide further guidance for the

disqualification will get a clearer sense of how often his colleagues have made the choice to step aside (or to require a colleague to step aside), making it psychologically easier for a judge to take the same course of action.

*B. Putting Theory Into Practice: The Effect of the Proposed Reforms on the Cheney Case*

Applying these suggested reforms to the *Cheney* case demonstrates that, if the traditional elements of adjudication were incorporated into recusal law, those laws would better serve the purpose of protecting the reputation of the judiciary.

Under the proposals discussed above, Justice Scalia would have been obligated to disclose the fact that he took the trip with Cheney before the press reported it. If the information had initially come from the Justice himself, rather than the media, it might have softened the public impression of the incident. Rather than a piece of investigative journalism, the story would have been billed as a routine public disclosure by a Justice. Although still newsworthy, the information would have been less likely to convey the impression of impropriety than articles trumpeting a heretofore “secret” vacation between a litigant and a Justice.

Furthermore, immediate and full disclosure of important details of the trip—such as the timing of the invitation and its acceptance, the number of guests who attended, and the travel arrangements—would have given the public a more complete picture of the trip and might have forestalled some of the criticism. Justice Scalia could have made clear from the outset that he and his family members did not benefit financially from flying on Air Force Two—an important fact needed to counter the reasonable assumption that they saved themselves the cost of a flight by traveling with the Vice President. He could also have clarified for the parties and the press that he was never alone with Cheney during the trip, which would have prevented editorialists from speculating that he had hours of private time with the Vice President in which to discuss the case.<sup>271</sup>

This type of information is relevant to the question of whether a Justice should recuse him or herself after vacationing with a litigant, and thus is properly subject to a public disclosure requirement. Justice Scalia implicitly acknowledged as much when he discussed these details in his

---

exercise of pretrial authority).

271. *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913 (2004).

defense of the propriety of the trip.<sup>272</sup> The reputation of the judiciary would have been better protected had this information been disclosed up front, before the press reported on the matter and certainly before the Sierra Club sought his removal from the case. Indeed, if Justice Scalia had disclosed that information in advance, it is possible that the Sierra Club would never have sought his removal from the case.

In his memorandum decision, Justice Scalia staunchly defended what he described as the “well-known and constant practice of Justices’ enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch.”<sup>273</sup> The disclosure requirement proposed in this Article may serve to discourage such social contact. A judge might think twice before socializing with a litigant if she realizes she will have to disclose the details of that event to the parties, and some judges might choose to curtail such socialization with litigants whose cases are pending before them. But those who, like Justice Scalia, feel strongly that they should be permitted to engage in such social contact would be free to do so under this Article’s proposal as long as they fully disclosed the information about any social engagements with litigants in pending cases.

The goal of promoting the appearance of justice would also have been better served if the other eight Justices had decided whether Justice Scalia should sit on the case, rather than leaving the decision to Justice Scalia himself. No matter how reasonable, well written, and persuasive his memorandum decision might be, it is tainted because the author had a personal stake in the matter. There is something odd about a Supreme Court pronouncement on a question of law that so prominently features the pronoun “I.” The memorandum decision is argumentative, personal, and a little defensive. It reads more like an opposing motion filed by a party than an opinion by a neutral decisionmaker.<sup>274</sup> In short, the very authority of the decision is undermined by the fact that its author is seeking to justify his own conduct.

Had the other eight Justices addressed the question of whether Justice Scalia should recuse himself, the decision would undoubtedly have been better received because it would have reflected the views of a majority of the Court and not a single, self-interested Justice. Even if the

---

272. *Id.* at 915–22. The less extensive the social interaction, the less relevant information there would be to disclose. So, for example, a Justice who attended the Vice President’s Christmas reception at the time the case was pending would not need to describe travel arrangements or the number of other attendees.

273. *Id.* at 926.

274. See *supra* notes 233–237 and accompanying text.

whole Court had agreed with Scalia that he need not recuse himself, an opinion authored by one of the other Justices would likely have been more moderate in tone, would have taken fewer opportunities to attack Scalia's critics, and would not have made such strident statements about the need to ensure that judges are free to socialize with other high ranking members of government. Both symbolically and substantively, the final decision about whether Scalia should be disqualified would have been improved had it come from the full Court, and would have better served the goal of protecting the Court's reputation. For these same reasons, all recusal decisions would benefit from the procedural reforms suggested in this Article.

#### VI. CONCLUSION

As is clear from the long history of controversy surrounding judicial recusal, including the recent attention given to Justice Scalia's refusal to recuse himself from the *Cheney* case, the law of judicial disqualification has failed to protect the integrity of the judiciary. Almost every commentator discussing problems with the disqualification laws has recommended expanding the grounds for judicial recusals.<sup>275</sup> But the history of judicial disqualification demonstrates that alterations to the substantive standard will do little good as long as members of the judiciary are responsible for construing and applying the disqualification laws to themselves. Moreover, it would be wrong to lower the substantive standards for disqualification so far as to force judges to withdraw from cases simply because the majority of editorial writers or political pundits suggest that they do so.

The solution I propose instead is to incorporate the traditional forms of adjudication into the recusal process. The basic procedural components of litigation—party presentation of disputes to an impartial decisionmaker who issues a reasoned decision based on an identifiable body of law—have long been valued as essential to ensuring accurate results of adjudication and, most important here, maintaining the legitimacy of the judiciary. Legal Process theorists cited these practices as a defense to Legal Realists' attacks on judicial lawmaking, assuming that most of us would accept the legitimacy of decisions made in accordance with these traditional forms that cabin judicial discretion and promote the accuracy of the final result. The traditional adjudicatory model lauded by Legal

---

275. See, e.g., Bassett, *supra* note 8; Frank, *supra* note 8; *The Standard*, *supra* note 8, at 763–70; *Bias in the Federal Courts*, *supra* note 8, at 1446–47; Leitch, *supra* note 8, at 527.

Process theorists fifty years ago continues to be cited today by scholars describing the sources of legitimacy for judicial decisionmaking. Incorporating these traditional forms of adjudication into the law of judicial disqualification will do more to protect judicial integrity than any change to the substantive recusal standards can accomplish.

## A PRIMER ON REGULATING FEDERAL JUDICIAL ETHICS

Russell R. Wheeler\*

*This Article first summarizes the agencies of the federal judiciary involved in ethics regulation. Then, it describes mechanisms and policies (constitutional, statutory, and administrative) designed to deter or discourage judicial misconduct and performance-degrading disability, including but not limited to conflict-of-interest statutes and the (nonstatutory) Code of Conduct for United States Judges and controversies over its application (including whether it should apply to Supreme Court Justices in the same way it does to other federal judges). The Article next reviews constitutional, statutory, and informal methods of dealing with allegations of judicial misconduct and disability (in particular the Judicial Conduct and Disability Act). Finally, the Article briefly suggests some additional questions about the regulation machinery and steps the federal judiciary, including the Supreme Court, might take to enhance the regulation of federal judicial ethics.*

### TABLE OF CONTENTS

INTRODUCTION .....	481
I. THE PLAYERS .....	482
II. POLICIES AND MECHANISMS TO DETER MISCONDUCT AND PERFORMANCE-DEGRADING DISABILITY .....	483
A. Constitutional Protections .....	483
B. Conduct-Regulating Statutes .....	483
1. Retirement Provisions .....	484
a. Senior Status .....	484
b. Disability .....	485
2. Limitations on Outside Income, Employment, and Gifts .....	486
3. Financial Disclosure .....	486
4. Judicial Disqualification Statutes .....	488
a. Disqualification Controversies .....	489

---

\* Russell R. Wheeler, B.A. Augustana College (Ill.), 1965; M.A. (1967), Ph.D. (1970), University of Chicago. President, the Governance Institute; Visiting Fellow in Governance Studies at the Brookings Institution, Washington, D.C. Many thanks to Professor Amanda Frost of the Washington College of Law, American University, for very helpful comments on an earlier draft.

b. Supreme Court Recusals .....	490	
c. Proposals Regarding Supreme Court Recusals .....	496	
i. H.R. 862 .....	496	
ii. Applying the Code of Conduct to the Justices .....	498	
iii. Temporary Assignment of Retired Justices .....	498	
iv. Use of “Congress’ Indirect Constitutional Tools” .....	498	
5. Internal and External Performance Monitoring .....	499	
C. The Code of Conduct .....	500	
 III. POLICIES TO DEAL WITH ALLEGATIONS OF MISCONDUCT AND DISABILITY ... 505		
A. Impeachment and Removal from Office .....	506	
B. Prosecution Under General Civil and Criminal Statutes .....	506	
C. The Judicial Conduct and Disability Act .....	507	
1. Main Provisions .....	507	
2. Results—Basic Data .....	508	
3. Results—Extended Analysis .....	509	
4. Breyer Committee Recommendations to Enhance Transparency, Monitoring, and Oversight .....	512	
a. Publicizing How to File a Complaint .....	512	
b. Publicizing Final Orders .....	513	
c. Chief Judges’ Identifying Complaints .....	515	
d. Greater Oversight by the Judicial Conduct Committee .....	516	
5. Other Recommendations .....	519	
a. Involving Nonjudges in Complaint Review .....	519	
b. A Complaint Mechanism for the Supreme Court .....	520	
D. Informal Controls and Guidance .....	521	
1. Counseling Services .....	521	
2. Informal Chief Judge Action, in the Shadow of the Judicial Conduct Act .....	522	
3. Anonymous Reporting by Individuals or Bar Committees .....	522	
 IV. CONCLUDING OBSERVATIONS AND A FEW SUGGESTIONS .....		523
A. In General .....	523	
B. The Supreme Court .....	524	

## INTRODUCTION

Serious misconduct by federal judges is rare, but recent instances have made headlines:

“Victims Allege Years of Sexual Abuse by Federal Judge” (who pleaded guilty to lying in a disciplinary proceeding over his harassing a staff assistant);<sup>1</sup>

“Senate Prepares for Trial of Federal Judge,” (whom it eventually removed from office for accepting bribes);<sup>2</sup>

“[Judge] set to retire May 3 as misconduct investigation concludes”<sup>3</sup> (concerning the judge’s forwarding, on his chambers computer, a racist email about President Obama and, as it turned out, many more inappropriate messages).<sup>4</sup>

These and similar, less visible incidents have produced judicial and legislative responses. When a member of Congress charged that a chief judge had improperly dismissed a complaint the member had filed under the Judicial Conduct and Disability Act<sup>5</sup> (“Judicial Conduct Act”), Chief Justice William H. Rehnquist appointed a committee, chaired by Justice Stephen G. Breyer, to investigate the Act’s implementation. Two members of Congress have introduced the Judicial Transparency and Ethics Enhancement Act to create an Inspector General for the judicial branch.<sup>6</sup> Chief Justice John G. Roberts, Jr., devoted his entire 2011 Year-End Report on the Federal Judiciary to Supreme Court ethics policies and practices.<sup>7</sup>

Regulating judicial ethics is an effort to balance competing values: judges’ accountability in a democracy balanced against the need for independent decision-making; the need for impartiality as to the disputes that may come before judges

---

1. Tom Cohen, *Victims Allege Years of Sexual Misconduct by Federal Judge*, CNN (June 3, 2009), <http://www.cnn.com/2009/POLITICS/06/03/judge.impeachment/index.html>.

2. David Ingram, *Senate Prepares for Trial of Federal Judge*, NAT'L. L.J. (Sept. 8, 2010), <http://www.alm.law.com/jsp/article.jsp?id=1202471736187&slreturn=20140228170200>; *Impeachments of Federal Judges*, FED. JUD. CTR., HISTORY OF THE FEDERAL JUDICIARY, [http://www.fjc.gov/history/home.nsf/page/judges\\_impeachments.html](http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html) (last visited Mar. 10, 2014).

3. Clair Johnson, *Cebull Set to Retire May 3 as Misconduct Investigation Concludes*, BILLINGS GAZETTE (Apr. 3, 2013), [http://billingsgazette.com/news/state-and-regional/montana/judge-cebull-to-retire-on-may/article\\_64d09638-8b0e-5229-a1f3-725cc3d311fe.html](http://billingsgazette.com/news/state-and-regional/montana/judge-cebull-to-retire-on-may/article_64d09638-8b0e-5229-a1f3-725cc3d311fe.html).

4. John S. Adams, *Cebull Probe Finds More Emails: Hundreds Are Related to Race, Politics, Gender*, GREAT FALLS TRIBUNE (Jan. 18, 2014), [http://www.greatfallstribune.com/article/20140117/NEWS01/301170038?nclick\\_check=1](http://www.greatfallstribune.com/article/20140117/NEWS01/301170038?nclick_check=1).

5. 28 U.S.C. §§ 351–64 (2012).

6. S. 575, introduced April 15, 2013 by Senator Charles Grassley and HR 1203, introduced by Representative James Sensenbrenner.

7. JOHN ROBERTS, UNITED STATES SUPREME COURT, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 4-5 (2011) available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

balanced against the value to them and to society of having judges engaged in the life of the community and the law; the value of transparency as a servant of accountability balanced against judges' legitimate needs for privacy. The Code of Conduct for United States Judges advises judges that they "must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."<sup>8</sup> That sound advice, however, is not a license for regulation of judges' affairs so unbridled as to deter responsible individuals from serving as federal judges.

The goal of this "primer" is not to discourse on how to balance these values, but rather to describe the landscape of federal judicial ethics regulation and to assess recent developments and proposals.

## I. THE PLAYERS

The major federal judicial administrative entities involved in formulating and administering ethics rules and guidelines are, first, each regional circuit's judicial council, comprising the chief circuit judge and an equal number of circuit and district judges.<sup>9</sup> Congress has assigned the councils general administrative oversight responsibilities as well as specific judicial misconduct and disability investigatory and disciplinary duties.<sup>10</sup> It has further granted them a plenary order-making authority, telling them to "make all necessary and appropriate orders for the effective and expeditious administration of justice within" their circuits.<sup>11</sup> By most accounts, the councils use this authority sparingly.

The Judicial Conference of the United States comprises the 13 chief circuit judges, 12 district judges elected by the circuit and district judges in each regional circuit, and the chief judge of the Court of International Trade. The Chief Justice is the presiding officer.<sup>12</sup> Much of the Conference's authority comes to it, indirectly, through the statutory mandate that the Administrative Office of the U.S. Courts ("A.O.") exercise its many duties under the Conference's "supervision and direction."<sup>13</sup> Congress has vested the Conference directly with a few responsibilities, such as authorizing it to prescribe rules for conducting proceedings under the Judicial Conduct Act<sup>14</sup> and to review some judicial council orders issued under the Act.<sup>15</sup> Unlike the councils, however, the Conference has no plenary order-making authority, and several years ago, it tabled a proposal to seek such authority from Congress.<sup>16</sup>

---

8. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2014).

9. 28 U.S.C. § 332.

10. *Id.* § 354(a).

11. *Id.* § 332 (d)(1).

12. *Id.* § 331.

13. *Id.* § 604(a).

14. *Id.* § 358.

15. *Id.* §§ 354(b), 355.

16. See Russell Wheeler, *A New Judge's Introduction to Federal Judicial Administration*, FED. JUD. CTR. 8–9 (2003).

The Conference does its work through 25 committees comprising over 200 members, almost all of them federal judges designated by the Chief Justice. Three committees are concerned with judicial ethics. The Judicial Conduct and Disability Committee oversees the administration of the Judicial Conduct Act and acts for the Conference in considering appeals of judicial council disciplinary orders.<sup>17</sup> The Codes of Conduct Committee proposes amendments to the Codes and provides judges with advice about how to comply with the Code.<sup>18</sup> The Financial Disclosure Committee reviews judges' and senior officials' annual financial disclosure reports.<sup>19</sup>

Chief circuit judges have specific investigatory responsibilities under the Judicial Conduct Act,<sup>20</sup> but chief judges at all levels—circuit, district, and bankruptcy—have also assumed informal responsibilities for regulating judicial ethics, principally in counseling, chiding, and encouraging judges to take or not take various actions.

It bears emphasis, especially for purposes of federal judicial ethics regulation, that the Supreme Court is not the federal courts' principal national administrative policymaker. In most state judicial systems, the supreme courts have the dominant administrative role.<sup>21</sup> In the federal system, the Judicial Conference plays that role, and the Conference is neither overseen by the Supreme Court, nor does it oversee the Court.

## II. POLICIES AND MECHANISMS TO DETER MISCONDUCT AND PERFORMANCE-DEGRADING DISABILITY

### A. Constitutional Protections

The Constitution, in Article III, Section 1, vests the judicial power of the United States in judges “who shall hold their Offices during good Behaviour” with salaries that may not be reduced during their continuance in office. The framers adopted those provisions to avoid the corruption that the Declaration of Independence attributed to the King’s making “Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” These provisions protect the Justices of the Supreme Court, courts of appeal, district courts, and Court of International Trade. Article III’s good behavior and salary protections do not extend to bankruptcy, magistrate, and Federal Claims Court judges.

### B. Conduct-Regulating Statutes

Congress has supplemented the constitutional provisions that promote independent decision-making with several conduct-regulating statutes directed at high-ranking federal officials, including judges (such as annual financial disclosure

---

17. 28 U.S.C. §§ 331, 356(b).

18. Discussed *infra* Part II.C.

19. Discussed *infra* Part II.B.3.

20. 28 U.S.C. §§ 352, 353.

21. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, STATE COURT ORGANIZATION 2004, tbl. 11 (2004), available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf>.

requirements, discussed in Part II.B.3), along with statutes directed solely at judges, dealing, for example, with retirement (discussed in Part II.C), performance reporting (discussed in Part II.B.5), and conflicts of interest (discussed in Part III.B.4).

Most, but not all, of those provisions apply by their terms to the Supreme Court. There is little question that Congress has the authority to enact ethics regulations for the so-called lower federal judiciary. Congress created those courts pursuant to Article III's authorization of "such inferior Courts as Congress may from time to time ordain and establish."<sup>22</sup> It is an open question, though, whether Congress has the authority to regulate the behavior of the Justices. Chief Justice Roberts argued in his 2011 report that because the Constitution itself creates the Supreme Court, Congress may lack the authority to regulate its ethics. At the least, he said, "[t]he Court has never addressed whether Congress may impose . . . [ethical] requirements on the . . . Court."<sup>23</sup> On the other hand, Justice Breyer, during a Senate Judiciary Committee hearing, referred to rules on "what [income] you can take or can't take, . . . the reporting requirements, and some of the general ethics requirements—can't sit in [conflict-of-interest] cases—those are statutory, and I think they bind us, period."<sup>24</sup>

#### *1. Retirement Provisions*

In the nineteenth century, Congress created the forerunners to today's judicial retirement statutes. Before their enactment, federal judges dependent on their judicial salaries sometimes served well past the age at which performance often deteriorates.<sup>25</sup> The statutes seek to deter performance-degrading disability by providing judges who have served an appropriate number of years (or who become disabled) a source of income without having to serve in full-time status when they may be unable to do so.

##### **a. Senior Status**

28 U.S.C. § 371 allows any district judge, circuit judge, or Supreme Court Justice judge to retire (to become what is called a "senior judge") under the "rule of

---

22. See, e.g., Louis Virelli, III, *The (UN)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1208, 1208 n.59 (citing long-standing Supreme Court precedent "explaining that the congressional power to 'ordain and establish' inferior federal courts 'carries with it the power to prescribe and regulate the modes of proceedings in such courts'").

23. See ROBERTS, *supra* note 7.

24. *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Sen. Judiciary Comm.*, 112th Congress (2011); see also Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 449–50 (2013).

25. For debate on the 1869 provisions that authorized judges 70 years or older with at least ten years of service to retire on salary, see 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, 1787–1875 at 256–57 (Bruce Ragsdale, ed., Federal Judicial Center 2013).

80"—which means that once the judge reaches 65, she can retire if the sum of her age and years of service is at least 80.

A judge who takes senior status and meets the annual statutory certification requirement (doing at least one-fourth the work of an active judge) receives any salary increases that come to judges in active service. Others receive the salary they were receiving when they went senior or when they were last certified. The court may decline to assign cases, or certain kinds of cases, to senior judges, and seniors may decline to take other cases.<sup>26</sup>

This provision has worked fairly well to encourage judges to give up full-time judicial work when they become eligible. Of the 1,308 federal district and circuit judges in office in mid-March 2014, 42% were on senior status.<sup>27</sup> The provision has had less of an impact with respect to the Supreme Court. Of the 12 living Justices in March 2014, only 25% were on senior status—O'Connor, Souter, and Stevens—even though 5 of the 9 active-status Justices were eligible (Breyer, Ginsburg, Kennedy, Scalia, and Thomas).<sup>28</sup> (Circuit and district judges may be more willing than Justices to take senior status because they can continue to serve, usually part-time, on their courts. Justices are ineligible to continue serving on the Supreme Court.)

#### b. Disability

28 U.S.C. § 372(a) authorizes any district judge, circuit judge, or Supreme Court Justice to retire from active service due to permanent disability by submitting to the president a certificate of disability signed by the Chief Justice (for Supreme Court Justices) or the chief circuit judge. A judge who retires on disability and has served ten years receives the salary of the office for life. One serving less than ten years receives half the salary of the office. Disability retirement is a fairly rare event.<sup>29</sup>

Section 372(b) authorizes a circuit judicial council to certify to the president that a judge is "permanently disabled from performing his judicial duties" even though that judge refuses to certify his or her disability. If the president agrees, he may appoint another judge, subject to Senate confirmation. The disabled judge goes to the bottom of the seniority list—the Constitution precludes removal from office except through the impeachment clause—and the vacancy created upon the disabled judge's death or resignation stays empty. One presumes that courts or

---

26. 28 U.S.C. §§ 43(b) and 132(b) provide that judges in active service "shall be competent to sit as judges of the court," while § 371(e) clearly contemplates that senior judges may serve in a more limited capacity.

27. Calculated from a search on the Federal Judicial Center's Biographical Directory of Federal Judges, available at [http://www.fjc.gov/history/home.nsf/page/research\\_categories.html](http://www.fjc.gov/history/home.nsf/page/research_categories.html).

28. Based on birth years. *Id.*

29. Based on an informal canvass of the biographies of circuit and district judges in senior status in early December 2013. *Id.*

judicial councils use their case-assignment authority<sup>30</sup> to not assign cases to judges who have been certified as disabled. The provision by its terms does not apply to the Supreme Court.

*2. Limitations on Outside Income, Employment, and Gifts*

The Ethics in Government Act limits the outside income and employment of high-ranking government officials (including federal judges and judicial branch officials),<sup>31</sup> as well as the gifts they may accept.<sup>32</sup> Congress authorized the Judicial Conference to issue regulations for the judicial branch, and the Conference has delegated to the Chief Justice its authority to issue such regulations for the Court.<sup>33</sup> Chief Justice Roberts has said that in “1991, the Members of the Court adopted an internal resolution in which they agreed to follow the Judicial Conference regulations as a matter of internal practice.” He cautioned, though, that the Court had not spoken on the regulations’ legal applicability to the Court.<sup>34</sup>

*3. Financial Disclosure*

An Ethics in Government Act provision requires all high-salaried government employees to file annual financial reports each May, covering aspects of their finances and gifts received in the previous calendar year.<sup>35</sup> Justices and judges file them with their clerks of court and with the Judicial Conference Financial Disclosure Committee—apparently the only instance of the Conference’s exercising administrative jurisdiction over the Justices. The reports are available for inspection at the A.O. in Washington, but they are not posted on the federal judiciary website, and judges, when notified of requests to review their reports, may redact statutorily required information if the Disclosure Committee agrees that release of the information could endanger the judges or their families.<sup>36</sup>

---

30. See 28 U.S.C. § 137 (2012) (providing that the judges of each district court may provide for the division of business by rules and orders, and in the event the judges are unable to agree, the judicial council will make the appropriate orders).

31. Citations to various statutory restrictions on outside earned income, honoraria, and employment, as they pertain to the federal judiciary, are in section 1010 of the Judicial Conference’s implementing regulations. *Outside Earned Income, Honoraria, and Employment*, in 2 GUIDE TO JUDICIARY POLICY § 1010, (last revised Dec. 14, 2010), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02C-Ch10.pdf>.

32. Citations to various statutory restrictions on gifts as they pertain to the federal judiciary are in section 620 of the Judicial Conference’s implementing regulations. *Gifts*, in 2 GUIDE TO JUDICIARY POLICY, *supra* note 31, at § 620.

33. See *Outside Earned Income, Honoraria, and Employment*, in 2 GUIDE TO JUDICIARY POLICY, *supra* note 31, at §1020.50(b); *Gifts*, in 2 GUIDE TO JUDICIARY POLICY *supra* note 31, at § 620.65(a).

34. See ROBERTS, *supra* note 7, at 6–7.

35. See *supra* notes 6–7.

36. See *Filing Instructions for Judicial Officers and Employees*, COMMITTEE ON FINANCIAL DISCLOSURE (2010) (last visited Apr. 10, 2014), available at <http://www.judicialwatch.org/files/documents/2011/2010judicialfinancialdisclosureinstructions.pdf>.

The Act authorizes the Attorney General to bring a civil action against any individual who “knowingly and willfully” fails to file a report or fails to report any required information and directs the report-receiving entities, including the Conference, to refer to the Attorney General anyone whom they have “reasonable cause to believe has . . . willfully failed to file information required to be reported.”<sup>37</sup> In 2011, Justice Clarence Thomas released amended financial disclosure forms after interest groups pointed to several years of his filings that omitted required information on the source of his wife’s income (her employment by conservative policy organizations was well known) and a possible error in not reporting certain travel expenses; the interest groups petitioned the Judicial Conference to refer the matter to the Justice Department.<sup>38</sup> Some House Democrats made the same request.<sup>39</sup>

Informal inquiries that I undertook at the time uncovered no instance of the Conference’s referring any covered employee to the Attorney General. The Conference took no action on the request concerning Justice Thomas (at least none that surfaced publicly), likely concluding that even though the disclosure forms are not very complicated for those with modest investments, mistakes occur that fall short of the statute’s “willfully failed” standard. Furthermore, consider the precedent a referral would create: Encouraging a group of lower court judges to refer a Justice to the Attorney General for civil prosecution creates the potential for sucking them into the partisan skirmishes over the Justices’ behavior. And the Attorney General hardly needs the headache of deciding whether to pursue a civil action against a Justice, at least for what was likely an unintentional oversight.

Another form of financial disclosure, imposed under the Conference’s statutory authority to regulate gifts, concerns judges who receive reimbursement from sponsors of nongovernmental education programs they attend. The regulation requires them to disclose, on their courts’ websites, the program(s) attended and requires providers to disclose the sources of funds for the programs.<sup>40</sup> These requirements stem from controversy in the last decade and earlier over judges’ attendance at what some legislators and interest groups regarded as ideologically oriented educational programs.<sup>41</sup> A desire to stave off the proposed Federal Judiciary Ethics Reform Act of 2006<sup>42</sup> probably led to adoption of the policy. There have been

---

37. 5 U.S.C. § 104 (2012).

38. Eric Lichtblau, *Thomas Cites Failure to Disclose Wife’s Job*, N.Y. TIMES, Jan. 24, 2011, at A16.

39. Julian Pecquet, *Dems Want Probe of Justice Thomas as Health Law Ruling Looms*, HILL (Sept. 29, 2011), <http://thehill.com/blogs/healthwatch/legal-challenges/184693-dems-raise-pressure-on-justice-thomas-as-high-court-ponders-ruling-on-health-law>.

40. See *Privately Funded Seminars Disclosure System*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/PrivateSeminarDisclosure.aspx> (last visited Mar. 10, 2014).

41. A sense of the controversy is provided by Abner Mikva, *Judges, Junkets, and Seminars*, 28 LITIGATION 3 (2002), and A. Raymond Randolph, *Private Judicial Seminars: A Reply to Abner Mikva*, 29 LITIGATION 3 (2002).

42. 109th Congress, 2d Session, S. 2202 (2006).

more recent analyses of attendance at private seminars,<sup>43</sup> even though one of the main providers has ended its judicial education programs.<sup>44</sup>

#### 4. Judicial Disqualification Statutes<sup>45</sup>

Three years after Congress created the federal judiciary,<sup>46</sup> it enacted the first statute regulating judicial ethics, which it has amended over the years to what is now the main judicial disqualification statute, 28 U.S.C. § 455.<sup>47</sup> A canon of the Code of Conduct, discussed in Part II.C of this Article, repeats the disqualification statute almost verbatim.<sup>48</sup> Three other disqualification statutes are on the books but are invoked infrequently.<sup>49</sup>

Section 455 requires “[a]ny justice, judge [including a bankruptcy judge] or magistrate judge” to “disqualify himself” in two situations. Section (a) (waivable under section (e)) requires disqualification “in any proceeding in which his impartiality might reasonably be questioned.” Section (b) (not waivable) identifies five circumstances requiring disqualification: (1) personal bias or prejudice concerning a party or knowledge of evidentiary facts; (2) involvement in the matter as a material witness or when in private practice (involvement by the judge or by a lawyer “with whom he previously practiced law”); (3) involvement in the matter as a government employee; (4) a financial interest in the matter by the judge or a spouse or minor child; and (5) involvement in the proceeding by the judge, spouse, or relative in the third degree of relationship. Section (c) defines the disqualifying “financial interest” in part as “ownership of a legal or equitable interest, however small”—in other words, a single share of stock. Section (f), though, in the interest of judicial efficiency, excuses from disqualification a judge who becomes aware of a relevant financial interest only after the judge has devoted “substantial judicial time . . . to the matter,” and the judge divests himself or herself of the interest.

---

43. See, e.g., Chris Young, Reity O'Brien & Andrea Fuller, *Corporations, Pro-Business Non-Profits Foot Bill for Judicial Seminars*, CENTER FOR PUBLIC INTEGRITY (July 13, 2013), available at <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars>.

44. David Ingram, *Hundreds of Trips: Who's Paying?*, NAT'L L.J. (October 17, 2011), <http://www.njlawjournal.com/id=1202519899372/Hundreds-of-trips:-who's-paying?&slreturn=20140315185700>.

45. These statutes and associated case law are analyzed in CHARLES GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (2d ed. 2010), but almost all of the treatise concerns 28 U.S.C. § 455 (2012).

46. Judiciary Act of 1789, 1 Stat 73.

47. For the evolution of § 455, see GEYH, *supra* note 45, at 5–6; Virelli III, *supra* note 22, at 1185–91.

48. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C) (2014).

49. 28 U.S.C. § 144 (authorizing parties to seek disqualification of a district judge by filing an affidavit alleging actual bias); *id.* § 47 (disqualifying court of appeals judges from sitting on appeals from decisions they rendered on a district court); *id.* § 2106 (allowing, essentially, an appellate court to remand a case to a different district judge for further proceedings if the court doubts the impartiality of the original judge).

#### a. Disqualification Controversies

The statute directs judges to recuse themselves when they believe the statute requires it. But parties may also request disqualification and seek a mandamus order from a higher court if the judge declines. The courts of appeals permit interlocutory appeals in such situations.<sup>50</sup> On appeal after judgment, though, litigants may ask an appellate court to vacate the decision, claiming that the judge sat on the case despite a recusal-requiring conflict of interest, especially one that came to light after the conclusion of the underlying proceedings. An extensive body of judicial decisions has applied the disqualification statute in specific circumstances.<sup>51</sup> Disqualification controversies bubble up occasionally, often involving financial holdings, either when discovered by journalists;<sup>52</sup> during the course of litigation, sometimes with the appearance of tactical moves;<sup>53</sup> or during nomination battles.<sup>54</sup>

In any event, their disclosure reports are of limited help to some substantially invested judges in identifying possible conflicts of interest. Nor are they always of help to lawyers concerned that the judge assigned to their case may have a conflict; the reports, while publicly available, are not online, and they are subject to redaction by the judge. Moreover, a disclosure in, say, May 2014 of finances in the calendar year 2013 will not disclose any changes in judges' portfolios occurring after December 31, 2013. Thus, the Judicial Conference, in 2006, after news stories about judges participating in cases in which they should have recused themselves, requested the circuit councils to order each court to use software that keeps a list of each judge's current financial holdings that court staff can screen to flag potential conflicts of interest.<sup>55</sup> A few district courts post the judges' "conflicts" (i.e., stock holdings) on their public websites.<sup>56</sup>

Some have asked whether parties should have to prove that a judge has a conflict. Several years ago, after numerous reports about federal judicial conflicts

---

50. GEYH, *supra* note 45, at 97.

51. *See, e.g., id.*

52. *See, e.g.,* Jennifer Gollan & Shane Shifflet, *Federal Judge's Rulings Favored Companies in Which He Owned Stock*, CAL. WATCH (Nov. 20, 2012), <http://californiawatch.org/money-and-politics/federal-judge-s-rulings-favored-companies-which-he-owned-stock-18680>.

53. *See e.g.,* Kent Faulk, *Alabama Power Says Federal Judge Should Not Recuse Herself from Clean Air Lawsuit*, AL.COM (April 10, 2012 12:42 PM), [http://blog.al.com/spotnews/2012/04/alabama\\_power\\_says\\_federal\\_jud.html](http://blog.al.com/spotnews/2012/04/alabama_power_says_federal_jud.html).

54. Will Evans, *Controversial Bush Judge Broke Ethics Law*, SALON (May 1, 2006), [http://www.salon.com/2006/05/01/boyle\\_6/](http://www.salon.com/2006/05/01/boyle_6/); Will Evans, *Bush Withdraws Nominees*, SALON (Mar. 8, 2006), [http://www.salon.com/2006/05/01/boyle\\_6/](http://www.salon.com/2006/05/01/boyle_6/).

55. *See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11* (Sept. 19, 2006).

56. *See, e.g., Judges Information*, U.S. DIST. CT. N. DIST. OF IOWA, <http://www.iand.uscourts.gov/e-web/home.nsf/65944fc56773c56862573a30055c4f3/b722f1265f569f3a862573a3006983fb?OpenDocument> (last visited Mar. 10, 2014) (listing, under each judge, "Conflicts"); *Recusal List for Judges*, U.S. DIST. CT. S. DIST. OF W.VA., <http://www.wvsd.uscourts.gov/recusal-list-judges> (last viewed Mar. 10, 2014).

and a 5–4 Supreme Court decision involving a state supreme court justice who declined to disqualify himself in a case involving a party who had contributed heavily to his campaign,<sup>57</sup> a House Judiciary subcommittee considered taking federal judges' recusal decisions partially out of their hands by allowing each party in the case one automatic disqualification, akin to some states' provisions for peremptory challenges of judges.<sup>58</sup> The Judicial Conference resisted the proposal, on the practical grounds that finding replacement judges in small districts would be difficult and on the policy grounds that giving parties the right of automatic disqualification was akin to permitting judge-shopping.

#### b. Supreme Court Recusals

There has also been controversy over the recusal of Supreme Court Justices, both as to financial holdings and nonfinancial matters, such as public statements. The most visible recent example of such controversy surfaced in 2011 concerning the litigation over the Affordable Care Act. Liberals called for Justice Thomas to recuse himself because his wife was active in groups opposing the law, and conservatives pressed for Justice Kagan to recuse herself because, as Solicitor General, she may have had brief exposure to the administration's efforts to plot its litigation strategy.<sup>59</sup> Given the anticipated likelihood of a 5–4 ruling, both demands had a tactical taint.<sup>60</sup>

But these have hardly been the only recent allegations of possible conflicts. Journalists and others have alleged, for a few examples, possible conflicts stemming from a Justice's speaking too freely about his views on the rights of military detainees<sup>61</sup> (or later, litigation over gay rights);<sup>62</sup> Justices' serving as paid faculty at a law school whose dean was a frequent Supreme Court litigator;<sup>63</sup> attendance at the annual "Red Mass" at Washington's Cathedral of St. Matthew, where the archbishop

---

57. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

58. David Ingram, *Federal Judges Push Back Against Recusal Proposals, Congress Considers Revising Rules on Judge Disqualifications*, NAT'L L.J. (Dec. 14, 2009), <http://www.law.com/jsp/article.jsp?id=1202436291667&slreturn=20130924141158>.

59. The press was full of reporting about these calls. See, e.g., Pecquet, *supra* note 39; Jerry Seper, *Probe Urged of Kagan's Health Care Role*, WASH. TIMES (Jun. 30, 2011), <http://www.washingtontimes.com/news/2011/jun/30/lawmakers-seek-probe-elena-kagan-health-care-work/print/>

60. *But see, e.g.*, Eric Segal, *A Liberal's Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/obamacare\\_and\\_the\\_supreme\\_court\\_should\\_elena\\_kagan\\_recuse\\_herself\\_single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/obamacare_and_the_supreme_court_should_elena_kagan_recuse_herself_single.html).

61. Michael Isikoff, *Supreme Court: Detainees' Rights—Scalia Speaks His Mind*, NEWSWEEK (April 3, 2006), <http://www.informationclearinghouse.info/article12511.htm>.

62. Peter Hardin, *To Another Impeachment Call, Just Say No*, GAVELGRAB (December 14, 2012), <http://www.gavelgrab.org/?p=49518>.

63. Tony Mauro, *High Court Advocate Ken Starr Is Justices' Summer Employer*, LEGAL TIMES (Mar. 27, 2007), <http://www.law.com/jsp/article.jsp?id=1174912592026>.

commented on various litigation topics important to the Catholic Church;<sup>64</sup> heavily discounted memberships at private clubs;<sup>65</sup> attending, as featured guests, a dinner funded in part by the law firm of a key attorney in the challenge to the Affordable Care Act and in part by a large pharmaceutical manufacturer;<sup>66</sup> a Justice's attending and having named after her a lecture series sponsored by the NOW Legal Defense Group;<sup>67</sup> attending a fundraising dinner for a conservative publication (possibly problematic because the Justice had previously given a keynote address for the event);<sup>68</sup> trips funded by the Federalist Society and the American Civil Liberties Union;<sup>69</sup> accepting substantial gifts from a donor with a likely interest in the outcome of Supreme Court decisions, who also contributed to projects of manifest interest to the Justice;<sup>70</sup> and a Justice's son clerking on a prominent federal appeals court.<sup>71</sup>

As a practical matter, application of most ethics statutes to the Supreme Court is fairly straightforward. Both law and practicality, however, make more complicated the application of the judicial disqualification statute. Some have argued that Congress has no authority to say when the Justices must disqualify themselves, arguing that the "judicial power of the United States" as it is vested in the Supreme Court includes the sole authority to make recusal decisions.<sup>72</sup> Others argue that such regulation is well within Congress's authority, citing the Necessary and Proper Clause's authorization for Congress to bring the "Supreme Court into being," which it did, starting with the first Judiciary Act.<sup>73</sup> Subsequent statutes have defined the Court's term, its size, the Justices' oath of office, their former circuit-riding obligations, and the Court's support offices (the Marshal, Clerk of Court, Reporter of Decisions, and Librarian).<sup>74</sup>

---

64. Marcy Hamilton, *Did the Six Supreme Court Justices Who Chose to Attend the 54th Annual "Red Mass" Exercise Bad Judgment?*, FIND LAW (Oct. 3, 2007), <http://www.kreplaw.com/2007/10/re-marci-hamilton-did-six-supreme-court.html>.

65. Terry Carter, *University Club 'Public Service' Discount for Justices Causing a Stir*, A.B.A. J. (Mar. 10, 2009), [http://www.abajournal.com/news/article/university\\_club\\_public\\_service\\_discount\\_for\\_justices\\_causing\\_a\\_stir](http://www.abajournal.com/news/article/university_club_public_service_discount_for_justices_causing_a_stir).

66. James Oliphant, *Scalia and Thomas Dine with Healthcare Law Challengers as Court Takes Case*, L.A. TIMES (Nov. 14, 2011), <http://articles.latimes.com/2011/nov/14/news/la-pn-scalia-thomas-20111114>.

67. See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 533 n.7 (2005).

68. Jeff Shesol, *Should the Justices Keep Their Opinions to Themselves?*, N.Y. TIMES, June 28, 2011, at A23.

69. Editorial, *The Justices' Junkets*, WASH. POST (Feb. 20, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002961.html>.

70. Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES, June 18, 2011, at A1.

71. *Justice Alito's Son's Clerkship Sparks Ethics Discussion*, SBM BLOG (June 3, 2013 10:21 AM), <http://sbmblog.typepad.com/sbm-blog/2013/06/justice-alitos-sons-clerkship-sparks-ethics-discussions.html#sithash.8SGkKBZ7.dpuf>.

72. See, e.g., Virelli, *supra* note 22, at 1208.

73. Judiciary Act of 1789, 1 Stat 73.

74. See Frost, *supra* note 24.

Others have asked whether the recusal decision should be left solely to the Justice in question, whether requested by a party or not. Appellate review of a Justice's refusal to recuse him or herself when requested to do so by one of the parties is not available for the obvious reason that the United States has no appellate court higher than the Supreme Court.

Another question is whether the Justices should weigh the factors counseling recusal differently than do other federal judges. The Supreme Court does almost all of its business *en banc*, so when a Justice steps aside, no replacement Justice is available, and Congress has made no provision for temporary assignment of other judges or retired Justices to the Court. If, after a recusal, the eight remaining Justices split on the resolution, the decision below stands and the considerable energy by lawyers and the Court to resolve what the Court regarded as a question needing national resolution essentially goes to waste.

Justice Breyer described the situation to the Senate Judiciary Committee:

When I was on the court of appeals, if I had a close question, I'd take myself out of the case. They'll put someone else in. One judge is as good as another, frankly. But if I take myself out of the case in the Supreme Court that could change the result, because there's no one else to put in. And . . . it's possible [the parties] could . . . try to choose [their] panel . . . [by removing a Justice.] So what that means is that there's an obligation to sit, where you're not recused, as well as an obligation to recuse. And sometimes those questions are tough and I really have to think through and I have to make up my own mind. Others can't make it up for me. And that's a . . . very important part, I think, of being an independent judge.<sup>75</sup>

Some facts about recent recusals are in the table below, which is based on a review of the online syllabi on the Supreme Court's website for five recent terms (October Terms 2008–2012).<sup>76</sup>

---

75. *Considering the Role of Judges Under the Constitution of the United States: Hearing of the Senate Judiciary Committee*, 112th Cong. 27–28 (2012) [hereinafter *Considering the Role of Judges*] (statement of Stephen Breyer, Associate Justice of the Supreme Court of the United States).

76. See generally *Opinions*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinions/opinions.aspx> (last visited Mar. 9, 2014).

## RECUSALS, OTs 08–12

	2008	2009	2010	2011	2012	TOTAL
Roberts			1	1		2
Stevens		1				1
Kennedy				1		1
Breyer		1			1	2
Alito		2			1	3
Sotomayor		6	3	1	1	11
Kagan			29	4	2	35
TOTAL	0	10	33	7	5	55

The 417 cases that the Court accepted for review saw 55 recusals (in no case did more than a single Justice step aside). The number of recusals per term varied from none to 33, but 29 of those 33 were by Justice Kagan, who as Solicitor General had had contacts with many cases that went on to the Supreme Court; 3 more were by Justice Sotomayor, all involving cases that came from the Second Circuit court of appeals and with which we can presume she had had some contact while on that court. The next highest number, 10 in the 2009 term, included 6 by Justice Sotomayor (all in Second Circuit cases), 2 by Justice Alito (both from his former court in the Third Circuit), and 1 by Justice Breyer, from the Ninth Circuit, in which his brother may have been involved as a district judge. We do not know, of course, whether recusal in other cases might have been appropriate, but the Justice in question decided against recusal to avoid the four–four tie situation.

As to tie votes, the next table shows that 25 of the 55 cases with recusals were decided 8–0; 18 more were 7–1 or 6–2; 10 were 5–3. Two produced 4–4 ties, both in the 2010–2011 term and both involving Justice Kagan’s recusals.<sup>77</sup>

---

77. *Flores-Villar v. United States*, 131. S. Ct. 2312 (2011) (mem.); *Costco Wholesale Corp. v. Omega, S. A.*, 131 S. Ct. 565 (2010) (mem.).

## VOTE BREAKDOWN IN CASES WITH RECUSALS, OT 08–12

	2008	2009	2010	2011	2012	TOTAL
8–0		3	18	4		25
7–1		4	3		3	10
6–2			7	1		8
5–3		3	3	2	2	10
4–4			2			2
Total		10	33	7	5	55

This statement, though, is based simply on the count of Justices who joined the majority opinion or at least concurred in the judgment. It does not account for tie votes on particular questions implicated in the case. Justice Stevens, for example, recused himself prior to argument in a takings case involving Florida beachfront property, evidently because he learned that he owned property in an area similar to that involved in the litigation. The court was 8–0 in affirming the Florida Supreme Court but split on whether a judicial decision can constitute a taking.<sup>78</sup>

A fourth aspect of Supreme Court recusals is what Justices say or do not say about their recusal actions. Usually, they say nothing and the fact of recusal appears as a docket notation, confirmed by the recused Justice's absence from oral argument and by the published opinions' statements of participation. Not stating the reasons for recusals fuels curiosity in the press<sup>79</sup> that covers the court and from attorneys who argue before it. More broadly, some argue it "imperils [the Justices'] accountability and legitimacy," especially because the Court regularly offers reasons for its other collective decisions.<sup>80</sup>

In the rare cases when a Justice honors an equally rare petition that he or she step aside, even if the Justice says nothing, it is sometimes reasonable to infer the reason from the petition, as when the appellant in the case involving the Pledge of Allegiance's "under God" phrase petitioned for Justice Scalia's recusal after he

---

78. See *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 560 U.S. 702 (2010); see also, Tony Mauro, *Stevens' Recusal Makes Difference in Florida Property Ruling*, *LEGAL TIMES* (June 17, 2010, 2:33 PM), <http://legaltimes.typepad.com/blt/2010/06/stop-the-beach-the-difference-a-recusal-can-make-.html>.

79. See, e.g., Tony Mauro, *Why Does Justice Stevens Recuse in Agent Orange Cases*, *LEGAL TIMES* (Mar. 2, 2009, 2:45 PM), <http://legaltimes.typepad.com/blt/2009/03/why-does-justice-stevens-recuse-in-agent-orange-cases.html>; Mike Scarella, *Disclosure Sheds Light on Justice Alito's Recusals*, *LEGAL TIMES* (Jul. 17, 2013, 4:13 PM), <http://legaltimes.typepad.com/blt/2013/07/disclosure-sheds-light-on-justice-alitos-recusals.html>.

80. Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 *WASH. & LEE L. REV.* 1535, 1552 (2012).

commented publicly that the courts were not the proper forum to resolve the matter.<sup>81</sup>

Reasons for other recusals can often be reasonably inferred. Of the 55 recusals in the 5 most recent terms, all but 5 involved either former Solicitor General Kagan; former circuit judges Sotomayor (in cases from the Second Circuit) and Alito (cases from the Third Circuit); or Justice Breyer (cases from the Ninth Circuit in which, we can assume, his brother, a Northern District of California judge, may have participated). And one of the five, in which Justice Stevens recused, involved the Florida beachfront property described earlier.<sup>82</sup> The four others<sup>83</sup> probably involved investments, but that is speculation. If a Justice recuses and the record reveals that a relative is working on the case as a lawyer or is closely associated with it, chances are that recusal is to comply with a statement of policy the Justices announced in 2003 concerning recusal in such cases and that at least some more recent appointees have said they would follow.<sup>84</sup>

One exception to the no-comment practice was then-Associate Justice Rehnquist's explanation for why he refused to step down when asked to do so by a certiorari-seeking respondent who had sued the Secretary of Defense over alleged surveillance of citizens. As an Assistant Attorney General, Rehnquist had testified about similar programs, but not the one at issue in the case. Rehnquist said, in an oft-cited memorandum order, that he declined to recuse himself because he believed the petitioner was acting on an erroneous understanding of the disqualification statute, not a misunderstanding of the facts of the case, which, he said, would be pointless to review absent an adversary context. He emphasized that he did not believe Justices' offering of such explanations "would be desirable or even appropriate in any but the peculiar circumstances present here."<sup>85</sup>

More recently, Justice Scalia declined, initially without comment, a recusal request by one of the parties—echoed by calls in the press—in a case involving a Bush administration energy policy group headed by Vice President Cheney, whom Scalia had recently joined on a hunting trip. After being battered in the press, Scalia issued a lengthy opinion explaining why the circumstances of the trip did not require recusal and asserting that, given the Washington, D.C. social scene, it was

---

81. See Suggestion for Recusal of Justice Scalia, *Newdow v. United States*, App. No. 03-7 (Sept. 5, 2003), available at [http://supreme.lp.findlaw.com/supreme\\_Court/briefs/02-1624/03-7.recuse.pdf](http://supreme.lp.findlaw.com/supreme_Court/briefs/02-1624/03-7.recuse.pdf).

82. See generally *Stop the Beach Renourishment, Inc.*, 560 U.S. at 702; see also Mauro, *supra* note 79.

83. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (Alito, J., recused); *RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 131 S. Ct. 2065 (2012) (Kennedy, J., recused); *Credit Suisse Sec. v. Simmonds*, 131 S. Ct. 1414 (2012) (Roberts, C.J., recused); *Microsoft Corp. v. ISI Limited P'ship*, 131 S. Ct. 647 (2010) (mem.) (same).

84. See Lyle Denniston, *Roberts' Recusal Policy*, SCOTUSBLOG (Sept. 30, 2005, 4:54 PM), <http://www.scotusblog.com/2005/09/roberts-recusal-policy/>.

85. *Laird v. Tatum*, 409 U.S. 824, 824 & n.1 (1972).

impossible for the Justices to avoid contact with government officials who may be implicated in litigation.<sup>86</sup>

Needless to say, it would be highly unusual for a judge or Justice to respond to recusal demands by those not party to the litigation. Despite all the public calls for Justices Thomas or Kagan to recuse themselves in the Affordable Care Act case, neither said anything about it publicly.

### c. Proposals Regarding Supreme Court Recusals

#### i. H.R. 862

A 2011 bill—H.R. 862—would have required a Justice who recuses him- or herself to explain the reasons for the recusal on the record; required a Justice who denies a recusal motion to disclose the reasons for the denial; and required the Judicial Conference to create a “process” by which sitting or retired judges or Justices would hear appeals from unsuccessful recusal motions and “decide whether the justice . . . should be so disqualified.”<sup>87</sup> The bill (which had other provisions discussed in the next section)<sup>88</sup> was preceded by an open letter to Congress by over 100 law professors seeking legislation along the lines of the subsequently introduced bill.<sup>89</sup>

The legislation’s passage was never likely, but it generated a fair amount of commentary, in part because it came during the calls for Justices Thomas and Kagan to step aside in the then-brewing health care litigation, and in part because critics were pointing to what they regarded as other examples of ethical sloppiness on the part of some Justices, such as the those referenced in Part II.B.4.b.

H.R. 862’s recusal provisions may be seen as a specific effort to realize a more general proposal offered in 2005 by Professor Amanda Frost to establish a recusal procedure that reflects the key elements of good litigation. The procedure, she wrote, should enable litigants to frame the recusal question, provide an impartial decision-maker, encourage the challenged judge to respond to a disqualification motion, and require the judge to explain a recusal decision.<sup>90</sup>

Although Professor Frost’s itemization of these elements was well articulated, H.R. 862 (whether or not its drafters had her itemization before them) is instructive as to the difficulty of writing well-founded general concerns into specific legislation. The bill would have created what it called a “Process for Determining Recusal of Supreme Court Justices.” In fact, though, it would have created a judicial

---

86. Memorandum from Justice Scalia on Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 541 U.S. 913 (2004) (No. 03-475) (Justice Scalia’s recusal was requested by the Sierra Club, a respondent in another case consolidated with the principal case).

87. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Congress (2011).

88. See Parts II.C & III.C.6.b.

89. Letter from Mark N. Aaronson, Professor of Law, Univ. of Cal. Hastings Coll. of Law et al., to Senator Patrick Leahy et al. (Mar. 17, 2011), *available at* [http://www.afj.org/wp-content/uploads/2011/03/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/wp-content/uploads/2011/03/judicial_ethics_sign_on_letter.pdf).

90. See Frost, *supra* note 67, at 239–74.

body to consider the petitioner's arguments, similar to how an appellate court considers an argument that a district judge should not have denied a recusal petition. Some have argued that a judicial body of lower court judges would most likely violate the Constitution's Article III mandate that there be "one Supreme Court."<sup>91</sup> Others, however, have suggested that an individual Justice's recusal decision is not an action of the entire Supreme Court but of an individual Justice, and that a review of that individual action would not be a review of the Court's decision, even if it would be awkward policy at best.<sup>92</sup>

Some have proposed vesting the review decision in the entire Court,<sup>93</sup> and argue that a Conference-established "process" in which only active Justices participated clearly would not violate the "one Supreme Court" mandate. To say the least, we have little precedent on the "one Supreme Court" language. Chief Justice Charles Evans Hughes, however, in challenging President Roosevelt's 1937 proposal to add Justices to the Court, objected to the idea that the Court could sit in divisions if the extra Justices made it too large to sit as a single body. The "Constitution," he said, "does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."<sup>94</sup> Hughes's view, though, is hardly the only word on the subject.<sup>95</sup>

Consider, however, the practical problems if H.R. 862's court were to survive a constitutional challenge: In the first place, only parties to the litigation may move for a recusal, and Supreme Court litigants rarely do. That may be because there is no transparent process for deciding the motions, but more likely because frequent Supreme Court litigators are reluctant to create satellite issues or appear to question a Justice's integrity. (For all the publicity surrounding calls in the press, in Congress, and among interest groups for Justices Thomas and Kagan to step aside in the health care litigation, apparently none of the many parties in the combined cases filed disqualification petitions.) So the bill, if enacted, would put in place a procedure that would almost never be invoked. That could be a serious problem to the degree it would augment the frustrations of the many Court observers who believe the Justices sit on some cases where they should not.

But when a party moved for recusal and the Justice declined, the H.R. 862 court would have to balance the motion against what some see as a judge's "duty to sit." Congress may have intended to eliminate the "duty to sit" requirement in an

---

91. See Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011), <http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler>.

92. Amanda Frost, *Regulating the Supreme Court Justices' Ethics: A Response to Russell Wheeler*, ACSBLOG (Mar. 25, 2011), <http://www.acslaw.org/acsblog/regulating-the-supreme-court-justices-ethics-a-response-to-russell-wheeler>.

93. See, e.g., Jeffrey W. Stemple, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589, 644 (1987).

94. *Reorganization of the Federal Judiciary: Hearings Before the S. Comm. on the Judiciary*, 75th Cong. 488, 491 (1937) (statement from C.J. Charles Evans Hughes to Sen. Burton K. Wheeler).

95. See, e.g., Chris Guthrie and Tracy George, *Remaking the United States Supreme Court in the Courts of Appeals' Image*, 58 DUKE L. J. 1439 (2009).

amendment to the disqualification statute.<sup>96</sup> The Justices, though, have a special problem, as Justice Breyer explained, because there is no provision for a substitute Justice. It is one thing for an individual Justice to balance those considerations, but quite another for lower court judges on the H.R. 862 court to do it for them, or even for some or all of the other Justices to do so, creating inevitable suspicions of forum manipulation. Finally, H.R. 862 was aimed at recusal motions filed at the outset of the case in the Supreme Court.<sup>97</sup> But what if, after the decision, additional evidence of a possible conflict emerged? In the lower courts, parties may also raise disqualification challenges after the case's disposition. Thus, on H.R. 862's logic, should not the moving party in the Supreme Court be able to renew the recusal motion before the special court, trying to get the decision vacated and, in the process, add a new complication to constitutional adjudication?

#### ii. Applying the Code of Conduct to the Justices

H.R. 862 would also, in section 2(a), have applied the Code of Conduct for United States Judges to the Supreme Court. This Article discusses this proposal in the next section, which describes and analyzes the Code.<sup>98</sup> However, a bill in the 113th Congress, H.R. 2902 (and its Senate companion, S. 1424),<sup>99</sup> would simply have directed the Justices to adopt a code of conduct for themselves, based on the Judicial Conference's Code, including the Canon that basically repeats the disqualification statute verbatim.<sup>100</sup> It is hard to see how such a bill, if enacted, would do anything to change the Supreme Court recusal situation. The Court is already covered by the disqualification statute, although there is some disagreement concerning whether Congress has authority to bind the Justices.

#### iii. Temporary Assignment of Retired Justices

In 2011, Senate Judiciary Committee chair Patrick Leahy introduced legislation to allow retired Justices to fill in for recused Justices, in part to avoid the specter of four-four decisions.<sup>101</sup> (He evidently did so partly at retired Justice Stevens's suggestion.)<sup>102</sup> The proposal did not go very far and was criticized for its impracticality, and, to a degree, as a solution in search of a problem.<sup>103</sup> (Recall that of the 55 recusals in the 2008 through 2012 October Terms, only 2 produced ties.)

#### iv. Use of "Congress' Indirect Constitutional Tools"

---

96. See generally Frost, *supra* note 67.

97. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. § 3(b) (2011).

98. See Part II.C.

99. Both bills are titled the Supreme Court Ethics Act of 2013.

100. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3D (2014).

101. Lisa McElroy & Michael Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 83 n.4 (2011).

102. *Id.*

103. *Id.*

Professor Louis Virelli has argued that although Congress lacks the constitutional authority to regulate Supreme Court recusal, Congress could still use other tools to encourage more considered and transparent practices.<sup>104</sup> Those tools include impeachment or the threat of it, procedural regulations (such as an admittedly unenforceable requirement for Justices to give reasons for a failure to recuse), screening Supreme Court nominees for their views on recusal, real or threatened retaliation through the annual appropriations process, and oversight investigations. He concedes, however, that “each of these constitutional approaches is limited in its scope and potential effectiveness with regard to individual recusal decisions.”<sup>105</sup> Beyond that, impeachment threats, funding reductions, even more explosive confirmation wars, and oversight investigations of alleged conflicts of interest will strike many as fueling interbranch contentiousness to deal with a comparatively minor problem.

#### *5. Internal and External Performance Monitoring*

Chronic delay in resolving cases can be a form of judicial misconduct.<sup>106</sup> 28 U.S.C. § 604(a)(2) directs the A.O. to “transmit semiannually to the chief judges of the circuits, statistical data and reports as to the business of the courts.” Chief judges, judicial councils, and courts can use these reports to monitor performance and promote peer pressure on laggard judges.

The Office also publishes extensive reports based on these data, in particular, *Federal Court Management Statistics* and *Judicial Business of the United States Courts*.<sup>107</sup> These reports contain data for individual courts but not for individual judges. A 1990 statute<sup>108</sup> added a new public reporting requirement that directs the A.O. to publish reports twice a year, showing—for each district, magistrate, and bankruptcy judge—the number of motions and the number of bench trials pending more than six months, and the number of cases not terminated within three years of filing.<sup>109</sup>

The provisions have been at least modestly successful in encouraging judges to keep their dockets current and getting the press to spotlight judges with serious backlogs. An empirical study of civil case processing using federal court electronic docket entries found marked upticks in motions dispositions in the weeks

---

104. Virelli, *supra* note 80, at 1587–99.

105. *Id.*

106. See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 3(h)(3)(B) (2008).

107. *Federal Court Management Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (last visited Mar. 28, 2014); *Judicial Business of the United States Courts*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> (last visited Mar. 28, 2014).

108. 28 U.S.C. § 476 (2012) (Enhancement of judicial information dissemination).

109. *Civil Justice Reform Act Report*, U.S. COURTS, <http://www.uscourts.gov/Statistics/civilJusticeReformActReport.aspx> (last visited Mar. 28, 2014) (providing links to the last seven Civil Justice Reform Act Reports).

leading up to the six month reporting deadlines.<sup>110</sup> And journalists scour the reports.<sup>111</sup> Every year, for example, the *Texas Lawyer* releases its “Slowpoke Report,” based on the A.O. data.<sup>112</sup>

*C. The Code of Conduct*

The Judicial Conference in 1973 adopted what is now the Code of Conduct for United States Judges.<sup>113</sup> Violation of some of its provisions could meet the Judicial Conduct Act standard of “conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>114</sup> The Code, though, by its terms, is advisory and aspirational rather than legally binding—a view that some dispute.<sup>115</sup> Because the Code necessarily speaks in general terms, the Conference has authorized its Codes of Conduct Committee (plural because there is also a code for judicial employees)<sup>116</sup> to provide advice to judges and employees who seek guidance about whether an activity is or would be consistent with the Code; many requests involve recusal. For matters likely to be of interest to other judges, the committee reformulates the advice into more general advisory opinions, which are available on the federal judiciary’s public website.<sup>117</sup>

The Conference adopted its Code during a period of revitalized national interest in judicial conduct. A year earlier, in 1972, the American Bar Association had promulgated its Model Code of Judicial Conduct (“ABA Code”), replacing its 1924 Canons of Judicial Ethics.<sup>118</sup> The ABA Code has been the basis for state codes, which differ from the U.S. Code by, for example, providing guidance to judges who

---

110. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 77–79 (2010), available at [http://iaals.du.edu/images/wygwan/documents/publications/PACER\\_FINAL\\_1-21-09.pdf](http://iaals.du.edu/images/wygwan/documents/publications/PACER_FINAL_1-21-09.pdf).

111. See, e.g., Joe Palazzolo, *The Slowest Federal Judge in the Land*, *LEGAL TIMES* (Jan. 14, 2008) (describing the backlogs of Southern District of New York judge Stephen Robinson, who resigned from the bench in 2010).

112. See, e.g., John Council, *The Slowpoke Report*, 28 *TEXAS LAWYER* 1 (2012).

113. See generally *CODE OF CONDUCT FOR UNITED STATES JUDGES* (2014).

114. 28 U.S.C. § 351(a) (2012).

115. See, e.g., Frost, *supra* note 67; Frost, *supra* note 24.

116. *Code of Conduct for Judicial Employees*, in U.S. COURTS, GUIDE TO JUDICIARY POL’Y (last revised Aug. 2, 2013), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch03.pdf>.

117. *Published Advisory Opinions*, in U.S. COURTS, GUIDE TO JUDICIARY POL’Y. (last revised Sept. 5, 2013), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>.

118. GEYH, *supra* note 45, at 6.

stand for election or retention. Most states also have advisory committees,<sup>119</sup> such as Arizona's Judicial Ethics Advisory Committee.<sup>120</sup>

The U.S. Code's "Introduction" lists the judges to whom it "applies"—all the judges in the federal judicial branch except the Justices. Allegations of misconduct by some of the Justices<sup>121</sup> have produced calls for applying the Code to them as well.<sup>122</sup> H.R. 862, the bill introduced in 2011 and discussed in a previous section,<sup>123</sup> provided that the Code "shall apply to the justices . . . to the same extent as such Code applies to circuit and district judges" and would have created the mechanism described below to receive complaints that a Justice had violated the Code and to determine what sanctions to impose.<sup>124</sup> Those provisions were rife with difficulties. The proposed mechanism was impractical and inconsistent with the structure of federal judicial administration, and the bill would have created one disciplinary standard for the vast majority of judges (the Judicial Conduct Act's standard) and another for Supreme Court Justices (the Code of Conduct).<sup>125</sup>

It is telling that H.R. 862's principal sponsor, then-Representative Christopher Murphy (D-Conn.), who was elected to the Senate in 2012, has not introduced the bill in the 113th Congress but instead introduced a much simpler bill, S. 1424, identical to H.R. 2902, introduced by Representative Louise Slaughter (D-N.Y.). Her Supreme Court Ethics Act of 2013 would direct the Court to "promulgate a code of ethics for the . . . Supreme Court that shall include the 5 canons of the Code of Conduct for United States Judges . . . , with any amendments or modifications thereto that the Supreme Court determines appropriate."

H.R. 2902 has no more chance of becoming law than did H.R. 862, but the issues raised by their supporters and critics are not likely to go away. The Justices, though, have tried to make them go away by noting that although the Code, by its terms, does not apply to them, they nonetheless observe its guidelines. Shortly after H.R. 862's introduction, Justice Breyer, at a Senate Judiciary Committee hearing, referred to the Code of Conduct provisions:

[I]f I had an ethical question of when I recuse myself or something, I'd go look and see what they say and I didn't distinguish in my mind

---

119. See, e.g., Cynthia Gray, *Advisory Committees Let Judges Look Before They Leap*, 42 JUDGES' J. 29 (2003).

120. See *Judicial Ethics Advisory Committee*, COMM. ON JUDICIAL CONDUCT, <http://www.azcourts.gov/azcjc/JudicialEthicsAdvisoryCommittee.aspx> (last visited Mar. 10, 2014).

121. See Part II.B.4.b.

122. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Congress (2011).

123. See Part II.B.4.c.i.

124. See Part III.C.6.b.

125. See Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011), <http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler>.

whether they're legally binding or something that I just follow . . . . [N]o one . . . wants to violate any of those rules.<sup>126</sup>

At a House Appropriations subcommittee hearing, Justice Anthony Kennedy said that the Code's provisions "apply to the justices in the sense that . . . by resolution we've agreed to be bound by them." And, he added, "We can ask for advice from the [Judicial Conference's Codes of Conduct] committee . . . . And we do ask for that."<sup>127</sup>

In his 2011 Year End Report, Chief Justice Roberts said:

All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since, as the commentary accompanying Canon 1 of the Code explains, the Code "is designed to provide guidance to judges." . . . Every Justice seeks to follow high ethical standards, and the Judicial Conference's Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.<sup>128</sup>

As explained later in this section, these statements of voluntary compliance have not satisfied critics, nor have the Justices' arguments that applying the Code to them would be legally dubious. Congress created the Judicial Conference, said Chief Justice Roberts, "for the benefit of the courts it had created" and thus it or its committees "have no mandate to prescribe rules or standards for any other body."<sup>129</sup> Justice Kennedy has also said:

making [the Code] binding . . . , there's an institutional dissonance problem. Those rules are made by the Judicial Conference of the United States, which are district and appellate judges, and we would find it structurally unprecedented for district and circuit judges to make rules that supreme court judges have to follow. There's a legal problem in doing this.<sup>130</sup>

In response, H.R. 2902's findings say that Congress has "the authority to regulate the [Court's] administration," citing Congressional regulation of the Court's size, its quorum, and the dates of its terms.

Professors Charles Geyh and Stephen Gillers, two leading judicial ethics experts, have suggested that the Court's adopting of its own code of ethics would be

---

126. *Considering the Role of Judges*, *supra* note 75, at 24 (Statement of Justice Stephen Breyer).

127. *U.S. Supreme Court Budget: Hearing Before the Subcomm. of Fin. Servs. and Gen. Gov't of the H. Comm. on Appropriations*, 112th Cong. 8 [hereinafter *Appropriations Hearing*] (statement of Anthony Kennedy, J.) (on file with author), available at <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=9386305>.

128. ROBERTS, *supra* note 7, at 4–5.

129. *Id.* at 4.

130. *Appropriations Hearing*, *supra* note 127, at 8.

an important gesture in itself because such a “pledge . . . has great value . . . Just as the public rightly expects judges to follow their oaths of office, it will also assume that a justice who vows to abide by ethics rules that the court itself adopted will do so.” They acknowledge, though, that “there is no workable way to enforce compliance.”<sup>131</sup>

The lack of a compliance mechanism is important, because advocates seem to think that applying the Code to the Justices would end the behavior they find objectionable. Part of the problem concerns the verbs “apply” and “bind.” A *New York Times* editorial said Chief Justice Roberts’s 2011 Year End Report “skirted the heart of the problem: the justices are the only American judges not bound by a code of ethics,” and that Roberts “misstate[d] the code’s authority. While a justice can ignore the code, all other judges must obey it.”<sup>132</sup> The Alliance for Justice said, “[t]he code is administered on other judges by the U.S. Judicial Conference, chaired by the Chief Justice.”<sup>133</sup>

Although the Code’s “Introduction” says it “applies” to the judges it lists, “applies” does not necessarily mean that it imposes rules of behavior that, when violated, can subject a judge to a sanction. And although the Conference, as the Alliance for Justice put it, “administer[s] the Code on other judges,” it does so through the advisory—repeat, advisory—opinions of its Codes of Conduct Committee. The U.S. Code itself says that it “provide[s] guidance to judges.” A former Codes of Conduct Committee chair described the Code as “advisory and aspirational.”<sup>134</sup> And the Committee does not provide advice to third parties about whether a judge’s behavior violates the Code. The Committee, in other words, is not on active police patrol regularly assessing the behavior of all judges.<sup>135</sup> “We are not,” said the former Committee chair, “in the discipline business.”<sup>136</sup>

Moreover, the Conference has no plenary authority to issue orders.<sup>137</sup> The only possible statutory authority for the Judicial Conference to issue binding disciplinary rules is the authorization to issue rules implementing the Judicial

---

131. Charles Geyh & Stephen Gillers, *The Supreme Court Needs a Code of Ethics*, POLITICO (Aug. 8, 2013), <http://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-95301.html>.

132. Editorial, *Judicial Ethics and the Supreme Court*, N.Y. TIMES, Jan. 5, 2012, at A24.

133. *Reformers, Senior Lawmaker Charge Justice Thomas and Federal Appellate Judge Diane Sykes with Violating Judicial Ethics*, ALLIANCE FOR JUSTICE (Nov. 13, 2013), <http://www.afj.org/press-room/press-releases/reformers-senior-lawmaker-charge-justice-thomas-and-federal-appellate-judge-diane-sykes-with-violating-judicial-ethics>.

134. *An Interview with Judge M. Margaret McKeown: Interpreting the Code*, THIRD BRANCH (July 2009), [http://www.uscourts.gov/News/TheThirdBranch/09-07-01/AnInterview\\_with\\_Judge\\_M\\_Margaret\\_McKeown\\_Interpreting\\_the\\_Code.aspx](http://www.uscourts.gov/News/TheThirdBranch/09-07-01/AnInterview_with_Judge_M_Margaret_McKeown_Interpreting_the_Code.aspx).

135. *Id.*

136. *Id.*

137. *See supra* Part I.

Conduct Act.<sup>138</sup> But the Conference's Rules and their commentary<sup>139</sup> explicitly do not make the Code the standard by which to determine misconduct. Rather, the rules and commentary say that “[a]lthough the Code . . . may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility of determining what constitutes misconduct under the statute is the province of the judicial councils” (subject to limitations in the statute and the Rules),<sup>140</sup> as they interpret whether a judge engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts.”

Note also the distinction the Code itself draws: It tells judges that “they *must* comply with the law and *should* comply with this Code.”<sup>141</sup> Compare those words with the Arizona Code of Conduct, which says that it consists of canons, “numbered rules,” and explanatory comments. Rule 1.1 of the Arizona Code states that “[a] judge shall comply with the law, including the Code of Judicial Conduct,” and “a judge may be disciplined . . . for violating a rule.”<sup>142</sup>

It is true that the Code for federal judges says that it “may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,”<sup>143</sup> and chief judge and judicial council orders often cite the Code’s more specific provisions to justify a finding of “conduct prejudicial to the effective and expeditious administration of the business of the courts.” In fact, appellate courts sometimes cite the Code in assessing whether behavior of district judges merits reversal.<sup>144</sup> But that is hardly the same as saying that a violation of the Code is, *ipso facto*, “conduct prejudicial to the effective and expeditious administration of the business of the courts.”

Furthermore, a reading of the Code belies the *New York Times*’s caricature of it as “the rigorous code of conduct that applies to all other parts of the federal judiciary.”<sup>145</sup> Some of it is indeed specific; a judge, for example, “should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”<sup>146</sup> Much of it, though, is hortative and aspirational: “[a] judge,” for example, “should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>147</sup> Or a “judge should dispose promptly of the business of the court,” an admonition amplified by the commentary’s advising judges to “monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs [and]

---

138. 28 U.S.C. § 358 (2012).

139. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008).

140. *Id.* at cmt R. 3.

141. ARIZONA CODE OF JUDICIAL CONDUCT Canon 1 cmt. (2009) (emphasis added).

142. ARIZ. CODE OF JUDICIAL CONDUCT Canon 1 (2009).

143. *Id.* Canon 1 cmt (2009).

144. *Ligon v. City of N.Y.*, 736 F.3d 231 (2d Cir. 2013).

145. Editorial, *Cloud over the Court*, N.Y. TIMES, June 22, 2011, at A26.

146. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2C (2009).

147. *Id.* Canon 2A (2009).

to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission.”<sup>148</sup> These words, however, do little to clarify when making exceptions to these well-taken generalities constitutes misconduct, and none of the published advisory opinions provide any guidance, probably because no judge has sought any on this point.

Compare that to the Conference’s rules governing judicial misconduct proceedings: Misconduct cognizable under the Act, they say, does not include “an allegation about delay in rendering a decision or ruling unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.”<sup>149</sup> The commentary to the rule elaborates: “[A] complaint of delay in a single case . . . may be said to challenge the correctness of an official action of the judge—in other words, assigning a low priority to deciding the particular case,” which is merits related and thus beyond the purview of the Act. “But . . . an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.”<sup>150</sup>

This and other definitions in the rules come from standards adopted by the Breyer Committee, which, as noted at the outset of this Article, Chief Justice Rehnquist appointed to study the implementation of the Act. The Committee recognized that a “major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards.”<sup>151</sup> That the rules do not spell out in chapter and verse the universe of actions that do or do not constitute misconduct under the Act makes all the more important the publication of chief judge and judicial council orders, organized systematically, that interpret the Act, as described in Part III.C.4.b of this Article.

The Code of Conduct is a valuable resource that provides help in divining what constitutes “conduct prejudicial to the effective and expeditious administration of the business of the courts.” But it is highly misleading to regard it as a cure for whatever ethical problems the Justices may exhibit.

### III. POLICIES TO DEAL WITH ALLEGATIONS OF MISCONDUCT AND DISABILITY

In addition to policies that seek to deter or avoid misconduct and performance-degrading disability, there are several policies and instruments to investigate allegations of misconduct and disability and impose punitive or remedial measures. These are in addition to the Constitution’s impeachment and removal provisions and include ordinary civil and criminal prosecutions and a mechanism to

---

148. *Id.* Canon 3(A)(5), Canon 3(A)(5) cmt (2009).

149. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 3(h)(3)(B) (2008).

150. *Id.* at R. 3(h)(3)(B) cmt.

151. *Id.* at R. 1 cmt. The Rule’s definition of cognizable delay is based upon Standard 2 of Appendix E in THE JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, 239 FRD 116, 145–46 [hereinafter BREYER COMMITTEE REPORT].

receive and investigate allegations of misconduct and performance-inhibiting disability. In addition to these formal mechanisms, informal methods have long operated.

#### *A. Impeachment and Removal from Office*

The Constitution provides for the removal from office of the President, Vice President, “and all civil Officers of the United States” upon impeachment for and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>152</sup> The House of Representatives, over the history of the judiciary, has impeached 14 judges (almost all of them district judges but including one Supreme Court Justice). Of the 14, the Senate removed 9 from office and acquitted 2; 3 resigned to avoid a Senate conviction. Of the 14 impeachments, 5 occurred recently (since 1986), as did 4 of the 9 convictions; 1 of the 3 conviction-avoiding resignations was recent (in 2009).<sup>153</sup>

Commentators speak of a strong if unwritten assumption that Congress will not use its impeach-and-removal authority to punish judges for their judicial decisions.<sup>154</sup> That precedent dates to the 1805 acquittal of Justice Samuel Chase, whom the House had impeached for partisan and intemperate grand jury charges delivered while serving, as Justices did at that time, as trial judges on the circuit courts.<sup>155</sup>

#### *B. Prosecution Under General Civil and Criminal Statutes*

Federal judges are subject to state and federal civil and criminal statutes applicable to all persons. (Examples include a former federal judge sentenced to a month in prison for giving drug money to an ex-felon stripper while still a judge,<sup>156</sup> or, while hardly in the same league, a federal judge who settled a six-figure lawsuit with a municipality over some destroyed trees.<sup>157</sup>) Judges are, albeit rarely, objects of investigations by the Justice Department’s Public Integrity Section involving, for example, disputed reimbursement claims.<sup>158</sup>

---

152. U.S. CONST. art. II, § 4.

153. *Impeachments of Federal Judges*, FED. JUD. CTR., [http://www.fjc.gov/history/home.nsf/page/judges\\_impeachments.html](http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html) (last visited Feb. 25, 2014).

154. E.g., BENJAMIN WITTES, CONFIRMATION WARS, PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 104 (2006) Stephen G. Breyer, *Judicial Independence*, 40 ST. LOUIS U. L.J. 989, 990 (1996); William H. Rehnquist, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 273 (1997).

155. See, e.g., Richard Ellis, *The Jeffersonian Crisis*, in COURTS AND POLITICS IN THE YOUNG REPUBLIC 76–87, 96–107 (1971).

156. *Ex-judge Camp Sentenced to 30 Days in Prison*, SENT’G L. & POL’Y (Mar. 11, 2011), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/03/ex-judge-camp-sentenced-to-30-days-in-prison.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/03/ex-judge-camp-sentenced-to-30-days-in-prison.html).

157. Jennifer Langston, *Judge Pays Off Debt for Cutting Park Trees*, SEATTLE POST-INTELLIGENCER (May 26, 2006), <http://www.seattlepi.com/local/article/Judge-pays-off-debt-for-cutting-park-trees-1204642.php>.

158. Andrew Wolfson, *Federal Judge’s Retirement Ended Investigation into Travel Reimbursements*, LOUISVILLE COURIER-JOURNAL (Jan. 20, 2014), available at

**C. The Judicial Conduct and Disability Act**

*I. Main Provisions*

The Judicial Conduct and Disability Act establishes a mechanism for receiving and acting upon complaints about judges. The Act,<sup>159</sup> enacted in 1980 and amended several times since, authorizes “[a]ny person” to file a complaint alleging that a federal judge—but not a Justice—“has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>160</sup> (Complaints may also allege that a judge “is unable to discharge all the duties of the office by reason of mental or physical disability.”<sup>161</sup> As explained below,<sup>162</sup> such complaints are rare.) The statute also authorizes chief judges, without receiving a complaint, to “identify” (initiate) one based on information that has come to them.<sup>163</sup>

The chief judge may undertake a “limited inquiry” of the complaint, however received, including communicating with the judge and the complainant, and may “dismiss” the complaint if it is about behavior not covered by the Act; is directly related to the merits of a judicial decision; is “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred”; or contains allegations that cannot be established through investigation or that lack any factual foundation as revealed by the limited inquiry. Or the chief judge may “conclude” the proceedings if the judge complained of has taken “appropriate corrective action” or because intervening events moot the complaint (e.g., the judge’s death or resignation).<sup>164</sup>

The statute is clear, however, that the chief judge “shall not undertake to make findings of fact about any matter that is reasonably in dispute.” For matters reasonably in dispute, the chief judge must appoint a “special committee” comprising the chief judge and an equal number of the circuit’s district and circuit judges to undertake an investigation and present a “comprehensive written report” to the circuit judicial council.<sup>165</sup> The circuit judicial council may then take a variety of actions, such as dismissing the complaint, issuing public and private reprimands, requesting retirement of “good-behavior tenured judges,” and initiating removal proceedings for term-limited judges.<sup>166</sup> It may also tell the Judicial Conference that there may be grounds for impeachment,<sup>167</sup> which the Conference may forward to the House of Representatives.<sup>168</sup> Other provisions of the Act provide for notice to the

---

<http://www.courier-journal.com/article/20140120/NEWS01/301200041/Federal-Judge-Boyce-Martin-Jr-s-retirement-ended-investigation-into-travel-reimbursements>.

159. 28 U.S.C. Ch.16 (2012).

160. *Id.* § 351(a).

161. *Id.*

162. *See infra* Part III.C.2.

163. 28 U.S.C. § 351(b).

164. *Id.* § 352.

165. *Id.* § 353.

166. *Id.* § 354(a).

167. *Id.* § 354(b).

168. *Id.* § 355 (b)(1).

complainant and judge,<sup>169</sup> opportunity for either to seek Judicial Conference review of a judicial council action based on a special committee report,<sup>170</sup> a limited opportunity to appear and call witnesses once the proceeding moves beyond the special committee phase,<sup>171</sup> and council and Conference rulemaking to implement the Act.<sup>172</sup>

Complainants may seek judicial council review of a chief judge's order dismissing or concluding a complaint, but there is no appeal from a council decision affirming such an order.<sup>173</sup> Complainants often file such appeals, but the councils rarely reverse the chief judge, as explained in the next section.

Although the Supreme Court has not substantively reviewed the Act, it has been upheld in the U.S. Court of Appeals for the District of Columbia Circuit. The dispositive litigation<sup>174</sup> involved a challenge to a disciplinary order entered by the Fifth Circuit's judicial council and upheld by the Judicial Conference. The disciplined judge argued that federal judges are subject to only three types of discipline—impeachment and removal, criminal or civil prosecution, and appellate review. The district judge who heard the challenge noted that almost as soon as Congress created the federal judiciary it began to prescribe ethical rules for its members (the early disqualification statute).<sup>175</sup> As to appellate review, she explained that:

a court of appeals is not the appropriate forum to monitor and redress a judge's broad course of conduct consisting of abusive and intemperate behavior, unless it affects the merits in a given case . . . . [W]hile a court of appeals may review a lower court's legal conclusions and a given judge's conduct in isolated instances, a judicial council is able to examine a judge's course of conduct as it ranges over many interactions . . . . A judge's treatment of an attorney may not affect the outcome of a particular case or pending motion, thereby insulating it from review, and yet have a profound effect on the efficacy of the attorney's representation.<sup>176</sup>

## 2. Results—Basic Data

Pursuant to statute,<sup>177</sup> the A.O. publishes each year fairly detailed data on filings and terminations under the Act.<sup>178</sup> Data for the period 2011 to 2013 show

---

169. *Id.* §§ 353(a)(3), 354(b)(3).

170. *Id.* § 357.

171. *Id.* § 358 (b)(2).

172. *Id.* § 358.

173. *Id.* § 352(c).

174. *McBryde v. Comm. to Review Cir. Council Conduct & Disability Orders of the Jud. Conf. of the U.S.*, 83 F.Supp.2d 135 (D. D.C. 1999), *aff'd in part and vacated in part*, 264 F.3d 52 (D.C. Cir. 2001).

175. *Id.* at 153; *see also supra* Part II.B.3.

176. *McBryde*, 83 F.Supp.2d at 162.

177. 28 U.S.C. § 604(h)(2).

178. *See Complaints Against Judges*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/complaints-against-judges.aspx> (last visited Mar. 12, 2014);

between 1,200 and 1,400 complaints each year, almost all of which were dismissed by the chief judge or the circuit council on appeal, and a handful in which the chief judge concluded the proceeding. Chief judges appointed one special committee in 2011, four in 2012, and two in 2013.

Circuit or district judges were the object of 975 of the 1,219 complaints filed in 2013. The overwhelming majority of the complaints were filed by what the A.O. calls “Litigants” and “Prison Inmates;” each group filed about half the complaints. Almost all of the inmates were no doubt complaining about some aspect of the proceeding that got them incarcerated. Complaints often cited multiple grounds, but the single most highly cited ground was “Erroneous Decision” (879) followed by “Delayed Decision” (106), although 297 cited what the A.O. lumped together in an “Other Misconduct” category. There were only 27 allegations of disability. Not surprisingly, the most frequent reason chief judges gave for dismissal was “Merits Related.”

### 3. Results—Extended Analysis

High dismissal rates have prompted some observers to charge that chief judges and judicial councils sweep complaints under the rug. In March 2004, then-House Judiciary Committee Chairman James Sensenbrenner asserted as much in remarks to the Judicial Conference.<sup>179</sup> He objected to the disposition of his complaint about a Democratic appointee on the since-lapsed panel that appointed independent counsels. Sensenbrenner alleged that the judge had leaked to the press, on the eve of Vice President Gore’s presidential nomination, that an independent counsel had impaneled a grand jury to investigate President Clinton. Sensenbrenner also complained that the judge had not admitted to the leak when Gore and his supporters publicly charged that the Republican-appointed independent counsel, or one of the other two panel judges (both Republican appointees), had leaked the information to embarrass Gore and the Democratic Party.

Sensenbrenner alleged in remarks to the Judicial Conference that the chief circuit judge:

only eight days after [receiving the complaint], simply whitewashed the matter regarding his colleague . . . *without conducting any investigation . . .* This [and other matters] raise . . . profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself. If the Judiciary will not act, Congress will . . . begin assessing whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue.<sup>180</sup>

---

*Table S-22, Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. § 351–364 During Twelve Month Period Ending September 30, 2013, U.S. COURTS, (2013), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S22Sep13.pdf>.*

<sup>179</sup> *Remarks of House Judiciary Committee Chairman Sensenbrenner Before the U.S. Judicial Conference, 16 FED. SENTENCING REPORTER 280, 281 (2004).*

<sup>180</sup> *Id.*

These remarks (despite the near-universal gasps they provoked among Conference members) launched more than the Congressman likely anticipated, including a major study of the Act's implementation and a series of recommendations, which led to, among other things, the judicial branch's first set of mandatory rules for administering the Act. The rules sought to make its administration more transparent and consistent, and to provide greater central oversight.

To head off the threatened Congressional inquiry, Chief Justice Rehnquist appointed, in May 2004, a committee to study the Act's implementation, chaired by Justice Breyer and comprising two former chief circuit judges, two former chief district judges, and the Chief Justice's administrative assistant; it worked with a handful of employees of the A.O. and the Federal Judicial Center.<sup>181</sup> The committee's object was not to determine how much judicial misconduct occurs but rather whether chief circuit judges (and judicial councils) had treated the complaints as the Act could be read to require. For the most part, that involved determining whether the chief judge had improperly terminated complaints without appointing a special committee to investigate matters reasonably in dispute.<sup>182</sup> With staff assistance, the committee identified two stratified samples that totaled over 700 complaints drawn from the over 2,000 complaints terminated in 2001–2003 and a much smaller universe of 17 high-visibility complaints from 2001–2005. "High-visibility complaints" received some press attention and, in some cases, legislative attention.<sup>183</sup>

The committee applied strict standards in determining whether a chief judge or council disposition was problematic. One case involved a prisoner's allegation that the judge allowed a young man, probably his intern, to conduct the proceedings. The judge unequivocally denied the charge and said that during the period in question he had no intern and that his law clerk was an older woman. The chief judge dismissed the complaint as "frivolous on its face," but the committee said that "[t]he allegation, albeit bizarre, is not so outlandish as to be [considered] 'inherently incredible.'" The chief judge should have inquired of the prosecutor and defense lawyer, who the complaint said had a tape recording of the proceeding.<sup>184</sup>

As to the two large samples of complaints, the committee found only 3.4% of the terminations to be "problematic,"<sup>185</sup> but found an error rate of 29.4% among the 17 high-visibility complaints.<sup>186</sup> It attributed this higher error rate to the fact that complaints that get press or legislative attention are more likely than most to contain some plausible—not necessarily true—allegations, thus presenting chief judges and

---

181. BREYER COMMITTEE REPORT, *supra* note 151, at 119. Full disclosure: I served essentially as the committee's staff director, although there was no such formal title.

182. For descriptions of how the committee reviewed the staff's assessment of the complaint processing, *see id.* at 120–22.

183. For explanations of the sample, and high visibility case, identification, *see id.* at 150–53, 172–74, 253–54.

184. *Id.* at 161.

185. *Id.* at 153.

186. *Id.* at 199.

judicial councils with more difficult decisions and a greater likelihood of error.<sup>187</sup> The high-visibility complaints included many of the matters that called attention to federal judges' behavior during the period, including, for example, complaints about judges' serving on the board of the provider of free-market-oriented federal judicial educational programs,<sup>188</sup> which caused the Conference to adopt the reporting requirements described in Part II.B.3; complaints about a federal judge's charge that President Bush obtained the presidency in 2000 through Hitler-Mussolini-like methods;<sup>189</sup> an allegation of chief circuit judge procedural manipulation of litigation involving the University of Michigan law school's admission program;<sup>190</sup> and Representative Sensenbrenner's charge that the chief judge improperly dismissed his complaint (the committee agreed).<sup>191</sup>

Some post-Breyer Committee high-visibility cases include two complaints that judges filed against themselves once the behavior at issue surfaced in the press and the judges likely wanted a formal resolution of the allegations. One involved a chief circuit judge who maintained pornographic images in inadequately secured computer files (for which he was admonished).<sup>192</sup> Another involved the district judge (highlighted at the outset of the Article) who forwarded a racist email about President Obama on his government computer (he resigned from the bench).<sup>193</sup> Another highly visible complaint involved a district judge accused of misuse of government property, solicitation of prostitution, and parking illegally in a handicapped spot; he resigned while the council investigation was underway.<sup>194</sup>

The low rate of problematic dispositions—3.4%—accords with an earlier study using the same methodology to review terminations in the period 1980–1991, 2.6% of which, it concluded, were problematic.<sup>195</sup> These two rigorous studies suggest that, at least for the great majority of complaints, chief judges and judicial councils are implementing the statute as Congress intended. Furthermore, as a result of the Breyer Committee recommendations, the Judicial Conference Committee on Judicial Conduct and Disability has undertaken a more vigorous oversight and

---

187. *Id.* at 200.

188. *Id.* at 175–77 (finding the determination nonproblematic).

189. *Id.* at 196–98 (finding the determination nonproblematic).

190. *Id.* at 180–83 (finding the determination problematic).

191. *Id.* at 178–80 (finding the determination problematic).

192. See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 293–94 (3d Cir. 2008); Cynthia Colts, *Ethics Panel Admonishes Kozinski, Closes Case*, BLOOMBERG (July 2, 2009, 5:25 PM), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3gw\\_Q8QcoXA](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3gw_Q8QcoXA).

193. See MEMORANDUM OF DECISION, PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM OF THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT 2 (2014), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/ced-13-01Order-final-01-17-14.pdf>.

194. *District Judge Nottingham Resigns, Apologizes*, DENVER POST, (Oct. 21, 2008, 2:49 PM), [http://www.denverpost.com/news/ci\\_10777031](http://www.denverpost.com/news/ci_10777031).

195. See BREYER COMMITTEE REPORT, *supra* note 151. The earlier study is Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 30–31, 79 (1993).

monitoring role. And the chair of the committee seemed responsive to suggestions at 2013 congressional oversight hearings that the committee publish periodic summaries of its monitoring to provide transparency and assurance that the judicial branch continues to implement the statute properly.<sup>196</sup>

*4. Breyer Committee Recommendations to Enhance Transparency, Monitoring, and Oversight*

The Breyer Committee offered twelve recommendations for a more transparent, centrally monitored, and uniformly administered implementation of the Act. The Judicial Conference, in Rules adopted in 2008<sup>197</sup> and through other administrative steps,<sup>198</sup> appears largely to have embraced the recommendations. Professor Arthur Hellman, a leading commentator on the federal disciplinary machinery, has faulted the rules for not doing enough to promote open disclosure of the process as to “high-visibility” complaints,<sup>199</sup> but he agreed with the Committee assessment of “no serious problems with the judiciary’s handling” of routine complaints.<sup>200</sup>

**a. Publicizing How to File a Complaint**

The Committee recommended that judicial councils order all courts within the circuit to put information on their websites’ home pages on how to file a complaint, including the complaint form, and to consider including an admonition not to use the procedure to complain about the merits of judicial decisions.<sup>201</sup> Rule 28 largely embodies this recommendation, although it says nothing about the admonition and does not specify placement on the sites’ home pages. Nevertheless, periodic random checks suggest that, due to the Rules and A.O. emphasis on

---

196. See *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7, 77–78 (2013) [hereinafter *An Examination of the Judicial Conduct and Disability System*] (statement of Hon. Anthony J. Scirica, Senior Judge, 3d Cir. Court of Appeals and Chair, Judicial Conference Comm. on Judicial Conduct and Disability), available at [http://judiciary.house.gov/\\_files/hearings/printers/113th/113-25\\_80544.PDF](http://judiciary.house.gov/_files/hearings/printers/113th/113-25_80544.PDF).

197. See generally RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008).

198. See *An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 16–20 (statement of Hon. Anthony J. Scirica).

199. See Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 325, 351 (2008); *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 34 (2013) [hereinafter Statement of Hellman] (statement of Arthur D. Hellman), available at [http://judiciary.house.gov/\\_files/hearings/printers/113th/113-25\\_80544.PDF](http://judiciary.house.gov/_files/hearings/printers/113th/113-25_80544.PDF).

200. Statement of Hellman, *supra* note 199, at 41.

201. See BREYER COMMITTEE REPORT, *supra* note 151.

adhering to them,<sup>202</sup> the information is fairly easy to find on most court websites, a far cry from the situation the Breyer Committee staff found in 2005–2006.<sup>203</sup>

#### b. Publicizing Final Orders

The Rules require the circuits to “mak[e] final orders] public,” but provide the option of “placing them in a publicly accessible file in the office of the circuit clerk *or* by placing the orders on the court’s public website. If the orders appear to have precedential value, the chief judge may cause them to be published.”<sup>204</sup> The rule itself offers two reasons for publicizing final orders, both consistent with Breyer committee recommendations, which in turn reflect transparency goals articulated by earlier commissions and judicial branch guidance.<sup>205</sup> One reason is to develop a body of precedents on how to apply the Act. The same rule promises that the Judicial Conduct Committee will make selected orders available on the federal courts’ website. At the April 2013 House Judiciary subcommittee hearings, the chair of the committee said that it would post on the website a “*Digest of Authorities*, a body of precedent in judicial conduct and disability cases.”<sup>206</sup>

The other reason for publicizing orders, in the words of the relevant rule, is “to provide additional information to the public on how complaints are addressed under the Act.”<sup>207</sup> Providing the option of *not* having to post orders on the courts’ public websites could be read as a conscious policy *not* to provide “additional information to the public on how complaints are addressed under the Act.” Four

---

202. Tony Mauro, *Makeover Urged for Federal Court Web Sites*, BLT: BLOG OF LEGALTIMES (Feb. 10, 2011, 10:11 AM), <http://legaltimes.typepad.com/blt/2011/02/look-for-a-makeover-in-federal-court-web-sites.html>.

203. See BREYER COMMITTEE REPORT, *supra* note 151, at 144–45.

204. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 24 (2008) (emphasis added).

205. See BREYER COMMITTEE REPORT, *supra* note 151, at 216–17.

206. See *An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 20 (statement of Hon. Anthony J. Scirica). The statement anticipated the digest’s posting in the summer of 2013; it was not available on the federal courts’ public website in early March 2014.

207. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 24(b) (2008).

circuits have taken advantage of the paper-only option,<sup>208</sup> seven post all orders,<sup>209</sup> and two post only those that have precedential value.<sup>210</sup>

Another barrier to public understanding of the Act's operations is the failure of circuits that post orders to identify the nature of the orders. They simply list each order by date and case number only, making no distinction between the few nonroutine orders and the great majority of routine orders.<sup>211</sup> Sifting through extensive lists of chaff to identify the relatively small amount of wheat (the few substantive orders) is a major task.<sup>212</sup> Circuits could identify which orders the chief judge or council believes to have precedential value as well as those that are otherwise unusual. At the least, the list could include the number of pages of each posted order as a rough surrogate for orders that are likely not routine dismissals. A list of 18 chief judge orders and one judicial-council-affirming order have been lifted from the Ninth Circuit Judicial Council website and copied below. All but one were routine dismissals of only a single page or a few lines longer. The list gives no indication that the January 24 order was 38 pages and dealt with the conduct referenced in the third headline in the Introduction to this Article.

---

208. The Fourth, Sixth, Eighth, and Eleventh Circuits, as of early March 2014.

209. See *Final Orders on Complaints of Judicial Misconduct*, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/judicial-conduct-disability> (last visited Feb. 7, 2014); *Judicial Conduct and Disability Opinions – 2013*, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, <http://www.ca3.uscourts.gov/judicial-conduct-and-disability-opinions-2013> (last visited Feb. 7, 2014); *In re Complaint Against a Judicial Officer: Memorandum Decision*, JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT, [http://www.ca7.uscourts.gov/JM\\_Memo/jm\\_memo.html](http://www.ca7.uscourts.gov/JM_Memo/jm_memo.html) (last updated Feb. 14, 2014); *In re Complaint of Judicial Misconduct*, U.S. COURTS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/misconduct/> (last visited Feb. 7, 2014); *Misconduct Decisions*, THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, <http://www.ca10.uscourts.gov/ce/misconduct/opinions> (last visited Feb. 7, 2014); *Judicial Misconduct and Disability – By Release Date*, U.S. COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT, <http://www.cadc.uscourts.gov/internet/misconduct.nsf/DocsByRDate?OpenView&count=100> (last visited Feb. 7, 2014); *Judicial Reports*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judicial-reports> (last visited Feb. 7, 2014).

210. See *Judicial Conduct*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, [http://www.ca2.uscourts.gov/judges/judicial\\_conduct.html](http://www.ca2.uscourts.gov/judges/judicial_conduct.html) (last updated Jan. 17, 2014); *Judicial Misconduct Orders*, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, <http://www.ca5.uscourts.gov/JudicialMisconductOrders.aspx> (last visited Feb. 7, 2014).

211. This statement is based on my review of the various courts of appeals websites.

212. The partial list of orders were copied, as noted, from the Ninth Circuit Judicial Council Website on March 12, 2014.

Results: 1 - 500 of 837			Pages:  << <<1, 2>> >>	Page size: 500
CASE NO.	DATE OF DECISION			
12-90100	January 31, 2014	Order, Chief Judge		
12-90099	January 31, 2014	Order, Chief Judge		
12-90027 - 12-90031, 12-90033 - 12-90035, 12-90039, 12-90042, 12-90043, 12-90050	January 24, 2014	Order, Chief Judge		
13-90067 - 13-90069	January 17, 2014	Order, Chief Judge		
13-90060	December 03, 2013	Order, Chief Judge		
13-90105 & 13-90106	December 02, 2013	Order, Chief Judge		
13-90053	November 20, 2013	Order, Chief Judge		
12-90129	November 19, 2013	Order, Chief Judge		
13-90064	November 18, 2013	Order, Chief Judge		
13-90024	February 11, 2014	Order, Judicial Council		
13-90024	November 18, 2013	Order, Chief Judge		
13-90043	November 13, 2013	Order, Chief Judge		
13-90041	November 06, 2013	Order, Chief Judge		
13-90050 - 13-90052	November 04, 2013	Order, Chief Judge		
13-90047 - 13-90049	November 04, 2013	Order, Chief Judge		
13-90032	November 04, 2013	Order, Chief Judge		
12-90163	October 28, 2013	Order, Chief Judge		
13-90009, 13-90001, 13-90076, 13-90090, 13-90092 - 13-90094 and 13-90155	October 16, 2013	Order, Chief Judge		
12-90164	September 26, 2013	Order, Chief Judge		

Partial list of Judicial Conduct and Disability Act final orders on the Ninth Circuit Judicial Council Website, visited Mar. 12, 2014, <http://www.ca9.uscourts.gov/misconduct/>.

#### c. Chief Judges' Identifying Complaints

The Breyer Committee called for greater education for chief circuit judges about their responsibilities under the Act, including “[w]hen to identify a complaint” based on information available to the chief judge. The Committee concluded that normally the best course for the chief judge upon receiving such information is to seek an informal resolution.<sup>213</sup> It pointed, though, to one of the high-visibility cases it examined, in which a chief judge declined to identify a complaint because he thought that, had he done so, he then would have dismissed the allegations. The Committee concluded that the better course would have been to identify the complaint, conduct a limited inquiry, and if it indicated dismissal, dismiss the

---

213. BREYER COMMITTEE REPORT, *supra* note 151, at 214.

complaint with a public order. Doing so would show that the judiciary takes complaints seriously, and, if there is a dismissal, it would protect the judge against rumors of wrongdoing.<sup>214</sup>

The Judicial Conference Rules have adopted the Committee recommendation,<sup>215</sup> but given the limited information on the courts' websites about disciplinary orders, it is difficult to assess the extent of compliance with the rule. Press coverage brought to light two recent examples of chief judge-identified complaints<sup>216</sup>—separate incidents several years ago in two circuits, in which judges contributed respectively to state and federal political campaigns, contrary to the Code of Conduct. The chief circuit judges promptly identified complaints and sought responses from the judges, who admitted having made the contributions while confessing ignorance of the prohibition. The chief judges took the confessions as corrective action and concluded the proceedings, putting the matters to rest.<sup>217</sup>

It would have been difficult to identify either incident without the press reports, i.e., merely by surfing the circuits' websites. One of the orders referred to above was in a circuit that does not post orders electronically. The other circuit posts its orders, but the order in question was simply listed as "Decision in Case Number 10-08-90999," one of eight similarly labeled decisions released on November 11, 2008 and one of many hundreds of similarly labeled orders listed since January 2008. It would take an intrepid researcher to go through each of the hundreds of orders to identify others in which the chief judge identified the complaint.

#### **d. Greater Oversight by the Judicial Conduct Committee**

The Judicial Conduct Committee has adopted a general oversight function and, according to its chair, "receives information on all complaint-related orders and examines a number of them to confirm that all proper procedures were followed" as well as to identify novel orders and orders in high-visibility cases.<sup>218</sup> The Committee released two 2014 orders emphasizing, as explained in the footnote, the importance of transparency with respect to serious allegations.<sup>219</sup>

---

214. *Id.* at 213.

215. *See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 5-7 (2008).*

216. Matt Canham, *Chief Utah Federal Judge Apologizes for Rule-Violating Obama Donation*, SALT LAKE TRIBUNE, (Oct. 24, 2008, 2:26 PM), [http://www.sltrib.com/News/ci\\_10806793](http://www.sltrib.com/News/ci_10806793); Will Evans, *Judge Apologizes*, CTR. FOR INVESTIGATIVE REPORTING (Jan. 11, 2007), <http://cironline.org/reports/judge-apologizes-2163>.

217. *In re: Complaint of Misconduct*, No. 07-6-351-01 (Judicial Council of the 6th Cir. 2007) (on file with author); *In re: Charge of Judicial Misconduct*, No. 10-08-90099 (Judicial Council of the 10th Cir. 2008) (on file with author).

218. *See An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 18-19 (statement of Hon. Anthony J. Scirica).

219. *In re: Complaint of Judicial Misconduct*, C.D.D. No. 13-01, (Comm. on Judicial Conduct and Disability Jan. 17, 2014), available at <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (follow "January 17, 2014 (C.C.D. No. 13-01)" hyperlink) (granting petitions

The Breyer Committee recommended that the Judicial Conference's Judicial Conduct Committee make clear that council members could alert the Committee chair if they believe appointment of a special committee would be warranted; the chair of the Committee could then provide any advice to the respective chief judge that the chair believed was warranted.<sup>220</sup> The Rules go further, vesting the Committee with what the Committee chair characterized as “reach down’ authority,”<sup>221</sup> which is basically the authority to determine whether a chief judge should have appointed a special committee.<sup>222</sup> Such authority can prevent chief circuit judges from making decisions about matters reasonably in dispute under the guise of a limited inquiry and then dismissing the complaint rather than appointing a special committee. Doing so shields the chief judge’s factual findings from review by the Judicial Conference because a complainant may not appeal a chief judge order dismissing or concluding a proceeding beyond the circuit council.<sup>223</sup>

One of the Breyer Committee’s high-visibility cases presented such a situation.<sup>224</sup> A district judge had intervened *sua sponte* in a bankruptcy proceeding involving a probationer whom the judge was supervising; the case included allegations of an *ex parte* communication. Although the case presented, in the Breyer Committee’s view, “matters reasonably in dispute,” the chief circuit judge, after investigating the matter, dismissed the complaint—a dismissal affirmed by a divided judicial council. Despite the statutory ban on such appeals, the complainant sought relief from what is now the Judicial Conference Judicial Conduct Committee. That Committee, in a divided vote, determined, as summarized by the Breyer Committee,

---

seeking review of orders of the Ninth Circuit judicial council for failure to release orders documenting hundreds of inappropriate emails and for failure to make public the name of the judge); *In re: Complaint of Judicial Misconduct*, C.D.D. No. 13-01, (Comm. on Judicial Conduct and Disability Jan. 17, 2014), *available at* <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (affirming the order of the Second Circuit judicial council, to whom the Chief Justice transferred a complaint initiated by the Chief Judge of the Sixth Circuit, making public the name of a judge alleged to have sought unwarranted travel reimbursements and referring the matter to the Justice Department’s Office of Public Integrity).

220. BREYER COMMITTEE REPORT, *supra* note 151, at 223.

221. *An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 18 (statement of Hon. Anthony J. Scirica). See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 21(b)(1) (2008).

222. See generally RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008).

223. See *supra* Part III.C.1.

224. BREYER COMMITTEE REPORT, *supra* note 151, at 184–89. The decision and opinions of the Judicial Conference Committee in this matter, Opinion of the Committee to Review Circuit Council and Disability Orders, April 28, 2006, are available at <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (follow “April 28, 2006” hyperlink). The Judicial Conference Executive Committee in March 2007 changed the name of the committee from that immediately above to the Committee on Judicial Conduct and Disability. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5 (Mar. 13, 2007), *available at* <http://www.uscourts.gov/judconf/07MarchProceedings.pdf>.

"that the Act is clear that the Conference may only review council actions taken pursuant to a special investigative committee; the chief judge had not appointed such a committee . . . , but instead had dismissed the complaint under section 352, a dismissal upheld by the council's . . . order."<sup>225</sup>

A possibly similar incident occurred in another circuit as the Breyer Committee was completing its September 2006 report, but before the Conference adopted its rules governing judicial conduct proceedings. A May 2006 news article reported that a district judge, at a naturalization ceremony, described to the citizens-to-be the "good work" of a local congressman who had just addressed them.<sup>226</sup> It further reported that the judge said "'for [him] to continue doing his good work, he needs your vote, OK?'"<sup>227</sup> A person other than the reporter<sup>228</sup> filed a complaint, which the chief circuit judge dismissed in a six-page October 2006 order.<sup>229</sup>

The subject judge, in responding to the complaint—in particular to the article's "he-needs-your-vote" allegation—said that he emphasized the importance of voting and told the new citizens that they could register to vote outside the auditorium and added: "If they liked what [the congressman] was doing, they could vote for him too."<sup>230</sup> The chief judge's order said:

[T]he judge's prepared remarks . . . did not go beyond praise of [the congressman's] prior public service, praise that would have been appropriate in introducing any elected official. In this context, the judge's unrecorded impromptu remark following the congressman's speech—whether quoted more accurately by the journalist or by the judge in his response—did not convert the judge's conduct in presiding over this important judicial ceremony into the public endorsement of a candidate for public office [and] clearly did not constitute the type of willful misconduct in office that is prejudicial to the effective and expeditious administration of the business of the courts within the meaning of 28 U.S.C. § 351.<sup>231</sup>

There is a fair argument that "a matter reasonably in dispute" is whether the judge said "they could vote for" the Congressman or said the Congressman "needs your vote." The order referred to "the judge's unrecorded impromptu remark," but did not describe any efforts the chief judge may have directed his staff to undertake to ascertain if in fact there was no available recording of the event—or to interview the reporter. A special committee might have investigated the incident.

---

225. BREYER COMMITTEE REPORT, *supra* note 151, at 187–88.

226. Tim O'Neil, *Judge Urges New Citizens to Vote for Rep. Clay Code of Conduct Bars Federal Judges from Making Endorsements*, ST. LOUIS POST-DISPATCH, May 1, 2006, at B2.

227. *Id.*

228. John Stoeffler, *Judge Loken's Loose Logic*, ST. LOUIS TODAY (Nov. 14, 2006, 12:00 PM), [http://www.stltoday.com/suburban-journals/judge-loken-s-loose-logic/article\\_90f526b5-2f89-50fb-919a-c481c3b0725f.html](http://www.stltoday.com/suburban-journals/judge-loken-s-loose-logic/article_90f526b5-2f89-50fb-919a-c481c3b0725f.html).

229. In re: Complaint of John Doe, Judicial Council of the Eighth Circuit, JCP No. 06-013, October 11, 2006 (on file with author).

230. *Id.* at 3.

231. *Id.* at 5–6.

If it concluded the judge offered an endorsement, even if impromptu and not overtly partisan, it might have recommended a very mild sanction. It might have concluded that a judge's saying "he needs your vote" may have come across to new citizens from totalitarian countries differently than it might have to two federal judges. Or it might have tried to determine if this was an isolated incident or whether the judge had offered endorsements of political candidates on other occasions.

The Judicial Conference's 2008 rules for processing judicial conduct complaints provide that the Conduct Committee "may review any judicial-council order [affirming a chief judge order dismissing a complaint or concluding a proceeding], but only to determine whether a special committee should be appointed."<sup>232</sup> "If [after reviewing the council's and chief judge's explanations of why a special committee should not have been appointed], the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons."<sup>233</sup> None of the Committee's published opinions as of mid-March 2014<sup>234</sup> deal with similar situations.

##### *5. Other Recommendations*

Two other recommendations about the Act, neither made by the Breyer committee, merit brief comment.

###### **a. Involving Nonjudges in Complaint Review**

One recommendation comes from the 1993 report of the statutorily created National Commission on Judicial Discipline and Removal.<sup>235</sup> The Commission's Report<sup>236</sup> dealt with the fact (without mentioning it explicitly) that the investigatory bodies that implement the Judicial Conduct Act (the special committees, judicial councils, and Judicial Conference) consist exclusively of federal judges. By contrast, every state has some form of judicial disciplinary mechanism, and in each state, the investigating body consists of judges, lawyers, and nonlawyers. The mechanisms in some states have two bodies—an investigating body (similar to the federal system's special committees) and an adjudicatory body (similar to the judicial councils)—or a single body that both investigates and adjudicates.<sup>237</sup> In Arizona, the Commission on Judicial Conduct performs both roles. Its members include six judges appointed by the Arizona Supreme Court from the state's various

---

232. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 21 (2008).

233. *Id.*

234. Based on author's review of the seven opinions published on the U.S. Courts website: <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx>.

235. Judicial Improvement Act of 1990, Pub. L. 101-650, §§ 408-18, 104 Stat. 5122 (1990).

236. REPORT OF THE NAT'L COMM. ON JUDICIAL DISCIPLINE & REMOVAL, 152 F.R.D. 265 (1994).

237. BUREAU OF JUSTICE STATISTICS, *supra* note 21.

appellate and trial courts, two lawyers appointed by the state bar, and three nonlawyers appointed by the governor after Senate confirmation.<sup>238</sup>

The 1993 National Commission proposed no change to the judicial council statute but did recommend that “each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints” as well as to “work with chief judges to identify problems that may be amenable to informal resolution.”<sup>239</sup> This proposal has never been embraced, although the Breyer Committee recommended something slightly similar, discussed below.<sup>240</sup>

#### b. A Complaint Mechanism for the Supreme Court

The other recommendation comes from H.R. 862, discussed above with respect to disqualification and recusal of Supreme Court Justices.<sup>241</sup> A provision of the bill would have directed the Conference to investigate “complaints . . . that a justice . . . has violated the Code of Conduct,” and to take “appropriate” action, using procedures “modeled after” the Judicial Conduct Act. This provision reflects a misunderstanding of the binding nature of the Code of Conduct, discussed in the previous section.<sup>242</sup>

The provision is also at odds with the administrative configuration of the federal courts. Most state supreme courts are integral parts of their state judicial system’s administration, and the judicial discipline mechanism can usually discipline a member of the state supreme court. The Alabama Court on the Judiciary, for example, with no Alabama Supreme Court members,<sup>243</sup> (similar to Arizona’s Commission on Judicial Conduct),<sup>244</sup> removed Chief Justice Roy Moore from office for disobeying a federal court order to dismantle a carving of the Ten Commandments that he had installed in the courthouse.<sup>245</sup>

As explained earlier in Part I, the U.S. Supreme Court is not administratively part of the federal judiciary in the same sense as the district and appellate courts. In 1939, Congress considered making the Supreme Court the administrative head of the federal judicial system. At the urging of, among others, the Court itself, Congress instead vested that authority in what is now the United States Judicial Conference.<sup>246</sup> There would seem no constitutional reason why

---

238. ARIZ. CONST. art. 6.1, § 1(A).

239. REPORT OF THE NATIONAL COMMISSION OF JUDICIAL REMOVAL, NAT’L COMM’N OF JUDICIAL REMOVAL, 152 F.R.D. 265, 346 (1994).

240. See *infra* Part III.D.3.

241. See *supra* Part II.B.4.c.(1).

242. See *supra* Part II.C.

243. See *Court of the Judiciary Overview*, ALA. APPELLATE COURTS, <http://judicial.alabama.gov/judiciary/judiciary.cfm> (last visited Mar. 10, 2014).

244. See ARIZ. CONST. art. 6.1, § 1(A).

245. See *In re Matter of Roy S. Moore*, Chief Justice of the Supreme Court of Alabama, Final Judgment, Court of the Judiciary, Case No. 33, Nov. 13, 2003, available at [http://www.foxnews.com/projects/pdf/111303\\_moore.pdf](http://www.foxnews.com/projects/pdf/111303_moore.pdf).

246. See PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 128, 138–42 (1973).

Congress could not integrate the Supreme Court into a unified federal judicial administrative machinery as head of the system (and eliminate the Judicial Conference or make it an advisory body). But Congress has not done so and there is no pressure to do so.

Unless it does, though, the current arrangement is at odds with making the Conference the overseer of complaints about the Justices' ethics. And consider the impracticality of having lower court judges decide what behavior by Justices is not acceptable and what to do about it. The Judicial Conduct Act authorizes councils to suspend a judge's case assignments. A Conference order telling a Justice to sit out a few cases could create a constitutional crisis. Given the Supreme Court's visibility, the Conference likely would be flooded with complaints, almost none of which would be meritorious. The high dismissal rate would breed more cynicism, and perhaps stoke unjustified legislative antagonism. And, while it is highly unlikely that lower court judges would take any action against members of the Supreme Court, there would be little benefit in pulling those judges into partisan battles over Supreme Court Justices.

#### *D. Informal Controls and Guidance*

The Breyer Committee concluded that the great bulk of possible misconduct (and performance-degrading disability) does not surface in complaints filed under the Judicial Conduct Act. It highlighted several means of dealing with such conduct and disability.

##### *1. Counseling Services*

The Judicial Council of the Ninth Circuit several years ago established a Private Assistance Line Service (P.A.L.S.), under which a private counselor, by contract with the circuit, is available to provide advice to chief judges dealing with delicate matters of perceived or actual misconduct or disability, or to judges and their families in need of assistance.<sup>247</sup> The P.A.L.S. program receives about four to six calls per year. Most come from chief district judges or another judge calling at the chief judge's request. Some come from family members, but very few come from judges seeking assistance for their own circumstances.<sup>248</sup> Although the Breyer Committee recommended that other judicial councils consider establishing similar programs,<sup>249</sup> it appears that only one other circuit has done so: the Tenth Circuit's JHealth, which the judicial council put into effect apparently in 2011. The program was created and is operated and supervised by the council's Judicial Health and Assistance Committee.<sup>250</sup>

---

247. Richard Carlton, *Addressing Disability and Promoting Wellness in the Federal Courts*, 90 JUDICATURE 26, 28 (2006).

248. Information provided in a November 14, 2013 email from Tina Brier, Assistant Circuit Executive, Ninth Circuit (on file with author).

249. BREYER COMMITTEE REPORT, *supra* note 151, at 221–22.

250. Information provided in a November 21, 2013 email from Victoria Giffin, Assistant Circuit Executive, Tenth Circuit (on file in redacted version with author).

*2. Informal Chief Judge Action, in the Shadow of the Judicial Conduct Act*

The Breyer Committee and its staff conducted interviews with current and former chief circuit judges, one of whom referred to the Judicial Conduct Act as “a bargaining chip the chief judge could use, hanging in the background.”<sup>251</sup> Another reported that there “have been no special committees during my time as chief judge. That underscores how much the formal process interacts with, but does not necessarily govern, the most serious cases.”<sup>252</sup> Another referred to the “three primary problems of delay, aging, and temperament: it’s amazing how seldom they pop up in formal complaints. The informal process is the best way to deal with those. The really thorny problems are dealt with informally.”<sup>253</sup> Because confidentiality is often the key to successful interventions, it would be difficult to test this assertion.

There are other limits to formal action under the statute. One is that a judge’s objectionable behavior may not meet the statutory standard of “conduct prejudicial to the effective and expeditious administration of the business of the courts” or be caused by a “mental or physical disability” that creates an inability to discharge all the duties of the office. One chief judge told the committee:

Some people have abusive temperaments . . . . You pick that up on the grapevine, at a judicial conference, at a bar meeting. In temperament cases, sometimes it works if you reverse the judge in a real sharp way. This has to be approached very carefully. You don’t want to look as if you’re moving against a judge because of stylistic differences or—God knows—because of the judge’s views. You could easily compromise the independence of the courts, doing that.<sup>254</sup>

Also, some behavior that may appear initially as misconduct may in fact be conduct related to the merits of a case, which the Act puts off limits from its purview.<sup>255</sup> One obvious example is a judge’s failure to recuse herself when requested by one of the parties; that is, in almost all cases, a judicial act subject to appellate review. Chief judges, though, can use informal methods to persuade judges to maintain up-to-date conflict-of-interest lists as requested by the Judicial Conference.<sup>256</sup>

*3. Anonymous Reporting by Individuals or Bar Committees*

The machinery created by the Judicial Conduct Act may never get engaged because only the local bar is aware of specific instances of possible misconduct or disability. One chief judge told the committee:

If someone on the court of appeals is losing it or is out of control, his colleagues see that . . . . If it’s a district judge, often the judge’s

---

251. BREYER COMMITTEE REPORT, *supra* note 151, at 202.

252. *Id.* at 203.

253. *Id.*

254. *Id.* at 204.

255. 28 U.S.C. § 352(b)(1)(A)(ii) (2012).

256. See *supra* Part II.B.3.

colleagues are the last to know, so lawyers will come to me. [But a]ttorneys and the bar don't want to file complaints against judges . . . . The lawyer's business is to appear before the judge. The lawyer can't blithely file a complaint.<sup>257</sup>

The Breyer Committee endorsed the call by some judges for bar committees to report possible misconduct or disability to chief circuit judges.<sup>258</sup> At least one chief circuit judge picked up, partially, on that recommendation. Then-Chief Judge Frank Easterbrook of the Seventh Circuit Court of Appeals told lawyers and judges at the circuit's 2008 conference to let him know directly, through the circuit executive, or anonymously through the circuit bar association, of judges who may have behaved improperly or showed signs of performance-degrading disability. "The more I know about how well the courts of this circuit are functioning, the better we can administer justice."<sup>259</sup>

A variation on this theme is the proposed use on the federal level<sup>260</sup> of judicial conduct or performance commissions,<sup>261</sup> which some states have created to undertake periodic "judicial performance evaluations" of judges on such measures as punctuality, courtesy toward litigants, and clear explanations of their actions. The main use of the evaluations, though, is to inform voters about judges up for reelection.<sup>262</sup> There has been little interest in such evaluations on the federal level, just as there has been little interest in electing federal judges.

#### IV. CONCLUDING OBSERVATIONS AND A FEW SUGGESTIONS

##### *A. In General*

Federal judicial ethics regulations do not need any major overhaul. We have no reliable survey data assessing the extent and seriousness of federal judicial misconduct and performance-degrading disability, and it is hard to imagine how to collect them. Were such a thing possible, though, it is unlikely it would find patterns of serious misbehavior, the examples cited in this Article notwithstanding. For one thing, potential federal judges at all levels undergo extensive vetting prior to selection. Once on the bench, they have a strong interest in behaving properly and just as strong an interest in not being the subject of press coverage based on accusations of improper behavior. The existing machinery—informal as well as formal—seems by and large capable of dealing with what misconduct and disability there is.

---

257. BREYER COMMITTEE REPORT, *supra* note 151, at 205.

258. *Id.*

259. Lynne Marek, *An All-Points Bulletin: Be on the Lookout for Aging, Cranky Judges*, NAT'L L.J. (May 21, 2008), <http://www.alm.law.com/jsp/article.jsp?id=1202421574442&slreturn=20140316132821>.

260. Rebecca Love Kourlis & Jordon M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 9 (2008).

261. See BUREAU OF JUSTICE STATISTICS, *supra* note 21, at tbl. 10; see also Rebecca White Berch & Erin Norris Bass, *Judicial Performance Review in Arizona: A Critical Assessment*, 56 ARIZ. L. REV. 353 (2014).

262. Kourlis & Singer, *supra* note 260, at 10.

Small changes may be worth considering. Are the conflict-of-interest-avoidance mechanisms described in Part II working as well as they could? Should courts publish their judges' conflict lists, as a few have done?<sup>263</sup> Has the Judicial Conference struck the right balance between judges' privacy and security interests in their financial disclosure reports and their public availability?

Do the Judicial Conduct Act and the implementing Rules undermine the transparency of the proceedings by providing that the names of judges remain confidential except when the judicial council imposes a sanction other than private censure or reprimand,<sup>264</sup> or when referred to the House of Representatives for possible impeachment, or when the judge authorizes disclosure?<sup>265</sup> By contrast, 38 of the states and Puerto Rico provide for disclosing the judge's identity when the complaint moves to adjudication<sup>266</sup> (akin to submission of a special committee report to the judicial council). Keeping confidential the name of the judge in cases where the complaint is dismissed or concluded makes, in Professor Hellman's words, "little sense" in high-visibility cases such as that of the judge who spoke at the naturalization ceremony.<sup>267</sup> In a few cases, press reports may hint at an investigation and speculate on the judge. Disclosure by the chief judge or judicial council in such cases could serve to clarify matters.

As to the Judicial Conduct and Disability Act, the rules adopted by and the additional steps taken by the Judicial Conference Committee on Judicial Conduct and Disability have done much to realize the recommendations of the Breyer Committee, although, as I argued in Part III.C.4, the judicial councils could do more to make their orders more transparent. Professor Hellman has offered several additional suggestions.<sup>268</sup>

#### *B. The Supreme Court*

A major source of recent interest in federal judicial ethics regulation has been less the behavior of the over 1,000 lower federal court judges and more what some argue are ethical missteps by members of the Supreme Court and the lack of mechanisms to deal with them. Several comments:

First, imposing additional formal regulatory mechanisms on the Court may be a cure worse than the disease. The efforts in the 112th Congress to do so by creating a court to hear appeals from Justices' denying recusal motions was of questionable constitutionality and was impractical. Most of the furor over alleged conflicts of interest is created by the press and Congress, not by parties in litigation

---

263. See *supra* Part II.

264. See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 24(a)(4) (2008).

265. 28 U.S.C. §§ 355 (b)(1), 360 (2012).

266. See BUREAU OF JUSTICE STATISTICS, *supra* note 21, at tbl. 11.

267. See *supra* Part III.C.4.d.

268. *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the Comm. of the Judiciary*, 113th Cong. 48–51 (2013) (statement of Arthur D. Hellman, Sally Ann Semenko Chair, Univ. of Pittsburgh Sch. of Law).

before the Court, who are the only entities who could invoke the proposed procedure. The efforts in the same Congress to create a mechanism similar to judicial council review of Judicial Conduct and Disability Act complaints was likewise impractical and, if not unconstitutional, inconsistent with the statutory separation of the Court from the rest of the federal judicial administrative machinery.

Second, especially with Gallup reporting the Court's approval rating at 46% (which is the second lowest since 2000 and due of course to more than ethics controversies),<sup>269</sup> the Court might seriously consider steps to ameliorate some of the criticism directed at some of the Justices from both sides of the aisle, tactical though much of that criticism might be.

For example, if the Justices have adopted resolutions agreeing to abide by disclosure statutes even without conceding whether Congress may require compliance, why not release those resolutions? They have released the policy that they adopted several decades ago concerning recusal in cases in which a relative is a lawyer in the case.

The Court could, as suggested in Part II.C, adopt its own Code of Conduct, not on mandate by Congress, but on its own volition. Even though there would be no compliance enforcement mechanism, there would be symbolic value to that step.

The Justices could also reconsider whether explaining recusal refusals is almost always a bad idea. When Justice Scalia explained why his hunting trip with Vice President Cheney did not require recusal in the case involving the Vice President, many responded that he was right but asked why it took almost a month to respond to the recusal motion, which was preceded by considerable press commentary.<sup>270</sup> And, while no one would expect the Justices to respond to every crackpot claim in the press and social media that they have conflicts of interest, the world would not end if, in special cases, they explained why recusal is not in order.

It is important to the credibility of the Justices' assertions of self-compliance that they demonstrate familiarity with the various federal judicial ethics regulations and guidelines. For example, in his 2011 testimony to the House Appropriations Subcommittee, Justice Kennedy said that the Justices had agreed by resolution to follow the Code of Conduct. It appears, however, that the resolution to which he referred does not concern the Code but rather the financial disclosure resolution that Chief Justice Roberts mentioned in his 2011 Year-End Report.<sup>271</sup>

---

269. Andrew Dugan, *Americans Still Divided on Approval of U.S. Supreme Court*, GALLUP POLITICS, (Oct. 14, 2013), <http://www.gallup.com/poll/165248/americans-still-divided-approval-supreme-court.aspx>.

270. *See supra* Part II.B.4.b.

271. *See supra* notes 34, 127 and accompanying text; *See also* Letter from Bob Edgar, President of Common Cause, to Chief Justice Roberts, May 19, 2011, citing a May 3, 2011 letter from a court official suggesting that "the resolution referred to by Justice Kennedy deals with the Court's compliance with Judicial Conference regulations on gifts, outside earned income, honoraria and outside employment, rather than with the Code," <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=9386305>.

Finally, the Justices, like all judges, would do well to keep in mind, and to demonstrate that they have in mind, the Code of Conduct's admonition quoted at the outset of the Article—namely that judges “must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”<sup>272</sup>



---

272. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2014).