BUILDING CONFIDENCE IN THE SUPREME COURT THROUGH ETHICS AND RECUSAL REFORMS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

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C O N T E N T S

WEDNESDAY, APRIL 27, 2022

BUILDING CONFIDENCE IN THE SUPREME COURT THROUGH ETHICS AND RECUSAL REFORMS

Wednesday, April 27, 2022

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to call, at 2:04 p.m., in Room 2141, Rayburn House Office Building, Hon. Hank Johnson [Chair of the Subcommittee] presiding.

Members present: Representatives Nadler, Johnson, Jones, Jeffries, Lieu, Stanton, Cohen, Swalwell, Ross, Neguse, Jordan, Issa, Chabot, Gohmert, Gaetz, Johnson, Tiffany, Massie, Bishop, Fitzgerald, and Bentz.

Staff present: Aaron Hiller, Chief Counsel and Deputy Staff Director; John Doty, Senior Advisor and Deputy Staff Director; Arya Hariharan, Chief Oversight Counsel; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Brady Young, Parliamentarian; Cierra Fontenot, Chief Clerk; Gabriel Barnett, Staff Assistant; Daniel Rubin, Communications Director; Merrick Nelson, Digital Director; Jamie Simpson, Chief Counsel for Courts & IP; Evan R. Christopher, Counsel for Courts & IP; Matt Robinson, Counsel for Courts & IP; Matt Robinson, Counsel for Courts & IP; Atarah McCoy, Professional Staff Member/Legislative Aide for Courts & IP; Betsy Ferguson, Minority Senior Counsel; Elliott Walden, Minority Counsel; Andrea Woodard, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. The Subcommittee will please come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome everyone to this afternoon's hearing on Building Confidence in the Supreme Court through Ethics and Recusal Reforms.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to cir-

culating exhibits, motions, or other written materials that Members might want to offer as part of today's hearing. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the material to Members and staff as quickly as we can.

I would also like to ask Members to please mute your microphones when you are not speaking. This will prevent feedback and other technical issues. You may unmute yourself any time you seek recognition.

I will now recognize myself for an opening statement.

We are here today to consider a question that goes to the heart of our democracy: Should the United States Supreme Court, the highest court in our Nation and one of the most powerful judicial bodies in the world, abide by a uniform and binding set of ethics rules?

Ours has been described as a government laws and not of men. Nowhere is that principle more essential than in the fair and even-handed Administration of justice. This house is built on the rule of law; its foundation is fairness, transparency, and accountability. The lack of enforceable ethical standards for judicial officers is a crack in that foundation.

It is a flaw that was first recognized nearly 50 years ago when the judges of the lower Federal courts wrote and adopted an ethics code to bind themselves to better conduct. That code does not apply to the Supreme Court. The justices were unpersuaded by the actions of their judicial peers and did not see the need to Act then. They refuse to Act now.

The result is sadly predictable: A steady stream of revelations that justices have approached the line of acceptable behavior in an ethical gray area or, seemingly, more and more often have crossed the line entirely. The propensity to transgress is not limited to the justices appointed by presidents of one political party. I am afraid it is not a coincidence that recent polling has shown a marked decline in public confidence in the Supreme Court.

Other events have made it disturbingly clear that without explicit enforceable rules, certain members of the high court are going to try to keep trying to get away with more and more, until they have gotten away with our whole republic. I am alarmed, for example, about unanswered questions about Justice Thomas' failure to recuse from a decision that we now know might have implicated the actions of his wife and her apparent efforts to overturn the 2020 election.

This problem is much bigger than Clarence Thomas, however. His is a case in point for why enacting enforceable ethics rules is long past due.

Today we explore how to fix that crack in our foundation. If the justices of the Supreme Court will not Act to safeguard their constitutional responsibilities as impartial judicial officers, then it is up to this body. It is Congress' responsibility to make laws governing the Federal Courts, which includes the Supreme Court. There are several bills that would bring much-needed improvements to the ethics and recusal practices of the Supreme Court justices.

These include two bills I have been proud to lead in the House: The Supreme Court Ethics Act and the 21 Century Courts Act of 2022. Any meaningful ethics reform must include meaningful recusal reform. They go hand-in-hand and are crucial to ensuring that the decisions made by unelected officers who serve for life, and who have the power to say what the law is, are made fairly and without respect to persons or profits.

That brings us to today's hearing and our distinguished panelists. I thank you in advance for your expertise and for the time you have devoted to these subjects and to this hearing. I look forward to your testimony.

Now, I will recognize the Ranking Member for his statement.

Mr. ISSA. Thank you, Mr. Chair. Thank you for holding this important hearing. I look forward to our Witnesses.

First, I would like to ask unanimous consent that we submit into the record an article penned yesterday from The Hill titled, "House panel to explore impeachment, judicialethics in wake of Ginni Thomas texts."

Chair NADLER. Without objection.

[The information follows:]

MR. ISSA FOR THE RECORD

A

House panel to explore impeachment, judicial ethics in wake of Ginni Thomas texts

by Emily Brooks - 04/26/22 5:55 PM ET

House Democrats on Wednesday will hold a hearing on Supreme Court ethics and the possibility of impeaching justices, a move that follows the revelation of controversial text messages from Ginni Thomas, the wife of Justice Clarence Thomas.

The texts from Ginni Thomas to then-White House chief of staff Mark Meadows about the 2020 presidential election and the Jan. 6, 2021, Capitol riot have set off a political firestorm in Washington, raising Democratic anger and calls for Clarence Thomas to recuse himself from decisions related to the election and former President Trump.

Republicans overwhelmingly have rallied to Clarence Thomas's defense.

A memo from Rep. Hank Johnson (D-Ga.), the chairman of the House Judiciary courts subcommittee, distributed to members ahead of Wednesday's hearing, and obtained by The Hill, explores codes of conduct for federal judges outside the Supreme Court and summarizes legislative proposals to impose ethics requirements on Supreme Court justices.

Notably, the memo also discusses Congress's impeachment authority in the Constitution as one form of regulation of the conduct of Supreme Court justices.

"Threats or inquiries of impeachment as a means of regulating the conduct of Supreme Court justices have had varying effects," the memo said.

Justice Abe Fortas resigned in 1969 amid ethics concerns, while Justice William O. Douglas sat on the court for five more years after the House Judiciary Committee voted on party lines to take no action following a 1970 impeachment inquiry.

Only one Supreme Court justice has ever been impeached by the House, Samuel Chase in 1804, but he was not convicted by the Senate a year later.

Issues surrounding Thomas are a clear driver of the committee's interest in Supreme Court ethics issues.

The memo points out that calls for the Supreme Court to implement a code of ethics gained steam among lawmakers "following the reporting about text messages between the spouse of an associate justice and the then-White House Chief of Staff."

"The Supreme Court has long operated as though it were above the law. But, Justice Clarence Thomas' refusal to recuse himself from cases surrounding January 6th, despite his wife's involvement, raises serious ethical — and legal — alarm bells," said Rep. Mondaire Jones (D-N.Y.), vice chair of the House Judiciary courts subcommittee.

"The need for strong, enforceable ethics laws is clearer than ever. We have to do more to hold the Court accountable and restore public trust through a binding code of ethics and recusal."

Thomas, the most senior associate justice, is a reliable conservative vote in matters before the court. Republicans have defended him amid scrutiny over his wife's activities.

Some in the GOP believe that with this hearing, Democrats are laying the groundwork for further action against him.

"Let's be honest, this hearing is nothing more than step one in impeaching Justice Thomas," a senior GOP aide told The Hill.

Ginni Thomas has been a regular presence in conservative activism circles for decades, but scrutiny of her activities escalated following a January New Yorker profile raising questions about whether her actions pose a conflict of interest to Justice Thomas.

In March, the House select committee investigating the Jan. 6 attack revealed Thomas's text messages to Meadows urging him to not let Trump concede the 2020 election, asserting without evidence that there was fraud in the election and expressing frustration that Republican members of Congress were not doing more to help overturn the results.

That further heightened outrage at Clarence Thomas, given that he could rule on cases about the 2020 election and the Jan. 6 Capitol attack. A group of 24 House and Senate Democrats sent a letter to Chief Justice John Roberts and Thomas asking Thomas to recuse himself from such cases.

Others went further. Johnson called for Thomas's resignation. Rep. Alexandria Ocasio-Cortez (D-N.Y.) said that his failure to recuse himself from matters involving his wife could prompt more investigation and "serve as grounds for impeachment."

Speaker Nancy Pelosi (D-Calif.) called Ginni Thomas a "proud contributor to a coup of our country" and renewed her call to institute a code of ethics for the Supreme Court.

Impeaching Clarence Thomas would be a heavy political lift, and several House Democrats have said they are not sure his conduct rises to that level. More appear most interested in pursuing legislative avenues to impose ethics standards on the Supreme Court.

Johnson last year introduced the Supreme Court Ethics Act to implement a judicial code of conduct that applies to the Supreme Court. Jones co-led the Twenty-First Century Courts Act, which would similarly implement a code of conduct for the justices.

"Recent reports that the text messages of a justice's spouse urging the overturning of a free and fair election may have been at issue in a case in front the Supreme Court — but that the justice did not recuse himself from the case — is just the latest and particularly egregious example in an unfortunately long list of illustrations as to why Supreme Court justices need to follow a formal code of ethics," Johnson told The Hill. "I have been calling for this sort of reform for years, and I am encouraged to see a large, bipartisan majority of the public in favor of this long overdue legislation."

The Wednesday hearing witness panel is packed with advocates for Thomas to recuse himself from cases that could present the appearance of a conflict of interest due to his wife's text messages.

Stephen Gillers, a New York University law professor and judicial ethics scholar, has said that Thomas should recuse himself from cases about Jan. 6 in light of his wife's text messages.

Also at the hearing will be Donald Sherman of Citizens for Responsibility and Ethics in Washington, which has also called Thomas's recusal and a code of conduct for the court. Gabe Roth of Fix the Court has for years called for Thomas to recuse himself from matters related to his wife's activism.

This has led to GOP attacks.

"For more than 30 years, Democrats have tried and failed to destroy Clarence Thomas. Their misogyny now towards his wife should be beneath them — but apparently not," said Jonathan Wilcox, communications director to the courts subcommittee's ranking member, Rep. Darrell Issa (R-Calif.).

The Republican witness for the panel is attorney Mark Paoletta, a defender of Thomas who previously worked in the White House for both Trump and former President George H.W. Bush, including on Thomas's confirmation.

Mr. ISSA. Thank you, Mr. Chair.

I am going to comment only on the, the headline here today. A headline like that does no good to the court, and it does no good to, in fact, this body. The actions, or beliefs, or views of a spouse of a member of the court cannot, should not, and will not ever be grounds for impeachment of a judge. That, I think, goes without saying. I am appalled that this kind of rumor and innuendo would even get into a headline, whether or not the context is appropriate.

We have nine justices of the Supreme Court. Those justices are well-respected. They are humans, men, and women, they are not perfect. They are mostly married or widowed. They, in fact, have lived long lives and served our country well. None of that is going to be doubted today.

There is a question, and it is a legitimate question for us here in this body. The Supreme Court does not and cannot make laws. The Executive Branch is not empowered to make laws, although regulations sometimes carry the power of law. We are empowered with that.

Therefore, the question of whether or not mandates under law shall be placed on the other two bodies will always be determined by this body. A voluntary standard by the Executive Branch can be changed by the Executive Branch. A voluntary standard by article III, the Judicial Branch, can we have changed by them.

Only a law passed by this body and signed by the President is binding on all of us until perpetuity or until changed by similar statute. That is what we will be considering today and in the days to come. I think we do so and must do so soberly because the separation of powers is real, and it is for a valid reason.

So, as we listen to the Witnesses and as we look at potential legislation, I know that all of us here on the dais will, in fact, do so knowing that we must measure carefully, measure again carefully, and make those cuts into the very fabric of our Constitution very sparingly.

Having said that, I am afraid that the opening comments that I put in from *The Hill* newspaper could in fact be the subject du jour. They should not. The question of whether or not there should be additional legislation affecting the justices of the Supreme Court is one that I am perfectly willing now and, in the future, to consider. Whether or not we are to pass a law, or to recuse, or to somehow admonish a justice of the Supreme Court because they had the audacity decades ago to marry somebody with an opinion is not something I want to hear, or discuss, or try today.

With that, Mr. Chair, I yield back.

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

Chair NADLER. Let me start by assuring my friend Mr. Issa that, as far as I know, nobody in this body wrote that headline.

Thank you, Mr. Chair, for holding today's important hearing. The Supreme Court is one of the nation's most vital institutions whose duties are sacred: To administer justice and uphold the rule of law, and to do so independently and fairly.

Now, and as always, the court's fidelity to the principles of legal and impartial justice, as well as the public's faith in the integrity

of the judiciary, are foundational to maintaining the rule of law. Our Federal judiciary is the envy of the world, and Congress has an obligation to ensure that this hard-earned reputation is maintained.

Unfortunately, the reputation of the court has been undermined in recent years by the actions of the justices themselves across the ideological spectrum. We expect the justices of our nation's highest court to hold themselves to the highest standards of ethical conduct but, in fact, their conduct too often falls below the standards that lower court judges are required to follow.

Public faith is weakened by every story about a justice being treated to a lavish junket, accepting an unreported gift, or failing to disclose an asset, appearing on stage or on social media with a political candidate, attending $350-a-head dinners hosted by dark money groups, or meeting behind closed doors with entities that have interests before the court.

People are justifiably shocked when they learn that not only is there no code of conduct for the Supreme Court but that the justices have steadfastly opposed the creation of one. Every Member of Congress is subject to a code of conduct, as is every other Federal judge.

Article I and the administrative law judges in the Executive Branch are subject to even more stringent ethics requirements, including a statutory prohibition on criminal conflicts of interest.

Even more concerning are the justices repeated failures to abide by the Federal recusal statute, which does apply to them. Not a year seems to go by without another example in which a justice fails to recuse themselves despite having a financial connection to a party, or having participated in a case before they became a justice, clear grounds for recusal.

A number of justices have suggested that they are subject to a less stringent recusal standard than every other Federal judge, even that the law might not apply to them in the same way as to other judges or at all.

In recent years, the recusal problem has grown much more serious. Last year, for example, Justice Barrett refused to recuse from a case involving a group that had spent more than a million dollars advocating her appointment to the bench. Three justices refused to recuse from a case involving a publisher who had given them six- and seven-digit book deals. Of course, we know that Justice Thomas failed to recuse from at least one case involving the attempt to overturn the 2020 election, despite his wife's apparent direct and active involvement in that effort.

The appearance of impropriety and disregard for the law can have devastating effects on the public's trust and the integrity and independence of the judiciary. Our constitution system suffers when it looks like the justice of the Supreme Court, the very people we entrust to maintain the rule of law, think that they themselves are above the law. Thus, we must remain vigilant against attempts to undermine the foundational ideals of impartiality and fairness upon which the public must rely.

With the seriousness of this obligation in mind, I look forward to hearing from our distinguished panel of Witnesses. I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you. I am pleased now to recognize the Ranking Member of the Full Committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. JORDAN. Thank you, Mr. Chair.

Everyone can see through the Democrat's charade here today. This isn't about ethics, or justice, or the separation of power, this is a partisan attack on the highest court in the land. The modern Left has zero tolerance for people who don't adhere to their progressive ideology.

Democrats control the Executive Branch, they control the bureaucracy, they control Congress, and they control this Committee, world progressives control the media and academia—academia, excuse me, they are making inroads in big business, and they control most of big tech. Used to control all big tech until just a couple days ago. Just the fact that one part of big tech may in fact now recognize free speech and the First Amendment they are going crazy.

There is one place of power that the Democrats don't control, and they can't stand it. They can't stand the fact that they don't control the United States Supreme Court. Doesn't matter that the conservative justices on the Supreme Court were nominated and confirmed by the Senate for life terms in line with what our founders put in the U.S. Constitution, Democrats can't stand that conservative justices serve on the bench. They are willing to destroy the Supreme Court itself to get their way.

They are so desperate to take down our time-honored institutions in furtherance of their radical agenda that last year senior Members of this Committee put out a bill to pack the Supreme Court. These Democrats, including the Chair and the Chair of this Subcommittee, suddenly decided that, despite 150 years of precedent, the magic number for the Supreme Court justices should now be 13. Just so happens that this is the exact number that would give Democrats a majority with the new appointments that would come from President Biden.

The Democrat attacks on the integrity of the Supreme Court are not just limited to court packing, prominent Democrats have said the Supreme Court is "not well," and threatened to restructure the court if it doesn't heal itself, meaning decide cases the way Democrats want them decided.

Senator Schumer called out Justice Gorsuch and Kavanaugh by name telling them that they would "will have to pay a price" if they "go forward with these awful decisions."

Don't forget how Democrats treated Justice Barrett during her confirmation, questioning her faith, something that is mentioned in the First Amendment, first thing in the Constitution, questioning her faith and whether the "dogma" that lives around her or lives within her.

Everyone remembers the public character assassination that Democrats committed against Justice Kavanaugh.

These Democrats' attacks aren't new. They go back 30 years, back to when Senator Joe Biden Chaired the Senate Judiciary Committee. Senator Biden's attacks were so egregious they yielded a new verb, whole new word, "borking," named after President Reagan's nominee to the Supreme Court in 1988, Judge Robert Bork.

The dictionary defines "borking" as attacking or defeating unfairly through an organized campaign of harsh criticism or vilification. Think about that. Senator Biden's attacks were so bad the dictionary had to create a new word to describe it. The attacks were successful, and Judge Bork pulled his nomination.

In 1991, Senator Biden tried it again on Justice Thomas. We are fortunate that the country, and the country is fortunate that Judge Thomas withstood these unfair attacks and is now Justice Thomas.

Here we are, 30 years later and the Democrats on this Committee are trying to finish what Joe Biden started. Don't take my word for it, read the Chair's own memo. The memo the Chair put out in advance of today's hearing has a whole section on previous attempts to impeach Supreme Court justices.

Why? Why would he reference that? The only plausible explanation for this is that they are desperate to try to build the case to impeach one of the sitting justices in the next few months so they can try to remove them and replace them with another Biden appointee.

This is as wrong as it gets. The American people expect better from us. There is a border crisis, there is a 41-year high inflation rate that is hitting everyone's pocket, there is a war in Ukraine, and Democrats are scheming in their ill-fated attempt to remove a life-tenured Supreme Court justice. This is not what we should be focused on.

Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Jordan.

Without objection, all other opening statements will be included in the record.

Before we introduce our panel of Witnesses, without objection I will enter the following written Witness statements into the record.

The first is a statement, Project On Government Oversight, or POGO, a nonpartisan independent organization devoted to exposing government, government waste, corruption, and abuse of power. POGO's statement discusses the longstanding need for a code of conduct at the Supreme Court, as well as other improvements in the recusal and disclosure process.

The second statement is from the Leadership Conference on Civil and Human Rights, a coalition of over 230 national organizations committed to promoting and protecting civil rights in the United States. The Leadership Conference's statement also reinforces the need for decisive action on a Supreme Court code of ethics, and strengthen recusal rules to ensure balanced, independent decision-making worthy of the public's confidence.

The third is a statement for Alliance for Justice, a national organization representing over 130 public interest and civil rights groups. Alliance for Justice's statement voices support for the work of this Subcommittee in holding this hearing, and for the 21st Century Courts Act.

Without objection, I will so order inclusion in the record.

[The information follows:]

MR. JOHNSON OF GEORGIA FOR THE RECORD

PROJECT ON GOVERNMENT OVERSIGHT

Statement of the Project On Government Oversight
Before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
"Building Confidence in the Supreme Court Through Ethics and Recusal Reforms"
April 27, 2022

Thank you, Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee for the opportunity to submit this comment about ethics, the Supreme Court, and Americans' trust in vital democratic institutions.[1] Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing; The Constitution Project was founded in 1997 and joined POGO in 2017. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Last year, we convened a task force of experts — including former judges with varied ideological backgrounds — who issued a report, *Above the Fray*, containing several recommendations to turn down the temperature on Supreme Court selection and enhance the court's legitimacy.[2] While many potential Supreme Court reforms are the subject of considerable debate, there is wide support for improving Supreme Court ethics rules, which would serve a critical role in restoring the public's faith in the court.

The creation and implementation of strong ethics rules can and should begin, regardless of any other reforms.

Strengthening Supreme Court ethics requires a multifaceted approach that should address several key substantive shortcomings in the current ethics regime: subjective recusal standards; insufficient guidance surrounding conduct that undermines justices' perceived impartiality; and inadequate disclosure of potential conflicts.

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[1] This testimony draws on several previous POGO publications, including *H.R. 1, the "For the People Act of 2019": Hearing before the House Committee on the Judiciary*, 116th Cong. (January 29, 2019) (testimony of Sarah Turberville, Director, The Constitution Project at POGO) https://www.pogo.org/testimony/2019/01/closing-the-gap-in-judicial-ethics/; Task Force on Federal Judicial Selection, *Above the Fray*, Project On Government Oversight, July 8, 2021, https://www.pogo.org/report/2021/07/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy/; *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules: Hearing before the House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet*, 117th Cong. (October 26, 2021) (testimony of Dylan Hedtler-Gaudette, Government Affairs Manager, POGO), https://www.pogo.org/testimony/2021/10/pogo-testimony-increasing-transparency-and-accountability-in-the-judicial-branch/; Sarah Turberville and David Janovsky, "A Potential Watershed Moment on Supreme Court Ethics," Project On Government Oversight, March 31, 2022, https://www.pogo.org/analysis/2022/03/a-potential-watershed-moment-on-supreme-court-ethics/.

[2] Project On Government Oversight, *Above the Fray* [see note 1].

Filling these gaps will likewise require multiple approaches, including strengthening and expanding existing laws and creating a code of conduct for the Supreme Court. Finally, all these reforms should contain mechanisms to ensure full and faithful compliance.
The recently introduced 21st Century Courts Act is a commendable step toward addressing many of these issues. This testimony elaborates on the ethics challenges facing the court to help guide the committee as it considers that bill and any future legislation.

The Need for Supreme Court Ethics Reform

As the most prominent judges in the country, there is little doubt that justices of the Supreme Court have a significant influence on the public's understanding of the workings and role of the courts, and — consequently — on their trust in the judiciary's commitment to fairness and impartiality. The concentration of power among just a handful of people on the court underscores how vital it is for justices to comport with a robust ethical framework.

There are a handful of statutes, case law, and norms that currently provide a basic — and, as my testimony argues, insufficient — ethics framework for the Supreme Court. Section 455 of Title 28 of the United States Code specifies when judges and justices must recuse themselves from a proceeding. It contains a blanket obligation to recuse whenever a judge or justice's "impartiality might reasonably be questioned."[3] The Ethics in Government Act of 1978 also confers limited ethical responsibilities by requiring federal judges, including Supreme Court justices, to submit annual financial disclosures.[4]

However, these laws have gaps that undermine their aims — and Chief Justice John Roberts has publicly cast doubt on whether these laws are actually binding on Supreme Court justices.[5] And members of the nation's highest court are not covered by the Judicial Conduct and Disability Act of 1980, which created a process for the filing and investigation of complaints and for discipline of federal judges.[6]

According to Chief Justice Roberts, the Supreme Court justices also consult the "Code of Conduct for United States Judges," which does not formally apply to the justices but governs the conduct of judges in lower federal courts.[7] But episodes over the last two decades — including several in very recent memory — have made clear that the Supreme Court's informal consultation of the code is not sufficient. Appearances matter in government ethics, and the inadequacy of the Supreme Court's ethics rules sends a signal, even if unintended, that the justices are above the standards for every other judge.

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[3] The provision, originally passed in 1940, was extended to appeals court judges and Supreme Court justices in 1974. The law also instructs judges to step aside when they have personal biases toward parties or knowledge of disputed facts; have previously been involved with a case as a lawyer, judge, or public servant; have a financial interest or a family member with a financial interest in the outcome; or when they or a family member are involved in or could be affected by the proceedings. 28 U.S.C. § 455 (2021), https://law.cornell.edu/uscode/text/28/455.
[4] 5 U.S.C. App. § 101(f)(11), https://uscode.house.gov/view.xhtml?req=(title:5a%20section:101%20edition:prelim.
[5] Chief Justice John Roberts, "2011 Year-End Report on the Federal Judiciary," (December 31, 2011), 7, https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.
[6] 28 U.S.C. §§ 351-364 (2021), https://www.law.cornell.edu/uscode/text/28/part-I/chapter-16.
[7] Roberts, "2011 Year-End Report on the Federal Judiciary," 4 [see note 5].

Ethics reform is neither partisan nor personal. Lapses are not limited to justices who ascribe to a particular judicial philosophy or were nominated by presidents of one party or the other. Every justice who has served in the last decade has done something that has raised questions about propriety and impartiality.[8]

While ethics reform must be informed by past incidents, it is fundamentally a forward-looking effort, one designed to ensure the Supreme Court has the best possible system in place to support the public's faith in the institution.

The Importance of a Code of Conduct

Every other federal judge is bound by a code of conduct.[9] The only exceptions are the most visible and consequential jurists in the land — the justices of the Supreme Court.

Having been entrusted with that great power, the justices owe the public not only a commitment to the ethical use of power, but also a conspicuous demonstration of their ethical conduct. While the simplest solution may be to apply the "Code of Conduct for United States Judges" to the Supreme Court as well, the existing code of conduct for lower federal court judges does not address a number of issues that are particular to the ethical conduct of Supreme Court justices, such as disqualification and the impact of public appearances and other off-the-bench conduct. It is time for the justices to be bound by a code of conduct that accounts for the unique circumstances that accompany service on the nation's highest court.

A Supreme Court code of conduct is a bipartisan idea whose time has come. In 2018, Ranking Member Issa sponsored a bill that contained a provision for a Supreme Court code of conduct.[10] The recently introduced 21st Century Courts Act similarly directs the court to create a code for itself.[11] Even President Biden's bipartisan Commission on the Supreme Court — a body unwilling to endorse any specific recommendations following its exhaustive, multi-month review of Supreme Court reforms — seemed to agree that the court would benefit from a code. It wrote, "experience in other contexts suggests that the adoption of an advisory code would be a positive step on its own, even absent binding sanctions."[12]

As we will discuss below, a Supreme Court code of conduct is one avenue for addressing some of the substantive shortcomings in the current ethics regime for the court.

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[8] Fix the Court, "Ahead of House Hearing on SCOTUS Ethics, We Recount the Justices' Many Ethical Lapses," March 2, 2022, https://fixthecourt.com/2022/03/ahead-house-hearing-scotus-ethics-recount-justices-many-ethical-lapses/; Turberville and Janovsky, "A Potential Watershed Moment on Supreme Court Ethics" [see note 1]

[9] Judicial Conference of the United States, "Code of Conduct for United States Judges," *Guide to Judiciary Policy*, vol. 2, ch. 2 (March 12, 2019), 2, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[10] Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/6755.

[11] 21st Century Courts Act, 117th Cong. § 2 (2022), https://www.whitehouse.senate.gov/imo/media/doc/21CA%20Bill%20Text%20(117th)%20EMBARGOED%20to%201130%204-6.pdf.

[12] Presidential Commission on the Supreme Court of the United States, *Final Report*, December 2021, 221, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

Addressing Recusal

On its face, the federal law that governs recusal standards for federal judges applies to Supreme Court justices as well.[13] But unlike lower court judges, recused Supreme Court justices cannot be replaced, making their recusal decisions even more consequential. Supreme Court ethics reform must adequately account for unique circumstances facing a justice's disqualification from hearing a case. This requires rebalancing the justices' current reluctance to recuse in any but the most extreme circumstances and creating a system that leads to more transparent and impartial decision-making around recusals.

Currently, when deciding whether to recuse, Supreme Court justices weigh the impact of an actual or perceived conflict of interest against concerns about the evenly split decision that could result from their disqualification. The often-counterproductive argument that justices have a "duty to sit," that is, to hear cases, has the effect of keeping justices involved where objective considerations would suggest recusal was prudent.[14]

Recusal for even apparent conflicts is far more beneficial to the court than having nine justices hear any given case.[15] Any new code of conduct should critically examine the presumptions on which the "duty to sit" is based.[16] As our task force emphasized, recent history and scholarship have shown that an even-numbered court is not a significant problem.[17] In fact, the evidence

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[13] *See* 28 U.S.C. § 455. In his 2011 letter on judicial ethics, Chief Justice Roberts questioned whether § 455 could constitutionally be applied to the justices [see note 5].

[14] For example, see Jeffrey Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine," *Buffalo Law Review*, vol. 57 (2009), 813-958, https://scholars.law.unlv.edu/facpub/232/. In his 2004 memo in Cheney v. U.S. Dist. Ct., Justice Scalia wrote that recusal to avoid the perception of bias "might be sound advice if I were sitting on a Court of Appeals. ... There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different." Cheney v. U.S. Dist. Ct., 542 U.S. 367 (2004) (Scalia, J. memo), 3, https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf.

[15] Judges do have a responsibility to hear cases: Canon 3(A)(2) of the "Code of Conduct for United States Judges" states, "a judge should hear and decide matters assigned, unless disqualified" [see note 9]. However, the purpose of this provision is not to narrow the instances where disqualification is required, but rather to prevent judges from avoiding potentially unpopular issues. See Stempel, "Chief William's Ghost," 818-834 [see note 14].

[16] Congress attempted to address the justices' reluctance to recuse following Justice Rehnquist's citation of what became known as the "duty to sit" to justify his refusal to disqualify from a case where a conflict was readily apparent. See *Laird v. Tatum*, 409 U.S. 824, 838 (1972); Sherrilyn A. Ifill, "Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore," *Maryland Law Review*, vol. 61, no. 3 (2002), 619, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3174&context=mlr. In 1974, Congress amended the judicial disqualification statute requiring judges' and justices' recusal in cases where their "impartiality might reasonably be questioned." See 28 U.S.C. § 544 (2022), https://www.law.cornell.edu/uscode/text/28/544. In 1993, Justices William Rehnquist, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Ruth Bader Ginsburg issued a recusal policy statement that expressed an unwillingness to recuse in some circumstances due to the perceived impact of recusal on the court: "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." "Statement of Recusal Policy," November 1, 1993, 1, http://eppc.org/docLib/20110106_RecusalPolicy23.pdf.

[17] See Ryan Black and Lee Epstein, "Recusals and the 'Problem' of an Equally Divided Supreme Court," *Journal of Appellate Practice and Process*, vol. 7, no. 1 (2005), 81, https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1315&context=appellatepracticeprocess.

suggests otherwise — the court may be more inclined to seek common ground and more modest and narrow decisions when faced with the prospect of an even split.[18]

Even so, there are reforms that could allay any concern about a split decision. The "duty to sit" is rendered moot if the court can replace a recused justice. While such a reform would be a departure, there is good precedent at the federal and state level. Retired Supreme Court justices already have the option of hearing cases as part of circuit court panels, and the law could be modified to allow them to fill in for recused justices as well.[19] This practice is already in place in states like New Hampshire, where the law permits the state's chief justice to randomly select a retired justice to temporarily serve if there is a vacancy left due to a disqualification.[20]

Congress should also clarify the recusal statute to better specify the types of situations that require recusal. While the current law lists several specific scenarios, largely dealing with conflicts from financial or employment relationships, many scenarios fall under the law's catch-all provision, which requires recusal when a reasonable person would doubt a judge's impartiality.[21] The 21st Century Courts Act would add much-needed detail, including specifying additional financial or work entanglements by judges or their families that require recusal and covering organizations affiliated with ones that pose a direct conflict.[22]

Revised recusal rules, both in statute and a code of conduct, should also clarify when financial or other circumstances involving a justice's family member would counsel the justice's disqualification from a case. This is not to suggest a justice should be disqualified simply because a spouse or child has strong views on controversial topics. The law currently requires recusal when a justice's immediate family has an "interest that could be substantially affected" by the outcome of a case, but it provides little elaboration.[23] If a relative is closely affiliated with a litigant, amicus, or issue before the court, that should call for a more critical analysis. The public has no way of knowing what justices and their close relatives discuss, and the public should not have to take it on faith that relatives who are tied to litigants are refraining from exerting influence.

Stronger recusal rules will have limited use if the enforcement mechanism is not improved. Currently, lower court judges and the justices decide for themselves if they can sit impartially on a case.[24] The justices' recusal decisions (or refusals) lack even the rudimentary enforcement

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[18] In 2017, Justice Samuel Alito commented, "Having eight was unusual and awkward. That probably required having a lot more discussion of some things and more compromise and maybe narrower opinions in some cases that we would have issued otherwise." Quoted in Jess Bravin, "With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc," *Wall Street Journal*, April 21, 2017, https://www.wsj.com/articles/BL-WB-68082. See also Adam Liptak, "A Cautious Supreme Court Sets a Modern Record for Consensus," *New York Times*, June 27, 2017, https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html.

[19] 28 U.S.C. § 294 (2022), https://www.law.cornell.edu/uscode/text/28/294.

[20] NH Rev Stat § 490:3 (2018), https://law.justia.com/codes/new-hampshire/2018/title-li/chapter-490/section-490-3/.

[21] 28 U.S.C. §455(a) (2022), https://www.law.cornell.edu/uscode/text/28/455.

[22] 21st Century Courts Act, §§ 3-4 [see note 11].

[23] 28 U.S.C. §455(b)(5)(iii) (2022), https://www.law.cornell.edu/uscode/text/28/455.

[24] "A fair trial in a fair tribunal is a basic requirement of due process. ... To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." In re Murchison, 349 U.S. 133, 136 (1955), https://tile.loc.gov/storage-services/service/ll/usrep/usrep349/usrep349133/usrep349133.pdf. The

mechanism that exists for lower courts, where failure to recuse can be grounds for vacating a decision on appeal.

New ethics rules, either as additions to the recusal statute or in a Supreme Court code of conduct, should seek to remove recusal decisions from the justice in question. This is especially important because the recusal statute defines many conflicts in terms of how a third party — a "reasonable person" — would view the judge's conduct. It is no criticism of a justice's temperament to note that they are poorly positioned to analyze their own conduct through this lens.

For model solutions, the court should look to the states. Some state courts, ranging from Texas to California, have rules that provide for a judge other than one with a potential conflict to make the disqualification decision.[25] These state supreme courts typically refer a recusal motion to the full court or authorize a party to appeal a justice's refusal to recuse to the full court.[26] The 21st Century Courts Act takes this approach as well, requiring justices to refer recusal motions to the full court.[27] Alternatively, the code could create mechanisms like allowing a panel of circuit judges to issue an advisory opinion on whether a Supreme Court justice should recuse.

However it addresses recusal, bringing greater transparency to recusal decision-making must be a priority for a new code. Judges' and justices' reasons for recusal are often unstated; the Supreme Court's decisions and orders simply note if a justice did not participate in an opinion or proceeding. A Supreme Court code of conduct should call for the disclosure of the reason for any

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court has restated this principle on numerous occasions. Examples include Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-22 (1986); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Withrow v. Larkin, 421 U.S. 35, 46-47 (1975); Ward v. Vill. of Monroeville, 409 U.S. 57, 61-62 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[25] See, e.g., Cal. Code Civ. P. 170.3(c)(5): "A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson."
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=170.3;
Utah R. Civ. P. 63(c)(1): "The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge" https://casetext.com/rule/utah-court-rules/utah-rules-of-civil-procedure/part-vii-judgment/rule-63-disability-or-disqualification-of-a-judge. At the federal level, Article III judges may "bow out of the case or ask that the recusal motion be assigned to a different judge for a hearing," but the law does not require it. In re United States, 158 F.3d 26, 34 (1st Cir. 1998) https://casetext.com/case/in-re-united-states-24.

[26] See, e.g., Tex. R. App. P. § 16.3: "[t]he challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court … [t]he challenged justices or judge must not sit with the remainder of the court to consider the motion as to him or her" https://www.txcourts.gov/media/1437631/texas-rules-of-appellate-procedure-updated-with-amendments-effective-2117-with-appendices.pdf; Alaska Stat. 22.20.020(c): "If a judicial officer denies disqualification the question shall be heard and determined by … the other members of the supreme court"
https://www.touchngo.com/lglcntr/akstats/Statutes/Title22/Chapter20/Section020.htm. See also Matthew Menendez and Dorothy Samuels, Brennan Center for Justice, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, (2016), 23 (note 47), https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification?msclkid=ce736735c4c511eca4005dd767210fdb; Russel Wheeler and Malia Reddick, Institute for the Advancement of the American Legal System, *Judicial Recusal Procedures*, (June 2017), 5-8,
https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf.

[27] 21st Century Courts Act, § 3 [see note 11].

voluntary recusal.[28] This would promote the development of a body of precedent to support consistent application of recusal, assist judges in identifying situations that require actions like divestments so that they need not recuse in the future, and help to rebuild public faith in the court by reaffirming that the public and litigants have a right to know why an individual in such a consequential position must step away from presiding over a case.

Addressing Questionable Conduct

Public actions that cast doubt on their impartiality are a common issue for Supreme Court justices, and any code of conduct for the court must provide guidance that helps justices avoid such actions, because even the appearance of impropriety can hurt the court. A few recent examples can both demonstrate the need for such guidance and illustrate the types of actions that should be directly addressed by a code of conduct.

The most direct form of questionable conduct is statements from justices themselves. Justices have offered public comments that would lead a reasonable person to conclude that their impartiality and judicial temperament is impaired. For example, during his 2018 confirmation process, then-Judge Brett Kavanaugh implied that he would retaliate for what he perceived as unfair treatment during the process. He described the allegations of sexual misconduct against him as a partisan conspiracy and said that "what goes around comes around."[29] In another well-publicized incident, in the midst of the 2016 presidential campaign, Justice Ruth Bader Ginsburg made public comments denigrating then-candidate Donald Trump. In an interview with the *New York Times,* she said: "I can't imagine what this place would be — I can't imagine what the country would be — with Donald Trump as our president."[30] Both later apologized for their comments, but each instance underscores how justices can at times act in ways that raise questions about possible biases toward the subjects of their comments.[31]

A second area of concern relates to justices' appearance before organizations that are perceived to be partisan — even if the organization does not identify as a political entity.[32] While the code of conduct for federal judges encourages them to participate in charitable, educational, and civic

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[28] As the nonpartisan advocacy organization Fix the Court has noted, it was the court's practice in the late 1800s to give brief explanations for a justice's non-participation in a case. The practice ended for unknown reasons in 1904. Gabe Roth, "Explaining the Unexplained Recusals at the Supreme Court," Fix the Court, May 3, 2018. https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf.

[29] *Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*, Hearing before the Senate Judiciary Committee, 115th Cong. (September 27, 2018) (testimony of Brett Kavanaugh), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript.

[30] Adam Liptak, "Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term," *New York Times*, July 10, 2016, https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html (Downloaded January 14, 2019).

[31] Brett M. Kavanaugh, "I am an Independent, Impartial Judge," *Wall Street Journal*, October 4, 2018, https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822?mod=e2tw; Jessica Taylor, "Ginsburg Apologizes for 'Ill-Advised' Trump Comments," *NPR*, July 14, 2016, https://www.npr.org/2016/07/14/486012897/ginsburg-apologies-for-ill-advised-trump-comments.

[32] Canon 5 directs a judge to refrain from holding office in a political organization, publicly endorse any political candidate, or make any contribution to a political candidate or organization and states that a judge may not engage in any other political activity. However, under Canon 4(C), a judge may assist nonprofit law-related organizations in planning fundraising activities and may be listed as an officer, director, or trustee. "Code of Conduct for United States Judges" [see note 9].

activities, it prohibits them from participating in extrajudicial activities that "reflect adversely on the judge's impartiality."[33] And the Judicial Conference already advises judges against participating in "law-related activity with political overtones" that would "give rise to an appearance of engaging in political activity."[34]

In 2020, the Judicial Conference issued a draft advisory opinion which would have specified that "formal affiliation" with the conservative Federalist Society and the progressive American Constitution Society would be inappropriate.[35] It was scrapped after nearly 200 federal court judges — many of whom were associated with the Federalist Society — voiced opposition.[36]

Despite the opinion's retraction, its theory was sound. Justices Kavanaugh, Samuel Alito, Clarence Thomas, and Neil Gorsuch have all spoken at Federalist Society events.[37] Like their conservative counterparts, Justices Ginsburg, Stephen Breyer, and Sonia Sotomayor have all spoken at various American Constitution Society events while serving on the court.[38]

To avoid even the specter of bias, a Supreme Court code of conduct should advise justices to avoid affiliating with organizations that cast doubt on the justices' impartiality, as these distinctly ideological groups do. The code could mirror the example set by Chief Justice Roberts and Justice Elena Kagan, both of whom have avoided such appearances, potentially due to the heavy partisan perception these events create.[39]

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[33] "Code of Conduct for United States Judges," Canon 4 [see note 9].

[34] Judicial Conference Committee on Codes of Conduct, "Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates," Advisory Opinion No. 116, February 2019, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

[35] Judicial Conference Committee on Codes of Conduct, "Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association," Exposure Draft Advisory Opinion No. 116, January 2020, http://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf.

[36] Letter from Federal Judges to Robert Deyling, Assistant General Counsel, Administrative Office of the United States Courts, regarding Advisory Opinion No. 117, March 18, 2020, https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf#page=1.

[37] Kalvis Golde, "At Federalist Society convention, Alito says religious liberty, gun ownership are under attack," *SCOTUSblog*, Nov. 13, 2020, https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/; "Justice Clarence Thomas at the Federalist Society," C-SPAN, September 8, 2018, https://www.c-span.org/video/?450905-1/justice-clarence-thomas-speaks-federalist-society; Richard Wolf, "Supreme Court Justice Brett Kavanaugh Gets Hero's Welcome from Conservative Federalist Society," *USA Today*, Nov. 14, 2019, https://www.usatoday.com/story/news/politics/2019/11/14/brett-kavanaugh-supreme-court-justice-federalist-society/4195854002/; Mariana Alfaro, "Gorsuch to headline GOP lineup of speakers at Federalist Society; media barred from his speech," *Washington Post*, February 4, 2022, https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-supreme-court/.

[38] *Private: Justice Ruth Bader Ginsburg to Address ACS National Convention*, AMERICAN CONST. SOC. (Mar. 1, 2012) https://www.acslaw.org/expertforum/justice-ruth-bader-ginsburg-to-address-acs-national-convention/; "Conversation with Supreme Court Justice Sonia Sotomayor," C-SPAN, June 8, 2018, https://www.c-span.org/video/?446713-1/conversation-supreme-court-justice-sonia-sotomayor; "United States Supreme Court Justice Stephen Breyer in Conversation with Dean Alan Morrison, Introduced by Judge Ketanji Brown Jackson," American Constitution Society, June 8, 2017, https://www.acslaw.org/video/united-states-supreme-court-justice-stephen-breyer-in-conversation-with-dean-alan-morrison-introduced-by-judge-ketanji-brown-jackson/.

[39] As Supreme Court reporter Adam Liptak said, "By not attending [the annual conventions of the American Constitution Society and Federalist Society], Kagan and [Roberts] are really showing the way. It is such a small thing, to simply stay at home. … There is so much evidence of politicization in the Court and there is no need for the

Public comments and organizational affiliations are not the extent of potential questionable conduct by justices. A code of conduct provides an opportunity for guidance on issues discussed elsewhere in this testimony, including recusals based on the conduct of a spouse or prior participation in a case before the court,[40] private travel paid for by litigants before the court,[41] and participation in events funded by litigants and potential beneficiaries of the court's decision-making.[42]

Improving Disclosures

Disclosure is a cornerstone of government ethics rules, giving the public insight into potential conflicts of interest and helping officials identify situations that would require their recusal. As mentioned above, Supreme Court justices are covered by some portions of the Ethics in Government Act's disclosure requirements. But, as my colleague Dylan Hedtler-Gaudette testified to this subcommittee last fall, they are not currently covered by some key disclosure requirements that other officials follow.[43] And given the unique circumstances facing the justices, they should be required to disclose certain things not currently in the law.

The Ethics in Government Act of 1978 requires justices to disclose financial assets like stocks. Despite this, there are examples of judges at all levels — including the Supreme Court — who presided over a case where evidence of a conflict later emerged.[44] The Act should be amended to require the justices to file periodic reports whenever they make securities transactions over $1,000, bringing them in line with members of Congress and certain categories of executive

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members to add to it." Interview with Adam Liptak, March 26, 2020 (on file with authors), cited in *Above the Fray*, note 75 [see note 1].

[40] Justice Kagan's vote to uphold the Affordable Care Act also caused controversy, as she had served as solicitor general under the Obama administration before joining the court. Warren Richey, "Would Elena Kagan Bow Out of a Health-Care Reform Case?" *Christian Science Monitor*, July 15, 2012, https://www.csmonitor.com/USA/Politics/2010/0715/Would-Elena-Kagan-bow-out-of-a-health-care-reform-case?msclkid=321f7584c4c811eca143a93b8ca0b24f.

[41] In a widely reported incident in 2004, the late Justice Antonin Scalia participated in a hunting trip with then-Vice President Dick Cheney, mere weeks after the Supreme Court had agreed to hear a case that had been brought against the vice president. Dan Collins, "Scalia-Cheney Trip Raises Eyebrows," CBS News, January 17, 2004. https://www.cbsnews.com/news/scalia-cheney-trip-raises-eyebrows/ (Downloaded January 25, 2019).

[42] In 2011, Common Cause requested then-Attorney General Eric Holder to investigate whether Justices Scalia and Thomas should have recused themselves from Citizens United, as both justices had attended private events hosted by Koch Industries, which stood to benefit financially from a decision favoring Citizens United. Sam Stein, "Justices Scalia and Thomas's Attendance at Koch Event Sparks Judicial Ethics Debate," *HuffPost*, October 20, 2010, https://www.huffpost.com/entry/scalia-thomas-koch-industries_n_769843.

[43] Hedtler-Gaudette, *Judicial Ethics and Transparency* [see note 1].

[44] For example, Justice Breyer participated in oral argument in Federal Energy Regulatory Commission v. Electric Power Supply Association, even though his wife owned stock in the defendant's company. After argument, a reporter asked Justice Breyer about the conflict; Justice Breyer's wife sold the stock, but Breyer did not recuse himself from the case. Tony Mauro, "Looking for Conflicts at High Court," *Law.com*, October 22, 2015, https://www.law.com/2015/10/22/how-supreme-court-justices-check-for-conflicts-of-interest (last accessed April 25, 2022); James Grimaldi, Coulter Jones, and Joe Palazzolo, "131 Federal Judges Broke the Law by hearing Cases Where They had a Financial Interest," *Wall Street Journal*, Sept. 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421.

officials.[45] It should also be amended to require all financial disclosure documents to be available online.[46]

To minimize the likelihood of conflicts, a code of conduct should also direct justices to divest from individual stocks or place their assets in a blind trust.[47] Here, executive branch practices provide a useful model. It has been standard practice in recent decades for most presidents to use blind trusts or non-conflicting assets, and senior officials typically divest problematic assets.[48]

Because of the unique expectations of impeccable impartiality and even-handed judgment placed on judges, litigants and the public should also have access to certain non-financial information about the justices. Current processes for reporting public and private appearances by the justices are not adequate.[49] Since it is the appearances themselves that could color the public's perception of impartiality, public disclosure and improved access to information about these extrajudicial engagements are critical.[50]

Ethics reforms should include robust rules requiring timely disclosure of justices' appearances, regardless of their financial component; such rules would go a long way toward improving the public's awareness of the justices' actions, while also requiring judges and justices to scrutinize their extrajudicial conduct carefully so as to avoid the appearance of impropriety. Justices should also be required to disclose positions they hold in social and political groups, two categories of organizations currently exempted from the Ethics in Government Act's reporting requirements.[51]

Finally, because the integrity of the judicial process is the responsibility of everyone who participates, Congress should also strengthen the reporting rules for parties and amici who appear before the court. There have been multiple proposals, including in the 21st Century Courts Act,

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[45] Ethics in Government Act of 1978, 5 U.S.C. App., https://www.govinfo.gov/app/details/USCODE-2010-title5/USCODE-2010-title5-app-ethicsing; Hedtler-Gaudette, *Judicial Ethics and* Transparency [see note 1].

[46] The Courthouse Ethics and Transparency Act, H.R. 5720, 117th Cong. (2021), which the House passed late last year, would achieve both of these aims.

[47] 7 Canon 4(D)(3) of the "Code of Conduct for United States Judges" directs judges to "divest investments and other financial interests that might require frequent disqualification" [see note 9].

[48] Project On Government Oversight, *Above the Fray*, 17 [see note 1]; Walter Shaub, "Conflicts of Interest," in Brookings Institution, *If It's Broke, Fix It* (2021), 12, https://www.brookings.edu/wp-content/uploads/2021/02/Brookings-Report-If-its-Broke-Fix-it.pdf.

[49] Justices report some of these activities in their financial disclosures. But those disclosures are triggered not by the fact of the appearance, but by reimbursements for transportation, lodging, or meals. The rules for judicial financial disclosures require judges to report reimbursements from any single source that are individually worth more than $166 and in aggregate worth more than $415. Thus, an appearance that only resulted in a $40 parking reimbursement would not have to be reported, nor would an appearance that did not result in a reimbursement. Judicial Conference of the United States, *Guide to Judiciary Policy*, vol. 2D, ch. 3 § 330, https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf.

[50] Security concerns are often raised as a reason to disfavor this sort of disclosure. POGO has long advocated for a system that serves both the public's interest in transparency while making necessary accommodations for the justices' safety.

[51] 5 U.S.C. App. §102(a)(6)(A) (2022), https://uscode.house.gov/view.xhtml?req=(title%3a5a+section%3a102+edition%3aprelim)&msclkid=b344428fc4c911ec86f8b8158f801939.

to require amici to identify their major funders.[52] Such disclosures could help the court identify amici that would cause conflicts for justices, giving the court an opportunity to reject such briefs.

Conclusion

The country relies on the Supreme Court as the apex of the judicial branch. That is why the public must be able to trust that the court's members are holding themselves to standards as high as the court's power is vast. The role of Supreme Court justices is not so unique that they can't be held accountable for the integrity of their public service. Public trust does not erode because we acknowledge the need for guardrails on the conduct of public servants; it erodes because of the *lack* of those guardrails.

After all, the worst judge of any person's conduct is that person, for we can never be truly objective about our own conduct.

[52] 21st Century Courts Act, § 5 [see note 11].

The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

April 26, 2022

The Honorable Jerrold Nadler, Chair
The Honorable Jim Jordan, Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Hank Johnson, Chair
The Honorable Darrell Issa, Ranking Member
Subcommittee on Courts, Intellectual Property,
and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chair Nadler, Ranking Member Jordan, Chair Johnson, and Ranking Member Issa:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, we write to the House Committee on the Judiciary's Subcommittee on Courts, Intellectual Property, and the Internet in advance of its April 27, 2022, hearing titled "Building Confidence in the Supreme Court Through Ethics and Recusal Reforms." We appreciate this opportunity to share with the subcommittee our strong support for modernizing our courts, including the need for improved ethics and transparency measures for the Supreme Court.

The Leadership Conference is heartened by the subcommittee's prioritization of the need for judicial ethics reform to ensure that our courts work for all of us, as the civil rights community has a vested interest in this crucial issue. For decades, The Leadership Conference has convened the Fair Courts Task Force, co-chaired by the National Women's Law Center and People For the American Way. The Fair Courts Task Force brings together organizations committed to civil and human rights to work on issues related to federal courts, including judicial nominations and court modernization efforts, in order to build an equal justice judiciary that protects the rights of all people in America. The task force has urged Congress to pass legislation to modernize and reform our federal judiciary by shoring up ethics and transparency reforms, such as extending the code of conduct for federal judges to apply to Supreme Court justices.[1]

Judicial ethics reform has been an enduring priority for our coalition because judges and the decisions they make matter so much to our lives. Federal judges and justices are the final arbiters of our laws and Constitution, and the decisions they make tell us who can vote; receive equal pay; marry the person they love; access affordable health care, education, and housing; obtain an abortion; breathe clean air and drink clean water; hold police officers accountable for using excessive force and other constitutional violations; and so much more. That is why institutions that we entrust to safeguard our democracy, including the federal judiciary, must work for everyone. Unlike any of our elected officials, most federal judges and justices serve on the bench for a lifetime. It is therefore crucial that these jurists are fair-minded, have

[1] "The Leadership Conference on Civil and Human Rights Transition Priorities." *The Leadership Conference on Civil and Human Rights*. November 24, 2020.

diverse lived and professional experiences, and are committed to the civil rights of all of us, not just the wealthy and powerful. There are various ways in which elected and other public officials who violate ethical guidelines can be held accountable; it is far more difficult for the public to hold unelected federal judges who violate ethical guidelines accountable. Congress has the sole authority to remove a federal judge or justice from office via the impeachment process, and only eight federal judges in our entire history have been removed in this way.[2] For us to have equal justice, every person must be able to trust that they will be treated fairly and equitably by judges and justices who are not unduly influenced by or beholden to corporate wealth, partisan politics, or any other conflicts of interest. We need ethics changes and more transparency measures to ensure our federal judges, and especially Supreme Court justices, are held to the highest standards.

Our current ethics guidelines for Supreme Court justices need improvement to protect against perceived or actual corruption and self-interest. The lack of adherence to current rules is problematic across the entire federal judiciary.[3] The ethics guidelines that bind lower-court judges are insufficient to prevent serious conflicts of interest, and even those minimal guidelines are not enforceable against Supreme Court justices.[4] While we are glad to see further consideration of bills that would strengthen some ethics rules for judges and justices, we know that more must be done to bolster judicial independence so the public can trust and know that judges and justices issue decisions based on the facts and law, not personal interest.

The Supreme Court's legitimacy is especially reliant on the public's confidence. It is imperative that our justices hold themselves to the highest ethical standards, not only to ensure fair decision-making but also to increase public trust in the institution. Justices are increasingly engaging in activities that undermine the legitimacy of the Court.[5] Indeed, public approval of our nation's highest court is at its lowest point in decades.[6] This is unsurprising, especially in light of the conduct of individual justices and the well-funded and long-term strategy by right-wing corporate interests to roll back and curb future progress on civil and human rights. For decades, conservatives have pursued litigation against civil rights protections and stacked the courts in favor of the wealthy and powerful.[7] Thus, the discussion about the ethics and transparency of the Supreme Court — and all our federal courts — is not an academic or theoretical one. Central to this discussion is the Court's decisions that directly impact the lives of people. The need for

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[2] "Impeachments of Federal Judges." *Federal Judicial Center*. Accessed April 2022.
[3] *See* Grimaldi, James V.; Jones, Coulter; and Palazzolo, Joe. "131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest." *Wall Street Journal*. September 28, 2021.
[4] *See* "Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules" at 6:00 (opening statement of Chairman Hank Johnson).
[5] *See, e.g.,* Woodward, Bob and Costa, Robert. "Virginia Thomas urged White House chief to pursue unrelenting efforts to overturn the 2020 election, texts show." *Washington Post*. March 24, 2022; Sherman, Mark. "Media barred from Justice Gorsuch talk to Federalist Society." *AP News*. February 1, 2022; Gresko, Jessica. "Chief justice: Judges must better avoid financial conflicts." *AP News*. December 31, 2021. Liptak, Adam. "In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties." *New York Times*. November 13, 2020.
[6] Jones, Jeffrey M. "Approval of U.S. Supreme Court Down to 40%, a New Low." *Gallup*. September 23, 2021.
[7] *See* Senators Booker, Cory; Stabenow, Debbie; Whitehouse, Sheldon; Blumenthal, Richard; Brown, Sherrod; Cardin, Ben; Van Hollen, Chris. "What's At Stake - Equal Justice Under Law: How Captured Courts Tilt the Playing Field Against America's Most Vulnerable." *Democratic Policy & Communications Committee*. October 2020.

The Leadership Conference

ethics reform is fundamentally about who our courts serve and whose rights they protect. It is imperative that members of this committee approach this issue by considering the very real consequences that court decisions have in people's lives.

We must acknowledge that the Supreme Court has a long way to go to fulfill the promise of equal justice under law. The Court's legitimacy is rooted in public trust, and the Court should adhere to established and transparent ethics rules to build trust and ensure balanced, independent judicial decision making that is free from perceived and actual conflicts of interest. In addition to our work to ensure that justices are fair-minded, committed to the civil and human rights of all people, and possess diverse backgrounds and experiences that will inform their role on the bench, we must establish high standards to which justices are held. Congress and the Court must ensure that justices are bound by ethical standards that help our highest court live up to its promise of equal justice under law.

Sincerely,

Wade Henderson
Interim President & CEO

Jesselyn McCurdy
Executive Vice President of Government Affairs

April 27, 2022

The Honorable Jerrold Nadler
Chairman
House Committee on the Judiciary

Dear Chairman Nadler:

On behalf of the Alliance for Justice (AFJ), a national association representing over 130 public interest and civil rights organizations, I write to thank you for holding the hearing, "*Building Confidence in the Supreme Court Through Ethics and Recusal Reform*."

All federal judges except the justices of the U.S. Supreme Court must follow the Code of Conduct for United States Judges — a set of ethical guidelines codified by the U.S. Judicial Conference. While all other federal judges are accountable to the Code, including its rules on extrajudicial and political conduct, the Supreme Court justices merely use the Code for "guidance." In the absence of a mandatory code, questionable conduct by Supreme Court justices has proliferated, creating escalating concerns about the integrity of our court system. Clearly, a voluntary system is not enough. The nation's most powerful Court, whose decisions shape the lives of all Americans, must be subject to a code of conduct.

The credibility of our federal judicial branch rests upon the ethical conduct of judges. As stated in the Code of Conduct, "the integrity and independence of judges depend in turn on their acting without fear or favor." Ethical conduct by judges is also necessary to preserve public confidence in the courts as fair and impartial arbiters. The Supreme Court itself recognized in *Caperton v. A.T. Massey Coal Co.* that judicial ethics play a critical role in preserving our democracy: "The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity."

Since the time of the country's founding, federal judges have pushed the boundaries of ethical political engagement. In response, the courts, and Congress, have sought reform. The Code of Conduct for United States Judge was adopted in 1973, after decades of advocacy. The Code contains five Canons. Canon 1 of the Code states that "a judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." Canons 2, 4, and 5 concern judges' extrajudicial and political activity. For instance, Canon 5 states that judges "must refrain from all political activity," which includes making speeches for political organizations, donating to political candidates or organizations, or purchasing a ticket to attend political events. The Code also prohibits judges

from engaging in fundraising activities, for political and apolitical organizations alike, and even conduct that leads to "the appearance of impropriety."

However, like the ethical reforms before it, the Code did not bind Supreme Court justices. And while justices claim that they follow the Code, their behavior indicates otherwise. Since its passage, Supreme Court justices appear to have engaged in conduct that would violate the Code, with conduct growing worse in the last two decades. In a 2011 memo about the Code of Conduct, AFJ catalogued allegations of extrajudicial, political misconduct by Supreme Court justices, particularly Justice Clarence Thomas and the late Justice Antonin Scalia. Since then, the allegations have not stopped.

While recent reporting has focused on Justice Thomas's potential misconduct, he is not the only justice with credible allegations of misconduct. A few recent examples of misconduct include:

- Judge Thomas's wife, Ginni Thomas, has a long history of involvement with ultra-conservative causes that consistently raise ethical issues for Justice Thomas. For example, after the 2020 election, she vehemently advocated for the invalidation of the election results to Trump's Chief of Staff Mark Meadows and attended the January 6 Stop the Steal rally at the White House. In likely violation of Canon 2, Justice Thomas has already participated in two 2020 election cases and plans to participate in another case related to the January 6 insurrection.
- Justices Alito and Kavanaugh arguably ran afoul of Canon 2 when they met with the head of the National Organization for Marriage (NOM) at the Supreme Court in 2019. NOM is a leading opponent of same-sex marriage which has repeated falsehoods about LGBTQ+ Americans. In addition to litigation, the organization spearheads state-based campaigns against LGBTQ+ equality. At the time of the Supreme Court meeting, NOM had submitted amicus briefs in three ongoing cases: *Bostock v. Clayton Co.*, *Altitude Express v. Zarda*, and *R.G. & G.R. Harris Funeral Homes v. EEOC*.
- Justice Gorsuch likely violated Canons 2, 4, and 5 when he spoke at a 2022 Florida Federalist Society event that included appearances by Governor Ron DeSantis, former Vice President Mike Pence, and former White House Press Secretary Kayleigh McEnany. The event was closed to the press and included a panel "The End of *Roe v. Wade?*," which featured Mississippi Solicitor General Scott Stewart who had asked Justice Gorsuch to overturn *Roe v. Wade* only months before in *Dobbs v. Jackson Women's Health Organization.*

These examples are only the tip of the iceberg. Without ethics rules and enforcement for the Supreme Court, there is no comprehensive list of misconduct allegations, and justices will continue to play by their own rules. Several justices, especially those recently in the news for far-right political activity, have allegedly engaged in partisan politics, improper fundraising activities, and other conduct that would lead any reasonable person to question their impartiality.

Their behaviors obstruct the Court's substantive decision-making and wreak havoc on public confidence in the institution. As of September 2021, just 40% of Americans approve of the job of the U.S. Supreme Court, according to a Gallup poll. The same poll indicated that just 54% of Americans have confidence in the federal judiciary overall, down from a high of 80% in the late 1990s. The decline in approval noted by the Gallup poll is true for Democrats, Independents, and Republicans alike. Only 38% of Americans would rate the honesty and ethical standards of judges as high or very high.

Thank you for holding this hearing to shed light on this threat to our democracy and equal justice. If the Court does not adopt the Code as binding, or create a similar set of binding ethical rules, Congress must take action. The 21st Century Courts Act, introduced earlier this month, is a great step forward in reforming the Court's ethics. AFJ looks forward to working with this Committee to ensure our federal courts are dispensing fair and impartial justice.

Sincerely,

Rakim Brooks
President, Alliance for Justice

Mr. JOHNSON of Georgia. I will now introduce the panel of our Witnesses.

Gabe Roth is the founder and Executive Director of Fix the Court, a nonprofit, nonpartisan organization that has worked to increase transparency and accountability across the Federal courts, but especially for the Supreme Court, since 2014. Mr. Roth earned his undergraduate degree from Washington University in St. Louis, and his master's degree from Northwestern University's Medill School of Journalism.

Welcome, Mr. Roth.

Donald K. Sherman is the Senior Vice President and Chief Counsel of Citizens for Responsibility and Ethics in Washington, or CREW. Mr. Sherman has a distinguished resumé in ethics and oversight across the Federal government, including time working in the White House, in both the House and Senate, and in a Federal agency.

Mr. Sherman graduated cum laude from Georgetown University and earned his J.D. from Georgetown University Law Center.

Welcome, Mr. Sherman.

Mark Paoletta, Paoletta, is a partner in private practice representing clients in congressional hearings and investigations. Before entering private practice, Mr. Paoletta most recently served as general counsel for the Office of Management and Budget under the Trump Administration, and as counsel to former Vice President Mike Pence.

Mr. Paoletta received his B.A. from Duquesne University and his J.D. from Georgetown University Law Center.

Welcome, Mr. Paoletta

Professor Stephen Gillers is the Elihu—and I hope I pronounced that correct—Elihu, Elihu, okay, either one, he is the Elihu or Elihu Root Professor of Law at New York University School of Law. He is a nationally recognized expert on legal and judicial ethics, and the author of several case books and articles, as well as a sought-after lecturer on the regulation of lawyers and judges.

Professor Gillers earned his B.A. from City University of New York and his J.D. Cum Laude from New York University School of Law.

Welcome, Professor Gillers.

Before proceeding with testimony, I would like to remind all our Witnesses that you have a legal obligation to provide truthful testimony and answers to this Subcommittee, and that any false statement you may make today may subject you to 18 U.S.C. 1001.

Please note that each of your written statements will be entered into the record in their entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that time frame there is a timing light on your table. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red it means that your five minutes have expired.

We will have five-minute rounds of questions after the Witnesses' testimonies.

Mr. Roth, you may begin.

STATEMENT OF GABE ROTH

Mr. ROTH. Thank you.

Chair Johnson, Ranking Member Issa, Members of the Subcommittee, back in 2016, a Supreme Court justice failed to recuse in a major patent case despite owning $250,000 worth of shares in one party's parent company. That same year, a different justice spoke at a $500-per-plate dinner with finance and oil executives. Another justice that year omitted from her financial disclosure report the fact that a public university paid for as many as 11 rooms for her in one of the State's fanciest hotels.

In 2019, in the Supreme Court building, two justices met with the head of an organization that had submitted amicus briefs in three then unresolved cases.

In 2020, a justice failed to recuse in a case concerning the constitutionality of a Federal law that she likely worked on a legal strategy to defend in her previous job.

Last year, a justice had dinner with a prominent politician and a dozen of his friends, and then gave a speech, with the politician at her side, in which she said the Supreme Court "is not comprised of a bunch of partisan hacks."

These are just a handful of examples of Supreme Court justices flouting basic ethics rules in the handful of years that my organization Fix the Court has existed. I have dozens more in my written statements. None of the justices just referenced is Clarence Thomas.

When asked over the years how they confront questions of ethics that go beyond the recusal law, the justices say they look to precedent, or scholarly articles, or seek advice from their colleagues or law professors. Which precedents, which articles, which colleagues, and which professors? That there is not a single, definitive source the justices use for guidance means that they will be more likely to come up with different conclusions about their ethical obligations.

This era of nine justices operating, as has been said, like nine independent law firms must end.

It shouldn't be the case that half the justice accept flights on private planes paid for by big-time political benefactors when the rest stick to business or coach, or that two justices leave free trips off their annual financial disclosures while the rest are filing accurately, or that three justices trade individual stocks and are unable to participate in some cases because of it and the rest do not, and that two justice recuse in cases involving the work of a family member, but two justices do not when faced with similar circumstances.

For these reasons, and more, we need a formal written code of conduct for the Supreme Court of the United States.

A code is not a panacea. The rules governing recusal must themselves be expanded and modernized. If a justice's spouse, for example, is paid a quarter million dollars at the time her employer filed an amicus brief on a major case, that justice shouldn't hear the case.

If a justice received lavish gifts and was flown around the country by individuals and organizations funding merits and amicus briefs, there should be recusals in those cases. If a justice's wife's

communications with a third party are subject of a congressional investigation, and the Supreme Court is asked to rule on the validity of that investigation, the justice should recuse.

The current recusal law says, among other things, that a justice—the judge or justice must recuse when "his impartiality might reasonably be questioned." I am a reasonable person, and I question Justice Thomas' impartiality in each of the examples I just mentioned and, sadly, in many more.

I will grant the "reasonable person" standard could use some improvement. We need a law to ensure judges and justices take the proactive step of informing themselves of every personal interest and every financial interest of theirs, and their spouses, and their families that could be implemented by the outcome of a proceeding. They should recuse when those who financially backed their confirmation appear as litigants. When they are given a free trip, there should be a cooling off period afterwards.

Take that trip, but then wait a few years before you participate in a case involving the sponsor.

All the reforms I have discussed, a formal ethics code, a more exacting recusal standard, and a cooling off period are in the 21st Century Courts Act of 2022 that was introduced earlier this month.

Now, why do we need this bill? Because time and again we see that, left to their own devices, the justices will do nothing to improve their policies and build a more modern, trustworthy institution. Despite all the ethics lapses I have mentioned, the justices have not lobbied—and they and the judiciary have lobbyists—the justices have not lobbied for any new laws, nor have they put any new accountability measures in place, to my knowledge.

Finally, this hearing is not the first attempt at fixing the judiciary's ethics lapses. The campaign to improve the recusal law and to impose an ethics code goes back 50 years.

More recently, though, in 2018, the Full Judiciary Committee unanimously passed a reform bill called the Judiciary ROOM Act. Led by Ranking Member Issa, the bill included a SCOTUS Code of Conduct, a requirement that the justices explain their recusal decisions, and a live streaming requirement.

These elements were carried forward into the 21st Century Courts Act of 2020. They are included in the 21st Century Courts Act of 2022. It is the spirit of bipartisanship that I pray carries the day, and that I hope that we can talk about more in our ensuing discussion.

Thank you again for the opportunity to testify.

[The statement of Mr. Roth follows:]

"Building Confidence in the Supreme Court Through Ethics and Recusal Reforms"

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

April 27, 2022

Testimony of Gabe Roth, Executive Director of Fix the Court

Chairman Johnson, Ranking Member Issa and Members of the Subcommittee: thank you for the opportunity to testify on ways we can build confidence in our highest court via more exacting ethics and recusal standards. There's clearly a lot that needs to be fixed in these areas.

Back in 2016, a Supreme Court justice failed to recuse in a major patent case despite owning shares in one party's parent company.[1] That same year, a different justice attended a $500-per-plate dinner in Texas with finance, legal and oil executives.[2] Another justice that year omitted from her financial disclosure report the fact that a public university paid for as many as 11 rooms in one of the state's fanciest hotels for her, her security detail and some family friends.[3]

In 2019, in the Supreme Court building, two justices met with the head of an organization that had submitted amicus briefs in three unresolved and highly contested cases.[4] Later that year, two justices failed to recuse from a petition involving their book publisher, though the two have earned $3.5 million combined from that company in the last few years.[5]

In 2020 a justice failed to recuse from a case regarding the constitutionality of a federal law even though, in her previous job, she likely worked on a legal strategy to defend said law.[6] And last year, a justice had dinner with a prominent politician and a dozen of his friends and then gave a speech — with that politician at the justice's side — in which the justice said the Supreme Court "is not comprised of a bunch of partisan hacks."[7]

These are just a handful of examples of the justices of the Supreme Court flouting basic ethics rules in the handful of years my organization, Fix the Court, has existed. Dozens more are listed at the end of this statement.

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[1] Chief Justice Roberts initially failed to recuse in a merits case, 14-1538, *Life Technologies Corp. v. Promega Corp.*, despite owning up to $250,000 in shares of Thermo Fisher Scientific, which owns Life Technologies. He did recuse after the error was brought to his attention after oral argument.

[2] The source is a public records request Fix the Court made to the University of Texas-Arlington in 2019, the files of which were uploaded to a cloud storage app (link) that have since been deleted either by the app or the university. I am seeking to get them restored.

[3] *See* response to Fix the Court's 2019 public records request to the University of Rhode Island re: Justice Sotomayor's 2016 commencement speech (link).

[4] In Oct. 2019, Justices Alito and Kavanaugh met with the head of the National Organization for Marriage at the Supreme Court per this photo. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC*, that were unresolved at the time.

[5] Justices Sotomayor and Gorsuch failed to recuse in 19-560, *Nicassio v. Viacom, et al*, where Penguin Random House was a party on the side of the respondents. By this point, Sotomayor had earned about $3 million from her book contracts with PRH since becoming a justice and Gorsuch had earned $555,000.

[6] Justice Kagan did not recuse from several Obamacare merits cases — including 11-393, *NFIB v. Sebelius*; 14-114, *King v. Burwell*; and 19–840, *California v. Texas* — even though she was the U.S. solicitor general at the time the White House and her office were crafting the legal defense of the law.

[7] Justice Barrett famously gave this speech in Louisville last year; *see*, "Justice Amy Coney Barrett argues US Supreme Court isn't 'a bunch of partisan hacks,'" *Louisville Courier-Journal*, Sept. 12, 2021 (link).

And none of the justices referenced above was Clarence Thomas.

When asked over the years about how they confront questions of ethics, the justices say[8] they look to precedent, scholarly articles or seek advice from their colleagues. But which precedents, which articles and which scholars? That there is not a single, definitive source the justices use for guidance is in itself problematic, as it means they'll be more likely come to different conclusions about their ethical obligations.

This era of the nine justices operating, as has been said, like nine independent law firms must end.

It shouldn't be the case that about half the justices, that we know of, are accepting flights on private planes, often paid for by public entities or big-time political benefactors, while the rest tend to stick with business or coach.[9] It shouldn't be that two justices are leaving some of their free trips off their annual financial disclosure reports,[10] while the rest are doing their best to file accurately. It shouldn't be that three justices are trading individual stocks — and being unable to participate in some cases and petitions because of it — when the rest do not.[11] It shouldn't be that two justices recuse when a case concerning the work done by a parent or a sibling comes before the Court, but two justices refuse to recuse when a case concerning the work done by their parent or their spouse comes before the Court.[12]

Today's hearing has been called in large part to talk about the absence of a Supreme Court Code of Conduct, so anticipating this, I sat down earlier this month and considered what such a Code might look like. I started with the Code that exists for lower court judges[13] and took out the parts that don't apply to the justices, such as dealing with witnesses and the like. Then I figured a Supreme Court Code could use more detail in a few key areas, like on attending fundraisers, participating in activities with political candidates and lending the prestige of the office to advance others' interests.

Although I didn't finish the project — my job title isn't mentioned in the Constitution, so I found this a bit presumptuous in the end — I came to the conclusion that this is not a problem that lacks a solution. It can be done. It must be done.

On Feb. 3, 2022 — before the news broke that Justice Thomas' wife Ginni was texting with former White House Chief of Staff Mark Meadows about strategies for overturning the election at a time when the justice was participating in cases dealing with election results — two dozen leading legal ethics scholars wrote to Chief Justice

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[8] *See*, e.g., the Chief Justice's 2011 Year-End Report on the Federal Judiciary: "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."

[9] From my research and public records requests, I have found examples of Justices Scalia, Thomas, Breyer opting to fly via private jet. (Justice Alito was scheduled to take one, but a hurricane canceled his flight.) *See generally*, "When Justices Go to School: Lessons from Supreme Court Visits to Public Colleges and Universities" (link).

[10] *See,* "2 SCOTUS justices agree to amend financial disclosures after Fix the Court asks questions," ABA Journal, March 24, 2020 (link).

[11] Chief Justice Roberts, Justice Breyer and Justice Alito are the three, collectively holding shares in about three dozen companies. *See* "Justices' 2020 Financial Disclosure Reports" (link).

[12] Justice Breyer recuses when a case comes to the Court via his brother's, Judge Charles Breyer's, courtroom in the Northern District of California. Justice Kavanaugh has recently recused from two petitions, 21-348, *Johnson & Johnson, et al., v. Fitch*, and 20-1223, *Johnson & Johnson, et al., v. Ingham, et al.*, in which an issue his father had previously worked — namely whether there's a link between talcum powder and ovarian cancer — reached the Court. Justice Barrett did not recuse from a recent case, 19-1189, *BP p.l.c., et al., v. Mayor and City Council of Baltimore*, involving Shell Oil, though her father was an executive their and Shell was on her circuit court conflicts list (link). Justice Thomas has never recused in a case involving the political activities of his wife.

[13] See, "Code of Conduct for United States Judges" (link).

Roberts[14] asking that he write a formal Supreme Court Code of Conduct. Such a document, they wrote, would "assist the justices in addressing potential conflicts of interest and other issues in a way that is consistent and builds public trust in the institution." Their letter concludes:

> [A]t a time when public institutions are redoubling their efforts to improve the public's trust, we maintain that a formal, written Code, offering a uniform set of principles that justices and the public alike would look to for guidance, would benefit the Court and the nation.

It's not just me or the legal academy who feels that a Code would be such a benefit; it's also the American people and those who represent them in Congress. According to a poll taken earlier this month,[15] more than three-fourths of Democrats, Republicans and Independents say they support the adoption of a code of ethics for the justices. That tracks with surveys that my organization, Fix the Court, and its forerunner, the Coalition for Court Transparency, have taken half a dozen times in the past decade.[16]

What's more, current and past Republicans and Democrats on this very Committee have offered support for a SCOTUS Code of Conduct.[17] At a 2017 Courts Subcommittee hearing, then-Chairman Darrell Issa said, "When it comes to transparency […], when it comes to the ethics of the judiciary, we" — meaning Congress — "have an obligation. We cannot alone simply say we'll wait to impeach a judge from time to time."

At a full Committee hearing in 2019, Chairman Jerry Nadler lamented that "the Supreme Court [is] the only court in the country currently not subject to any binding code of ethics." At the same hearing, then-Ranking Member Doug Collins said he believed drafting a Supreme Court Code of Conduct was "something I think we can find agreement on" across the aisle.[18] And Courts Subcommittee Chairman Hank Johnson said at a 2021 hearing: "People are 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."[19]

A Code is not a panacea. No one believes that its mere existence would end the spate of ethical lapses I recount in the appendix to this testimony. But it is a critical step in a suite of reforms that are so desperately needed to build trust in our nation's highest court.

The next step should be an obvious one, as well, as recent events have made it clear that the rules governing recusal must be expanded to reflect modern times. "Nemo iudex in causa sua," i.e., "no one should be a judge in their own cause or case," is centuries old. The main judicial recusal law,[20] which has roots from America's founding, was expanded in 1948 and 1973. It is time for the next chapter to be written.

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[14] *See*, "Two Dozen Legal Ethics Scholars Ask Chief Justice Roberts for an Ethics Code," Fix the Court, Feb. 3, 2022 (link).

[15] *See*, "Voters Are Split on Their Perception of the Supreme Court, but Support a Code of Ethics for Justices," April 19, 2022 (link).

[16] *See generally*, "New Poll: Greater Transparency at SCOTUS May Be the Only Thing the Left and Right Agree On," June 12, 2018 (link).

[17] Other conservatives who support a Supreme Court Code of Conduct include those who signed the April 8, 2022, letter, "Statement on the Need for SCOTUS to Adopt a Compulsory Ethics Code," that was released by the group Checks & Balances (link).

[18] *See*, "Hearing on H.R. 1, For the People Act," Jan. 29, 2019 (link).

[19] "The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency," June 21, 2019 (link).

[20] 28 U.S.C §455.

If a justice's spouse was paid a quarter million dollars at the time her benefactor co-wrote an amicus brief in a major case, that justice shouldn't participate in the case.[21] If a justice receives lavish gifts and is flown around the country by organizations funding merits and amicus briefs, there should be recusals in those cases.[22] If a justice's wife's communications with a third party are subject of a congressional investigation, and the Supreme Court is asked to rule on the validity of that investigation, the justice should recuse from that determination.[23]

The current law says a judge or justice must recuse when his impartiality might reasonably be questioned. I am a reasonable person, and I question Justice Thomas' impartiality in each of the examples I just mentioned and, sadly, in many more (*see generally* Appendix A).

But I'll grant that the "reasonable person" standard might be vague. So is the line two subsections later in the recusal law, which says, "A judge should […] make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."

To inspire confidence in our jurists' impartiality, we must do better. Judges — and justices; let's include them here, too, by title — must take the proactive step to inform themselves of any personal and any financial interests of their spouses (and of themselves). They must seek out and make a frequently updated list of any interest[24] they or their spouse has that could be impacted by the outcome of a proceeding.

One more thing: if you're a justice and you're given a free trip or a gift by a Supreme Court litigant or amicus, you should have a "cooling off" period. Take that trip, accept that gift —but you must then wait a few years until you participate in a case involving the source of the perk.

All of these provisions — an ethics code, a more exacting recusal standard, a way to ensure that parties filing briefs aren't unduly trying to influence the justices and a formal "cooling off" period — are in the 21st Century Courts Act of 2022 (H.R. 74265 and S. 4010) that was introduced in the House and Senate earlier this month.

Why do we need this bill? Because time and again we see that, left to their own devices, the justices will do almost nothing to change policies and build a more modern, trustworthy institution.[25]

The nine all know that, as I mentioned before, some of their colleagues are flying on megadonors' private planes, and others are receiving gifts 500 times larger in value than the limit they're supposed to adhere to.[26] But the justices have not lobbied for any new laws, nor have they put any new accountability measures in place.

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[21] Justice Thomas participated in 17-965, *Trump v. Hawaii*, though his wife Ginni earned more than $235,000 total in 2017 and 2018 from the Center for Security Policy, whose founder Frank Gaffney signed an amicus brief in the case.

[22] For example, in 2008 Thomas attended a Koch Industries-backed retreat in Palm Springs, Calif., at a time in which Koch was bankrolling several litigants with cases before the Supreme Court.

[23] Thomas failed to recuse in the petition 21A272, *Trump v. Thompson*, over the Jan. 6 Committee's access to documents related to the insurrection, even though Ginni signed a letter in December denouncing Committee's very existence, and it's likely documents that indicate her involvement to invalidate the election results will be turned over to the Committee.

[24] *E.g.*, if your wife is texting someone about end times related to an issue that's before the justices, that counts as "an interest."

[25] I'm interested in solutions not only for the current nine but also for the judges and justices of the future: more and more these days our federal judges are coming from the ranks of law clerks, and a lack of any action to fix the lapses I've mentioned would signal to that next generation of judges that there are no repercussions for speaking at a fundraiser or effectively endorsing a Senate candidate weeks before his primary.

[26] The justices were not included in the 1989 Ethics Reform Act, which updated the gift acceptance laws, but in 1991 Chief Justice Rehnquist wrote a resolution stating the nine would follow its strictures (link). That policy remains in effect today. In 2016, Justice Ginsburg accepted a prize worth $1,000,000, which is 500 times the $2,000 limit. She did, though, donate it all to charity (*see generally*, Appendix A).

Here's a timely example: The FY23 budget proposal the Supreme Court released a few weeks ago[27] contained no request for funding, say, the installation of a software-based conflict-check system so the justices might overlook conflicts less often. It included no funding request for an ethics officer who'd assist the justices in clarifying whether their participation in certain cases or petition determinations might pose a conflict. There was no ask for a travel ombudsman, who'd vet the dozens of free trips to fancy and far-flung locales that the justices receive each year to ensure they're not compromising their ethics.

But there was a request for $15.9 million for the "Supreme Court Courtyard Restoration." Eleven percent of their budget next year will go to interior landscaping — recall that the building is essentially a square-shaped donut — and not on several areas I've just mentioned that are sorely in need of some upkeep to maintain the public's trust.[28]

Finally, it's important to recall that this hearing is not a first attempt at fixing the judiciary's ethical lapses; the campaign to improve the recusal law and impose an ethics code on the justices goes back decades. Instead of recounting that history here, though, I want to focus on a more recent effort.

In 2018, the full Judiciary Committee passed a bill[29] called the Judiciary ROOM Act.[30] Led by Courts Subcommittee Ranking Member Issa, who was then chairman, the bill included a Code of Conduct for the Supreme Court; a requirement that the justices, when they recuse, give a brief explanation for that decision; and a requirement that the justices livestream their oral arguments.

These elements were carried forward into the 21st Century Courts Act of 2020,[31] and they are included once more in the 21st Century Courts Act of 2022.

It's this spirit of bipartisanship that I pray carries the day. Thank you again for the opportunity to testify.

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[27] *See* "FY 2023 Congressional Budget Request, United States Supreme Court: Care of the Building and Grounds" (link).

[28] I also bring up the budget to point out that it's completely constitutional for Congress to give the justices $15.9 million for that restoration, as it is for Congress and to withhold such discretionary funding if the justices fail to write an ethics code.

[29] *See* "House Judiciary Approves Major Transparency Bill Featuring Several of Our 'Fixes,'" Fix the Court, Sept. 14, 2018 (link).

[30] H.R. 6755 in the 115th Congress.

[31] H.R. 6017 in the 116th Congress.

Appendix A: Recent Ethical Lapses by Supreme Court Justices

These lapses were compiled by Fix the Court staff in March and April 2022. They are by a justice's seniority, then in chronological order. They comprise mostly those that have occurred since FTC's founding in 2014. Citations were omitted for ease of reading but are available on FixTheCourt.com.

Current justices:

Chief Justice John Roberts

— Failed to recuse in 14-972, *ABB Inc., et al. v. Arizona Board of Regents, et al.* (cert. denied), despite owning shares in Texas Instruments stock, a party on the ABB side. (2015)

— Initially failed to recuse in a merits case, 14-1538, *Life Technologies Corp. v. Promega Corp.*, despite owning shares in Thermo Fisher Scientific, which owns Life Technologies; did recuse after the error was brought to his attention after oral argument. (2016)

— Failed to recuse in 17-1287, *Marcus Roberts et al. v. AT&T Mobility* (cert. denied), despite owning shares in Time-Warner, which had merged with AT&T. (2018)

Justice Clarence Thomas

— Accepted private plane rides and gifts, including a bible once owned by Frederick Douglass valued at $19,000, from financier Harlan Crowe. Crowe also donated $500,000 to help Ginni Thomas establish Liberty Consulting in 2011, a platform she used to lobby against laws like Obamacare that were before the Court; gave $175,000 to a library in Savannah to name a wing after Thomas; and raised millions to build a museum in Thomas' hometown of Pin Point, Ga. (multiple years)

— Attended a Koch Industries-backed retreat in Palm Springs, Calif., at a time in which Koch was bankrolling several litigants with cases before the Supreme Court. (2008)

— Name was used in promotional materials for the nonprofit NRA Foundation, which stated its 2009 National Youth Education Summit included "exciting question and answer discussions with [the] wife of Supreme Court Justice Clarence Thomas." (2009)

— Was found to have omitted data on five years of Ginni's employment (2003-07), where she earned $686,589 from the Heritage Foundation, from his annual financial disclosures. (2011)

— Attended the annual Eagle Forum conference, which, at up to $350 a head, may have been a fundraiser. Ginni Thomas used the justice's appearance as a fig to increase attendanee, urging in promotional materials that prospective attendees come to hear "my amazing husband." (2017)

— Participated in 17-965, *Trump v. Hawaii*, though Ginni earned more than $235,000 total in 2017 and 2018 from the Center for Security Policy, whose founder Frank Gaffney signed an amicus brief in the ease. (2017-18)

— Prominently displays in his Court chambers a photo of Vice President Mike Pence's swearing-in, which Thomas presided over, that's signed by Pence. (2017-present)

— Omitted from his financial disclosure report the reimbursements for transportation, food and lodging he received from Creighton University School of Law, where he taught that year. After FTC's report on justices' lavish trips was released in 2020, amended his report, though the amendment wasn't made public until 2022 (2017-22)

— Omitted from his financial disclosure report the reimbursements for transportation, food and lodging he received from the law schools of the University of Kansas and the University of Georgia, where he taught that year. After FTC's report on justices' lavish trips was released in 2020, amended his report, though the amendment wasn't made public until 2022. (2018-22)

— Documentary about his life financed by several groups, including the Koch Foundation, Judicial Education Project and Scaife Foundation, that were funding Supreme Court litigants and amici around the time the film was produced and released. (2019- 2020)

— Failed to recuse in any of the 2020 election petitions that reached the Supreme Court, even though it is likely Ginni had an "interest," cf., 28 U.S.C. §455(b)(5)(iii), in the outcome of the election, seeing as how her publicly released text messages and social media and listserv posts show she was actively working with high-level Trump administration officials to subvert and overturn its results. (2020-2021)
— May have been in contact with Fla. Gov. Ron DeSantis possibly around the time in which Florida was a respondent in 21A247, *Ohio v. OSHA, et al.*, over the federal test-or-vax mandate. (2021)
— Failed to recuse in the petition 21A272, *Trump v. Thompson*, over the Jan. 6 Committee's access to documents related to the insurrection, even though Ginni signed a letter in December denouncing Committee's very existence, and it's likely documents that indicate her involvement to invalidate the election results will be turned over to the Committee. (2022)
— Is participating in 20-1199, *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, even though Ginni sits on the board of the National Association of Scholars, which filed an amicus brief in the case. (2022)
— Name is being used on third-party website, JusticeThomas.com, at the bottom of which is written "© 2022 · Justice Clarence Thomas." Though the domain name was purchased by Domains By Proxy, LLC, it is unlikely that Thomas himself maintains it, and it encourages visitors to purchase his memoir. (2022)
— Posed for a photo in a Supreme Court alcove with Herschel Walker, a Senate candidate in Georgia, seven weeks before Walker's primary election; photo was tweeted out by Walker's campaign communications director and hasn't been deleted as of today, April 10. (2022)

Justice Stephen Breyer
— Failed to recuse in merits case 14–840, *FERC v. EPSA*, despite owning shares in Johnson Controls, a party on the EPSA side. Breyer learned about the conflict the day after oral argument and sold the stock. (2015)
— Attended a $500-per-plate dinner at the University of Texas at Arlington with finance, legal and oil executives ahead of his talk at the school. The high price suggests the event was a fundraiser. (2016)
— Along with Alito, failed to recuse in 18-6644, *Feng v. Komenda and Rockwell Collins, Inc.* (cert. denied), though he owns shares in Rockwell's parent company, United Technologies Corp. Said he had "no way of knowing" about the conflict since Rockwell didn't file a response, which is spurious reasoning. (2019)
— While asking a question during oral argument in a public charge case, apparently gave away the result in 20-601, *Cameron v. EMW Surgical Center*, where Ky. Attorney General Daniel Cameron asked to intervene to defend a state law when no other governmental representative would defend it. (2022)
— Nothing wrong with justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Justice Samuel Alito
— Failed to recuse in merits case 07-582, *FCC, et al., v. Fox Television, et al.*, despite holding 2,000 shares of Disney stock on behalf of his minor children. ABC, which Disney owns, was a party on the respondents' side. (2008)
— Failed to recuse in merits case 17-290, *Merck Sharp & Dohme Corp. v. Albrecht*, despite owning shares in Merck. Eventually sold shares and unrecused. (2017-2018)
— Along with Kavanaugh, met with the head of the National Organization for Marriage at the Supreme Court. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC* that were unresolved at the time. (2019)
— Attended Secretary of State Mike Pompeo's taxpayer-funded Madison Dinner with other politicians and GOP donors. (2019)
— Along with Breyer, failed to recuse in 18-6644, *Feng v. Komenda and Rockwell Collins, Inc.* (cert. denied), though he owns shares in Rockwell's parent company, United Technologies Corp. (2019)
— Speech to Federalist Society annual convention included discussion on COVID's impact on religious exercise at a time when cases concerning the topic remained active at the Court. (2020)

— Failed to recuse in 20-6256, *Valentine v. PNC Financial Services, et al.* (cert. denied), where one of the respondents was PNC Bank, whose shares Alito owns. (2021)
— Chillingly, given power imbalance between a justice and a journalist, quoted directly from a journalist's article on the "shadow docket" in speech attempting to rebut the justices' increasing use of emergency orders to make impactful rulings. (2021)

Justice Sonia Sotomayor
— Failed to recuse in 12-965, *Greenspan, v. Random House* (cert. denied), even though the respondent, her book publisher, had months before spent tens of thousands of dollars sending her around the country to promote her autobiography. (2013)
— Omitted from financial disclosure that the University of Rhode Island paid more than $1,000 for her round-trip flight for a commencement speech, as well as up to 11 rooms in one of the state's fanciest hotels for her, her security detail and possibly some family friends. The trip included a five-car motorcade from the airport, and URI ordered 125 copies of her autobiography for the appearance. (2016)
— Failed to recuse in 19-560, *Nicassio v. Viacom, et al.* (cert. denied), where Penguin Random House was a party on the side of the respondents. By this point, Sotomayor had earned more than $3 million from her book contracts with PRH since becoming a justice. (2019-20)
— Initially failed to recuse from merits case 19-518, *Colorado Department of State v. Michael Baca, et al.*, despite her close friendship with Polly Baca, one of the respondents. After some months, she did recuse. (2020)

Justice Elena Kagan
— Failed to recuse from several Obamacare merits cases — including 11-393, *NFIB v. Sebelius*; 14-114, *King v. Burwell*; 19–840, *California v. Texas* — even though she was the U.S. solicitor general at the time the White House and her office were crafting the legal defense of the law. (2011, 2014 and 2020)
— Initially failed to recuse in the (argued and reargued) merits case 15–1204, *Jennings v. Rodriguez*, despite her previous work on the case when U.S. solicitor general. Stepped aside when the error was brought to her attention. (2016 and 2017)
— A speech she gave at the University of Wisconsin Law School was part of its Dean's Summit, which is an annual gathering for those who pledge at least $1,000 per year to the school. (2017)
— Failed to recuse in 19-720, *U.S. v. Briones, Jr.*, a case that was remanded to the Ninth Circuit, even though she had previously participated in an earlier version of this case. (2021)
— Nothing wrong with justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Justice Neil Gorsuch
— Gave a talk at Trump International Hotel in Washington to The Fund for American Studies. TFAS is an associate member of the State Policy Network, whose Illinois-based partner organization was at the time representing Mark Janus in a major union dues case, 16-1466, *Janus v. AFSCME*, that was argued the following year. (2017)
— Failed to recuse in 19-560, *Nicassio v. Viacom, et al.* (cert. denied), where Penguin Random House was a party on the side of the respondents. Gorsuch has earned more than $650,000 from his PRH book contract since becoming a justice. (2019-20)
— Nothing wrong with justices voting but as of 2020 was a registered Republican. (2020)
— Spoke at a Florida Federalist Society event that was closed to the press and included appearances by Gov. Ron DeSantis and former Vice President Mike Pence. (2022)

Justice Brett Kavanaugh
— Told the Senate Judiciary Committee during his confirmation hearing, "As we all know, in the United States political system of the early 2000s, what goes around comes around," among other musings. Unclear what this was in reference to. (2018)
— Along with Alito, met with the head of the National Organization for Marriage at the Supreme Court. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC* that were unresolved at the time. (2019)

Justice Amy Barrett
— Americans for Prosperity spent more than $1 million to help get Barrett confirmed, and she did not recuse from the merits case 19-251, *Americans for Prosperity Foundation v. Bonta*. (2021)
— Gave a speech at the McConnell Center at the University of Louisville, standing next to Minority Leader Mitch McConnell, during which she exhorted the public not to view the Court as political. The speech, for which video streaming and video recording were prohibited, was preceded by dinner with Barrett, McConnell and 12 to 15 of the senator's friends. (2021)

Future justices:

Judge Ketanji Brown Jackson
— Nothing wrong with future justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Former justices:

Justice Ruth Bader Ginsburg
— Likened a Sen. Grassley proposal to create a judiciary inspector general's office to Stalinism, saying that such oversight "is a really scary idea" that "sounds to me very much like [how] the Soviet Union was." (2006)
— Was a featured presenter at the 100th anniversary gala of liberal magazine *The New Republic*. Worse, the event was underwritten by Credit Suisse, which earlier in the year was a party in a Court petition. (2014)
— Gave an interview to *The New Republic* in which she offered a dim view of a Texas anti-abortion law, HB2. The law was eventually challenged all the way to the Supreme Court, and Ginsburg did not recuse from the case. (2014-16).
— Called then-candidate Donald Trump a "faker" with "an ego" in an interview with CNN. Said she couldn't "imagine what the country would be [like] with Donald Trump as our president" in an interview with the *New York Times*. Later apologized, saying, "My recent remarks [...] were ill-advised, and I regret making them. Judges should avoid commenting on a candidate for public office." Ginsburg never recused from a case in which President Trump was a litigant. (2016; 2017-2020)
— Accepted a lifetime achievement award from the Genesis Prize Foundation, which came with a $1 million in prize money that she later donated, though judicial gift regulations cap the value of what may be accepted at $2,000. (2017)
— Following her Genesis Prize acceptance, was the guest of businessman Morris Kahn on a tour of the Middle East; Kahn had business before the Court the previous year — 17-136, *Openet Telecom, Inc. v. Amdocs* (cert. denied) — which preserved a lower court victory for Kahn's company (Amdocs) and from which Ginsburg did not recuse. (2017-18)
— Accepted the $1 million Berggruen Institute prize for philosophy and culture (also donated the money). (2019)
— Nothing wrong with justices voting but as of 2020 was a registered Democrat. (2020)

Justice Anthony Kennedy

— Press reports indicate he spoke to the Trump presidential campaign as the campaign was compiling a list of prospective Supreme Court nominees. (2016)

— Initially failed to recuse in merits case 17-269, *Washington v. U.S.*, despite his previous work on it as a lower court judge. Stepped aside once the error was identified. (2018)

Justice Antonin Scalia

— Voiced his opposition to tribunals for Guantanamo detainees weeks before the Court heard a case on that issue (from which he did not recuse, despite public outcry), saying, "We are in a war. We are capturing these people on the battlefield. [...] War is war, and it has never been the case that when you capture a combatant, you have to give them a jury trial in your civil courts. It's a crazy idea to me." (2006)

— Attended Koch Industries-backed retreat in Palm Springs, Calif., at time in which Koch was bankrolling several litigants with cases before the Supreme Court. (2007)

— Addressed a closed-door, closed-press event, called a "Conservative Constitutional Seminar," hosted by the Tea Party Caucus. (2011)

— During a speech in Brooklyn, and as he and his colleagues were weighing the very issue, said it's "truly stupid" the Court would have the "last word" on whether an NSA surveillance program oversteps the bounds of the Fourth Amendment. (2014)

— Flew on a private plane, furnished by John Poindexter, from Houston to Marfa, Tex., to stay for free in a $700-per-night room on Poindexter's ranch, where Scalia sadly passed away. Poindexter was a 2015 Supreme Court litigant in 15-150, *Hinga v. MIC Group*, cert. denied; Poindexter's company, J.B. Poindexter & Co., owns MIC Group. (2015-16)

Appendix B: Recent Ethical Lapses by Lower Court Judges

These lapses were compiled by Fix the Court staff in March and April 2022 and are in chronological order. Citations have been included.

1. In Jan. 2020, Fifth Circuit Judge Kyle Duncan deliberately misgendered the respondent, a transgender woman, more than two dozen times in his opinion in *U.S. v. Varner*.[32]
2. In Mar. 2020, then-Western District of Kentucky Judge Justin Walker at his investiture ceremony disparaged the Chief Justice of the United States, talked about his appearances on Fox News and in so many words (e.g., "We will not surrender") spoke as if he were separating himself from half the country — and half people whose litigation he'd soon be ruling on.[33]
3. In June 2020, D.C. Circuit Senior Judge Laurence Silberman sent an email to every judge in his court and all D.C. District judges, plus other courthouse staff, in which he criticized a Senate proposal to rename U.S. military bases named after Confederate officers as "madness" and downplayed slavery being a cause of the Civil War.[34]
4. In Dec. 2020, Senior Southern District of Iowa Judge Robert Pratt insulted then-President Trump and those he pardoned in a media interview, saying, "It's not surprising that a criminal like Trump pardons other criminals. […A]pparently to get a pardon, one has to be either a Republican, a convicted child murderer or a turkey."[35]
5. In April 2021, Judge Silberman in his opinion in *Tah v. Global Witness Publishing* went far beyond the facts of the case to rail against the purported media "bias against the Republican Party," calling the *New York Times* and *Washington Post* "Democratic Party broadsheets" and adding that "Silicon Valley […] similarly filters news delivery in ways favorable to the Democratic Party."[36]
6. In May 2021, a panel of Fifth Circuit judges removed Southern District of Texas Judge Lynn Hughes from a case, *U.S. v. Khan*, due to what the panel called a "fixed and inflexible view of the case" after making several anti-government remarks, including calling Justice Department lawyers "blue-suited thugs" and "retarded" and expressing, per the panel, that government attorneys, are "lazy, useless, unintelligent, or arrogant."[37]
7. In Aug. 2021, Ninth Circuit Judge Lawrence VanDyke in his opinion in *Ford v. Peery* compared his colleagues to career criminals, who would feel no "shame" if they had to confront what he called their "rap sheet," i.e., a series of opinions VanDyke described as "habeas dysfunction."[38]
8. In Sept. 2021, Ninth Circuit Senior Judge Carlos Bea accepted an award at an event hosted by failed insurrectionist John Eastman.[39]

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[32] *U.S. v. Varner*, 948 F.3d 250 (2020).

[33] *See* Judge Walker's speech at this link.

[34] *See*, "A judge's all-courthouse email sparks debate over removal of Confederate symbols," *Washington Post*, June 16, 2020 (link).

[35] *See*, "Federal judge in Iowa ridicules Trump's pardons," *Associated Press*, Dec. 29, 2020 (link).

[36] *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231 (2021).

[37] *U.S. v. Khan*, 997 F.3d 242 (2021).

[38] *Ford v. Peery*, 9 F.4th 1086, 1097 (2021).

[39] *See*, "Ninth Circuit Judge Carlos Bea Despicably Agrees to Be Honored by John Eastman's Claremont Institute, at Event with Orwellian Panel on 'Election Integrity,'" *Election Law Blog*, Sept. 1, 2021 (link).

9. In Sept. 2021, when confronted about breaking the federal recusal statute by *Wall Street Journal* reporters investigating judges' participation in cases in which they had a financial interest in a party, several judges downplayed the significance of their lawbreaking and their responsibility to have complied with the law. Examples include: Eastern District of Texas Judge Rodney Gilstrap pleading ignorance as to what was required by the recusal statute, claiming he had declined to disqualify himself in some cases because he believed they'd require little or no action on his part and in others because he didn't think his wife's holdings fell under the ambit of the law; Central District of California Judge R. Gary Klausner saying he had delegated conflict-screening to his staff; and Senior Eastern District of New York Judge I. Leo Glasser and District of Nebraska Judge John Gerrard faulting the judiciary's own financial reporting requirements, claiming that by only requiring the disclosure of stock ownership annually, they did not have motivation to keep themselves informed of their holdings year-round.[40]
10. In Jan. 2022, Judge VanDyke wrote a bizarre separate concurrence to his own majority opinion in order to mock his fellow Ninth Circuit judges' jurisprudence on gun cases and demean their integrity.[41]
11. In Jan. 2022, in the midst of the Omicron surge, Fifth Circuit Judge Jerry Smith demanded that an attorney remove his mask during oral argument despite the fact that the attorney was plainly audible and made his preference to remain masked clear.[42]
12. In Jan. 2022, writing that "The Good Ship Fifth Circuit is on fire," Judge Smith in a case involving United Airlines' vaccine mandate for employees lambasted his two colleagues who held the majority in a 2-1 decision, calling it "incoherent reasoning" and "an orgy of jurisprudential violence," which, had he written it himself, would cause him to "hide [his] head in a bag."[43]
13. In Feb. 2022, Fifth Circuit Judge James Ho gave a speech defending Georgetown University Law Center's Ilya Shapiro for tweeting that President Biden's pledge to nominate a Black woman to the Supreme Court would result in a "lesser" nominee who will "always have an asterisk attached."[44]

Of the judges listed above, only Silberman (in the all-court email instance) and Pratt to my knowledge have apologized for their intemperance.

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[40] *See*, "Federal Judges With Financial Conflicts," *Wall Street Journal*, Sept. 28, 2021 (link).

[41] *McDougall v. County of Ventura*, 20-56220 (5th Cir., Jan. 20, 2022).

[42] *See*, "5th Circuit judge accused of forcing DOJ attorney to remove mask," *Reuters*, Feb. 3, 2022 (link).

[43] *Sambrano v. United Airlines*, 21-11159 (5th Cir., Feb. 17, 2022).

[44] *See*, "'Go ahead and cancel me too.' Judge defends embattled Georgetown Law hire," *Reuters*, Feb. 16, 2022 (link).

Mr. JOHNSON of Georgia. Thank you, Mr. Roth.
Mr. Sherman, you may begin.

STATEMENT OF DONALD K. SHERMAN

Mr. SHERMAN. Thank you.

Chair Johnson, Ranking Member Issa, and Members of the Subcommittee, thank you for the opportunity to testify before you today about the urgent need for Congress to ensure that Federal judges meet the highest ethical standards.

I am here representing Citizens for Responsibility and Ethics in Washington, a nonpartisan, nonprofit organization focused on ensuring the integrity of our government institutions. Today, there is a crisis of confidence in our Federal judiciary. This crisis is the result of a number of overlapping failures, but chief among them is the judiciary's apparent inability to abide by the rules of ethical conduct their high office requires.

In a nine-year period, more than 130 Federal judges have presided over at least 650 cases in which they have a material financial interest in one of the parties. These conflicts have or will touch every congressional district in America.

In addition, Supreme Court justices across the ideological spectrum have engaged in conduct that raises ethical or impartiality concerns.

One of the more egregious examples in recent memory arises from a spousal conflict. Earlier this year, Justice Clarence Thomas failed to recuse from a case, *Trump* v. *Thompson*, where he was the lone dissent in the court's decision to reject former President Trump's attempt to block the release of documents requested by the January 6th Committee. He did this despite his wife Ginni Thomas' active support of and communications with Trump Administration officials about the subject of the Committee's inquiry, the former President's efforts to overturn the 2020 election.

By deciding to hear this case, Justice Thomas has undermined public trust in the court's impartiality. The ethics issues facing the court are longstanding and not limited to one justice.

The patchwork of rules and regulations that the Federal judiciary developed to police itself has failed, and the Supreme Court's unwritten honor system is clearly broken. Public confidence in the third branch is at or near all-time lows, 53 percent of Americans having an unfavorable view of the high court. For an institution whose currency is credibility, this is an abject failure.

Despite having the power of judicial review and enjoying life tenure, Federal judges have substantially fewer ethical checks than their counterparts in the Legislative and Executive Branches. We require even low-level Executive Branch employees to abide by a vigorous code of conduct, and we have numerous ways to hold them accountable, including by subjecting them to the criminal conflicts of interest statute. Yet, our Federal judges and justices are exempt from this provision.

Not only do most government ethics rules not apply to Federal judges at all levels, but the Supreme Court does not even have a code of conduct to provide clear and binding ethical guidance or a transparent process for recusals when conflicts do arise.

It has become clear that the judiciary cannot or will not effectively regulate itself. It is now time for Congress to step in.

We recommend three immediate actions that Congress can take to rebuild the Federal judiciary's ethics regime.

First, Congress needs to direct the Supreme Court to adopt a code of ethical conduct. Specifically, the code needs to include detailed standards to protect the court's impartiality, and clear guidance regarding recusal, spousal conflicts, gifts, speeches, travel, financial conflicts, and other issues that I address in greater detail in my written testimony.

Second, Congress should enact a blanket prohibition on all Federal judges, their spouses, and their dependent children owning or trading any individual stocks or other similar financial instruments. Banning judges and their families from buying and owning individuals' stocks is the simplest way to address the financial conflicts that are undermining our judicial system.

Many judges have claimed they are unfamiliar with their own assets or ethical obligations. Litigants often don't feel comfortable policing conflict concerns. Congress can address this issue at scale.

Third, Congress should apply the Federal Criminal Conflict of Interest statute, 18 U.S.C. 208, to the entire Federal judiciary. By expanding this key law, Congress would be adding a powerful tool to combat egregious ethical misconduct in the judiciary, while binding it to similar rules as the other branches, as Ranking Member Issa put it in October.

In closing, it is important to note that the crisis of ethics in our government is the result of decades of benign neglect by leaders in all three branches of government, not the misconduct of one or even a few people.

Ethics is not a partisan issue. The public can and should demand that Federal judges are held to the highest ethical standards. As the public's representatives in Congress, the task is now yours to mandate reform. Though judges and justices interpret and sometimes strike down Federal law, they are not above it.

Thank you for the opportunity to testify. I look forward to your questions.

[The statement of Mr. Sherman follows:]

TESTIMONY BEFORE
THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET HEARING ON
"BUILDING CONFIDENCE IN THE SUPREME COURT THROUGH ETHICS AND RECUSAL REFORMS"

APRIL 27, 2022

DONALD K. SHERMAN
SENIOR VICE PRESIDENT AND CHIEF COUNSEL
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (CREW)

Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, thank you for the opportunity to appear before you today to address the worrying state of ethics at the Supreme Court and throughout the federal judiciary. The issues we will discuss today are of the highest importance, as they have contributed to the burgeoning crisis of institutional legitimacy that is slowly engulfing our entire democratic system.

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I appear here on behalf of CREW to urge that you act to ensure that our high court and the entire third branch are held to the highest standards of ethical conduct.

Before I begin, I would like to applaud members of the Subcommittee for passing the important bipartisan Courthouse Ethics and Transparency Act. It takes important steps to bring more transparency and accountability to the current judicial ethics regime, and I hope that Congress will send it to President Biden's desk expeditiously. I also commend the Subcommittee's prompt response to this evolving and multifaceted ethics situation.

This crisis of public confidence in the federal judiciary has various related elements that I will address. Just one indicator of this concern is recent polling finding that Americans' disapproval of the Supreme Court has been rising, with 53% now having an unfavorable opinion of the high court, the highest disapproval rating since *Gallup* began polling the question twenty years ago.[1] But the overall effect is a broken system that undermines the public's faith in the justice system and in our government. I have had the privilege of working in the judicial branch of our government and have every confidence that most federal judges are people of the highest honor and integrity. But the system of vague, inadequate rules and loose self-monitoring has

[1] Jeffrey M. Jones, "Approval of U.S. Supreme Court Down to 40%, A New Low," *Gallup*, Sep. 23, 2021, https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

unfortunately resulted in a failure to uphold the rules of ethical conduct their high offices require. Supreme Court Justices have repeatedly engaged in conduct that causes the public to question their impartiality. Hundreds of federal judges have presided over cases in which they have a material financial interest in one of the parties.

As CREW argued in testimony submitted to the Subcommittee in October, it is time for a fundamental re-thinking of the responsibilities that those who are entrusted with interpreting our laws owe to the people over whom they exercise their power.[2] The patchwork of rules and regulations that the federal judiciary developed to police itself has failed, and the Supreme Court's unspoken ethical honor system would be untenable even if it wasn't clearly broken. As a result of these and other factors, public confidence in the third branch is at or near all-time lows.[3] Still, in his annual report on the state of the federal judiciary, Chief Justice Roberts minimized the ethics concerns facing the courts.

Since the federal judiciary cannot or will not effectively regulate itself, Congress must step in. There are a number of actions that you can take under the Constitution to respond to this crisis--each of which will help rebuild public confidence in the judiciary. And while Congress cannot solve this problem by itself, these necessary steps can help to ensure that the judicial branch is held to the high ethical standard their positions demand.

1. Spousal Conflicts of Interest

Recent news reports raise questions about Supreme Court Justices' impartiality and recusal obligations with respect to cases that affect their spouse's political interests, business clients, and relate to their advocacy work.[4] For example, Justice Clarence Thomas has failed to recuse from Supreme Court cases relating to the 2020 election, including in *Trump v. Thompson*, where Justice Thomas was the lone dissent from the Court's decision to reject President Trump's attempt to block the release of documents requested by the House Select Committee to Investigate the January 6th Attack on the United States Capitol, despite his spouse's active support of and communications with Trump administration officials about President Donald J.

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[2] Hearing on *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary ("October Hearing"), Statement of Noah Bookbinder, October 26, 2021, https://www.citizensforethics.org/wp-content/uploads/2021/11/CREW-Statement-for-the-Record.pdf.
[3] Jeffrey M. Jones, "Approval of U.S. Supreme Court Down to 40%, A New Low," *Gallup*, Sep. 23, 2021, https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.
[4] Jane Mayer, "Is Ginni Thomas a Threat to the Supreme Court," *New Yorker*, Jan. 31, 2022, https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court; Ed Pilkington, "Who has more influence on supreme court: Clarence Thomas or his activist wife?," *Guardian*, Jan. 6, 2022, https://www.theguardian.com/law/2022/jan/28/clarence-thomas-supreme-court-affirmative-action-case-ginni-thomas

Trump's unprecedented efforts to overturn the 2020 election.[5] By deciding to hear these cases, Justice Thomas compromised the Court's independence and impartiality and contributed to the Court's current crisis of public confidence.

There have been long standing concerns regarding Justice Thomas' potential conflicts of interest related to his wife's activities. For example, similar ethics issues arose as a result of Virginia Thomas reportedly receiving $200,000 in consulting fees from an individual who filed an amicus brief with the Supreme Court regarding President Trump's Muslin ban.[6] She also serves on the advisory board for an organization that filed an amicus brief in an affirmative action case currently pending before the Supreme Court[7] and weighed in publicly on controversial issues that are likely to come before the Supreme Court.[8] Justice Thomas's failure to recuse from these cases not only undermines the Supreme Court's impartiality, it also potentially violates his ethical obligations under 28 U.S.C. § 455.

A. The Disqualification Statute: 28 U.S.C. § 455

Congress passed the governing statute for disqualification of a justice, judge, or magistrate judge, 28 U.S.C. § 455, to require all federal judges, including members of the Supreme Court, to recuse themselves from any judicial proceedings in which their impartiality might reasonably be questioned.[9] In addition, a judge must recuse when he knows that his spouse has "any . . . interest that could be substantially affected by the outcome of the proceeding."[10] Under the Court's current ethical framework, individual Justices decide for themselves whether recusal is warranted under Section 455.[11] This process leaves Justices largely unaccountable if they fail to properly recuse themselves from cases in which their impartiality may reasonably be questioned, since recusal determinations are not subject to review.

For executive branch employees, who are subject to a similar recusal standard by virtue of the executive branch's standards of ethical conduct, the integrity of the agency's decision-making process is protected by requiring employees who are dealing with appearance issues to consult with an agency's ethics official.[12] In determining whether an employee should participate in a specific matter, the agency's ethics official weighs the appearance concerns against the interests

[5] *See* Letter to Chief Justice John G. Roberts, Jr. from Noah Bookbinder, Apr. 1, 2022, https://www.citizensforethics.org/legal-action/legal-complaints/thomas-must-recuse-supreme-court-needs-code-of-conduct/.
[6] Mayer, *New Yorker*, Jan. 31, 2022.
[7] *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199 (U.S. Jan. 24, 2022).
[8] Mayer, New Yorker, Jan. 31, 2022.
[9] 28 U.S.C. § 455(a).
[10] 28 U.S.C. § 455(b)(4).
[11] *See* Chief Justice John G. Roberts, "2011 Year-End Report on the Judiciary," Dec. 31, 2011, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.
[12] 5 C.F.R. § 2635.502.

of the Government in the employee's participation, while taking into account all relevant circumstances and a list of factors.[13]

All of this underscores the need for the Supreme Court to adopt a Code of Conduct with formal and transparent recusal processes.

In this regard, there are existing models used by the Supreme Court that may be instructive when considering processes to include in a Supreme Court Code of Conduct to help the Court preserve its impartiality.[14] In the absence of a similar process for members of the Court, Justices will continue to make these decisions for themselves on a seemingly ad hoc, opaque, and unregulated basis, and the Supreme Court will likely continue to be viewed by the public as largely unaccountable and increasingly "politicized."[15]

B. The Ethics in Government Act

Specific circumstances identified in the statute requiring recusal, such as when a spouse has a financial interest in a subject matter in controversy or in a party to the proceeding,[16] may never come to light in individual cases due to loopholes in the Ethics in Government Act ("EIGA"). Although EIGA establishes financial disclosure reporting requirements for the Justices and other judicial officers,[17] spousal conflicts of interest based on their clients or outside positions are difficult to identify under EIGA's current reporting regime.[18] Spousal outside positions and clients are not always required to be disclosed. For example, when spousal compensation passes through a limited liability company ("LLC") or similar legal entity, there is currently no requirement to disclose the client who generated the spousal earned income. Only the spouse's LLC or other business entity would need to be reported as the source of spousal earned income.[19] In contrast, if compensation is sent directly to the spouse without passing through an LLC or similar business entity, the client is required to be reported as a source of spousal earned income assuming the $1,000 reporting threshold is met.[20] In the latter case, potential spousal conflicts of interest can be more easily identified.

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[13] *Id.*
[14] For example, in 1991 the Court adopted a resolution that requires a Justice who "desires to receive compensation for teaching [to] obtain the prior approval of the Chief Justice. Should the Chief Justice deny approval, the request may be renewed to the Court and granted by it. If the Chief Justice desires to receive compensation for teaching, he must obtain the prior approval of the Court." U.S. Supreme Court Resolution, Jan. 18, 1991, https://www.citizensforethics.org/wp-content/uploads/2022/03/1991_Resolution.pdf.
[15] Mayer, *New Yorker*, Jan. 31, 2022.
[16] 28 U.S.C. § 455 (b)(4).
[17] 5 U.S.C. app. § 101(f)(11).
[18] Spousal uncompensated outside positions are not required to be disclosed. Only spousal positions that result in earned income that exceeds the $1,000 reporting threshold is required to be disclosed. *See* 5 U.S.C. app. §102(e)(1)(A).
[19] 5 U.S.C. app. §102(e)(1)(A).
[20] 5 U.S.C. app. §102(e)(1)(A).

C. Amicus Briefs

In more and more cases before the Court, third parties submit and Justices refer to amicus briefs that weigh in on controversial issues under consideration.[21] When the views expressed in an amicus brief or by a party cite to public statements or advocacy positions by a Justice's spouse, or when a spouse has ties to an entity that files an amicus brief, obvious questions arise about whether a Justice has the requisite impartiality or appearance of impartiality to participate in that case. For this reason, some spouses have chosen to step back from pursuing legal or advocacy work on controversial issues that will likely end up being decided in cases brought before the Court.[22] Jane Roberts, Chief Justice Roberts' wife, for example, left her lucrative career as a partner at an international law firm to join a legal recruiting business in order to avoid conflicts of interest when her husband was appointed to the Supreme Court.[23] The decision by a spouse to step back may come at a personal cost, however, and for that reason may not be the right choice for every individual. In every circumstance, the Justice must nevertheless assume primary responsibility for protecting the Court's impartiality and take appropriate measures to recuse from cases in which their impartiality could reasonably be questioned due to their spouse's advocacy work and affiliations. When questions about the Court's impartiality are at issue, recusal needs to be the Justices' default position rather than the exception.

For this reason, CREW supports legislative efforts to facilitate the creation of a Supreme Court Code of Conduct that would more fully address recusal requirements that stem from spousal business activities and political advocacy work. The Supreme Court Code of Conduct should also address these issues in the context of the rising use of amicus briefs.

In addition, CREW supports legislative efforts to enhance disclosure requirements so that conflicts of interest stemming from spousal activities can be more readily discerned. For example, these measures should require Justices to annually disclose on their public financial disclosure report their spouse's board and consulting positions and identify any clients from whom their spouse received compensation that exceeded $1,000. The reporting requirement should cover clients that make payments to the spouse's employer, LLC, or other business entity in return for personal services. To be fair, similar reporting requirements would need to be put in place for other public disclosure filers, including elected officials and presidential appointees confirmed by the Senate.

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[21] Mayer, *New Yorker*, Jan. 31, 2022.
[22] *Id.*
[23] https://www.abajournal.com/news/article/meet_jane_roberts_chief_justices_spouse.

2. Recusal Transparency

A Supreme Court Code of Conduct should address the public's right to know when and why a justice chooses to recuse or not to recuse from a case. Justices will often recuse from a case without any explanation--these nonpublic recusals reportedly occur in approximately 200 matters each year.[24] This lack of transparency harms individual litigants who expect their cases to have a fair hearing before the full court, and it harms the public's perception of the high court. Moreover, these nonpublic decisions don't just impact a single case: they leave the public to wonder whether there are other similar cases where the justice should have recused--but chose not to.

A Supreme Court Code of Conduct needs to ensure that recusal decisions are made in writing and on the record, even if a Justice considers recusal but ultimately participates in the matter. Public confidence in the integrity of the courts is best served by recusal decisions that articulate why a justice has decided not to participate in a matter. That transparency would have ripple effects: it would help establish precedent for recusal, and it would allow the public--and litigants before the Court--to understand the scope of a justice's conflicts.

3. Outside Speaking Engagements

A Supreme Court Code of Conduct is also necessary to help address the potential ethical concerns that arise from Justices' participation in certain outside speaking engagements.[25] For example, recent reports have been critical of Justices who speak at conferences that bar news media from covering their speeches.[26] When these events are sponsored by organizations whose members are strongly associated with a particular ideology or prominently feature politicians of a particular political party rather than a spectrum of views,[27] they give rise to questions about preferential treatment, loss of impartiality, partisanship, and undue influence. Concerns about undue influence are further magnified when the organization is viewed as having close ties to and extraordinary influence over several members of the Supreme Court, including by getting them to "accept legal arguments that were previously outside the mainstream."[28]

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[24] https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf

[25] In 2020, the Judicial Conference proposed, and ultimately failed to adopt, an ethics opinion that would have told federal judges that they could not be members of American Constitution Society, the Federalist Society, or the American Bar Association, because membership in those organizations would, for example, "frustrate the public's trust in the integrity and independence of the judiciary." See https://cppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf; see also, https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members.

[26] Nathan T. Carrington and Logan Strother, "Gorsuch is scheduled to speak to the right-wing Federalist Society. Americans find such speeches inappropriate," *Washington Post*, Feb. 4, 2022, https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-republicans/.

[27] *Id.*

[28] *Id.*

Based on rules set forth in the *Code of Conduct for United States Judges*, a lower court federal judge would need to consider whether speaking at these types of events raises questions about appearances of impropriety.[29] Relevant provisions of the Judicial Code of Conduct include:

- Canon 2 requires judges to refrain from lending the "prestige of the judicial office to advance the private interests of the judge or others" or to "convey or permit others to convey the impression that they are in a special position to influence the judge."[30]
- Canon 4 mandates that judges refrain from extrajudicial activities that interfere with the performance of the judge's official duties or reflect adversely on the judge's impartiality.[31]
- Canon 5 mandates that judges refrain from political activity.[32]

Executive branch employees are subject to similar standards of conduct that guard against preferential treatment.[33]

Since Justices are not subject to the *Code of Conduct for United States Judges*,[34] however, they are seemingly less constrained in terms of their outside speaking engagements and commitments. A Supreme Court Code of Conduct is necessary to restore public confidence in the independence of the judiciary. A Supreme Court Code of Conduct should establish common sense guidelines for minimizing appearance issues arising from outside speaking engagements. For example, Justices should be prohibited from being members of organizations with clear partisan political or judicial biases, be advised to avoid allegations of preferential treatment by making their speeches publicly available, speaking at widely-attended events only when they are open to the press, and accepting speaking invitations from a variety of similarly-situated organizations to ensure balanced exposure to different legal issues and judicial philosophies. But, under no circumstances should a Justice accept speaking invitations from current litigants or those with a history of practicing before the Court. Justices should also avoid perceptions of partisan political endorsements by eschewing participation in conferences or other public events that prominently feature politicians from a particular political party in favor of events that include persons who represent a variety of political views.

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[29] Code of Conduct for United States Judges ("Code of Conduct"), March 12, 2019, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] 5 C.F.R. § 2635.101(b)(8); § 2635.702.
[34] Code of Conduct.

4. Gifts

Similar conflict of interest concerns can arise from the acceptance of gifts.[35] Despite having life tenure, Justices appear to be less constrained by ethical considerations than other government officials. The absence of clear standards governing the solicitation or acceptance of gifts makes Justices particularly susceptible to conflicts of interest when they or their spouses accept expensive gifts. These concerns are pronounced when the gifts are coming from donors whose interests are publicly aligned with certain political or ideological causes.[36] Under these circumstances, a reasonable person would question whether a Justice who is the recipient of expensive gifts has the requisite impartiality to hear cases that would impact the political or ideological causes supported by the donor.

Like lower court judges, Justices are barred by 5 U.S.C. § 7353 from soliciting or accepting gifts from anyone who is seeking official action from, or doing business before, their court, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's official duties.[37] However, Justices, unlike other federal judges, are not technically subject to the *Judicial Conference Regulations on Gifts*, which implement Section 7535.[38] Instead, members of the Court have agreed to follow the Judicial Conference gift regulations as a matter of internal practice,[39] with the Chief Justice being delegated administrative and enforcement authority under 5 U.S.C. § 7353 for officers and employees of the Supreme Court.[40] The Justices, like other federal judges, also consult a wide variety of other authorities to help them resolve specific ethical issues, such as judicial opinions,

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[35] For this reason, executive branch officials are cautioned by the *Standards for Ethical Conduct for Employees of the Executive Branch* to decline otherwise permissible gifts when a reasonable person would question their integrity or impartiality as a result of accepting the gift. 5 C.F.R. § 2635.201(b). For example, when considering whether to accept an otherwise permissible gift, executive branch officials are instructed to consider whether: the gift has a high market value; the timing of the gift creates the appearance that the donor is seeking to influence an official action; acceptance of the gift would provide the donor with significantly disproportionate access; and the gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. *Id.*

[36] *See* Mike McIntire, "Friendship of Justice and Magnate Puts Focus on Ethics," *New York Times*, June 18, 2011, https://www.nytimes.com/2011/06/19/us/politics/19thomas.html. For example, one donor reportedly helped finance a library project dedicated to a Justice, presented him with a $19,000 Bible that belonged to Frederick Douglass, gave him a $6,484 bronze bust of Frederick Douglass, and reportedly provided $500,000 for his spouse to start a Tea Party-related group and also spent time together at gatherings of prominent Republicans and businesspeople at the donor's Adirondacks estate and his camp in East Texas. *Id.*; Richard A. Serrano and David G. Savage, "Justice Thomas Reports Wealth of Gifts," *Los Angeles Times*, Dec. 31, 2004, https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html; Justice Clarence Thomas, Public Financial Disclosure Report, part V, item 1, May 15, 2016, https://www.opensecrets.org/personal-finances/search?q=thomas&type=person.

[37] 5 U.S.C. § 7353 similarly applies to executive branch officials and members of Congress.

[38] Judicial Conference Regulations on Gifts, § 620.20.

[39] Joanna R. Lampe, "A Code of Conduct for the Supreme Court? Legal Questions and Considerations," Congressional Research Service, Apr. 6, 2022, https://sgp.fas.org/crs/misc/LSB10255.pdf.

[40] *Id.* at § 620.65.

treatises, scholarly articles, and disciplinary decisions and seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues.[41]

While most judges would be expected to recuse when an expensive gift would cause a reasonable person to question their impartiality in a case, Chief Justice John Roberts noted in his *2011 Annual Report on the Judiciary* that some of the general principles for recusals that apply to lower court federal judges differ due to the unique circumstances of the Supreme Court.[42]

> 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.[43]

Because of these heightened recusal concerns, the Supreme Court's current ethical framework does not adequately address conflicts of interest that arise from expensive gifts and must be made more rigorous. A Supreme Court Code of Conduct is necessary to clarify and make publicly available the standards for soliciting and accepting gifts, including those based on *bona fide* personal friendships. In the absence of evidence that a Justice has a pre-existing personal friendship with a donor where they would exchange gifts of comparable value, a Supreme Court Code of Conduct should require the Justice to decline expensive gifts.

Specifically, the Code of Conduct should contain a clear bar on accepting expensive gifts to avoid any impression that a member of the Court could be unduly influenced in their decision making by donors motivated by a particular political or ideological cause. In the absence of a clear prohibition, the Supreme Court must mandate a broad standard of recusal to avoid compromising public trust in the integrity of the Court's decision-making process. Relatedly, the Code of Conduct should also enhance the Justices' public financial disclosure requirements, so that donations in support of a spouse's or dependent child's non-profit endeavors that give rise to similar potential conflicts of interest can be appropriately identified and addressed through recusal.[44]

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[41] Chief Justice John G. Roberts, "2011 Year-End Report on the Judiciary," Dec. 31, 2011, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.
[42] 2011 Year-End Report on the Judiciary.
[43] *Id.*
[44] Danny Hakim and Jo Becker, "The Long Crusade of Clarence and Ginni Thomas," *New York Times*, Feb. 22, 2022, https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html.

5. Financial Conflicts of Interest

Last fall, the *Wall Street Journal* released the results of a sweeping investigation into financial conflicts of interest in the judiciary.[45] The results were stunning. The *Journal* found that at least 131 federal judges violated the law by hearing cases in which they had a financial interest in one of the parties. And 61 judges or their families actively traded shares in a party to an ongoing case. These revelations have caused a wave of appeals, some of which threaten to overturn verdicts that could reach into the billions of dollars.[46] This is a practical disaster, and, more importantly, a severe crisis of ethics in the judiciary--and it is compounded by the apparent unwillingness of those who are tasked with overseeing the judiciary to acknowledge it as such.[47]

The Supreme Court itself is also not immune from financial conflicts of interest. Three currently-serving Justices own individual stocks,[48] and since 2015, each of them has participated in at least one case in which they have a material financial interest.[49] That unacceptably harms the public's faith in the Court's impartiality. And as long as Supreme Court Justices own individual securities, these conflicts will continue to occur.

With that in mind, there are two policies that can be adopted to stop financial conflicts of interest in the judiciary:

First, Congress should enact a blanket prohibition on all federal judges, their spouses, and their dependent children owning or trading any individual stocks or other financial instruments. This is the best and only comprehensive way that Congress can ensure that federal judges are not violating their duty to preside over cases as disinterested arbiters of law and fact. By imposing such a ban, Congress would limit the possibility for these conflicts of interest before any

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[45] James V. Grimaldi, Coulter Jones and Joe Palazzolo, "131 Judges Broke the Law by Hearing Cases Where They Had A Financial Interest," *Wall St. Journal*, Sep. 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421; Coulter Jones, Joe Palazzolo and James V. Grimaldi, "Federal Judges or Their Brokers Traded Stocks of Litigants During Cases," *Wall St. Journal*, Oct. 15, 2021, https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192.

[46] James V. Grimaldi, Joe Palazzolo, and Coulter Jones, "Fallout From Judge's Financial Conflicts Spreads to Appeals Courts," *Wall St. Journal*, Mar. 1, 2022, https://www.wsj.com/articles/fallout-from-judges-financial-conflicts-spreads-to-appeals-courts-11646155384.

[47] Justice Roberts, for example, downplayed the *Journal*'s reporting in his yearly report on the federal judiciary. *See* Gabe Lezra, "Justice Roberts gets it wrong: federal judges' conflicts of interest threaten the entire judiciary," *CREW*, Jan. 2022, https://www.citizensforethics.org/news/analysis/justice-roberts-gets-it-wrong-federal-judges-conflicts-of-interest-threaten-the-entire-judiciary/.

[48] Those Justices are Chief Justice Roberts, Justice Samuel Alito, and retiring Justice Stephen Breyer. *See* Fix The Court, "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest," (sic) Jan. 18, 2022, https://fixthecourt.com/2022/01/recent-times-justice-failed-recuse-despite-clear-conflict-interest/.

[49] *Id.*

violation occurs. A prospective ban on owning or trading individual securities is preferable to a disciplinary rule because members of the federal judiciary are appointed for life, and are removable only for grave constitutional offenses. Impeachment is far too arcane and weighty to ever function as a true check on anything but the most egregious ethical failings.

This requirement would not mean that federal judges would need to take a vow of poverty to serve. There are many ways to invest money that don't come with similar conflict of interest concerns. Diversified mutual or index funds, which do not create such a risk, are Americans' most common investment, whereas only 14% of Americans own individual stocks.[50] Should judges and their close family members wish to continue to have investments in individual securities, they could place their assets in a qualified blind trust[51] and direct the trustee to divest from their current holdings and then reinvest the proceeds in individual stocks as the trustee sees fit.

The weighty questions of public confidence that should inform any ethics regime applicable to federal judges are doubly important for the Supreme Court. While the Supreme Court is the final court of appeal in our system of laws, because the Court does not have the power of the purse or the authority to enforce the laws, its entire foundation rests on public trust and belief in its legitimacy. The framers of our constitution were so acutely aware of the necessity of public trust in our judiciary that they granted Supreme Court Justices lifetime tenure--a privilege that the Constitution grants exclusively to the judiciary.[52] The Supreme Court is the ultimate guardian of the rule of law in our republic, and the very appearance of a conflict of interest can undermine its credibility. Public confidence that the legal system is fair and impartial is critical to maintaining democratic governance. As a result, Justices of the Supreme Court must hold themselves to the highest of ethical standards.

To avoid even the appearance of financial conflicts that might undermine the impartiality of the court and the validity of its judgments, a Supreme Court Code of Conduct should include a comprehensive ban on owning any individual stock, bond, commodity, or other similar financial instruments.

Second, Congress should apply the federal criminal conflict of interest statute, 18 U.S.C. § 208, to the Supreme Court and the entire federal judiciary. The criminal conflict of interest statute protects the public from those who would seek to exploit their position of public trust for private gain. Specifically, it bars executive branch employees from participating in "particular matter[s]"

[50] Kim Parker and Richard Fry, "More than half of U.S. households have some investment in the stock market," *Pew Research*, Mar. 25, 2020, https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/.

[51] A "qualified blind trust" as generally defined in 5 C.F.R. § 2634.402(e).

[52] *See* Federalist 78 (Hamilton), "nothing will contribute so much as [lifetime tenure] to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."

focused on the interests of a discrete and identifiable class of persons or identified parties. In the case of judges, Section 208 would apply to cases in which a judge has a financial interest in one of the parties based on their investment holdings. At present, there is no workable mechanism to hold judges and Justices accountable for egregious violations of their ethical duties short of impeachment. Applying the criminal laws to police this type of conduct would serve as a powerful check on egregious ethical misconduct. The result of these changes would essentially be to "bind [federal judges] to substantially the same rules as the other two branches," as Ranking Member Issa put it during this Subcommittee's hearing in October.[53]

Justices are already required to recuse themselves from any cases in which they have a financial interest in a party to a proceeding.[54] And were an extension of Section 208 to the judiciary to be combined with a ban on ownership and trading of individual stocks and financial instruments, as we recommend, Justices would for the most part only have to adhere to that simple, bright line rule to steer well clear of any trouble. That some federal judges have appeared to treat conflict of interest law as simply a suggestion rather than a rule is precisely the point: applying Section 208 would add teeth to this now toothless legal regime--as the circumstances that give rise to this hearing demonstrate. The expansion would finally provide a procedural mechanism by which judges could be held accountable for egregious violations of their ethical duties. And it would also have the benefit of allowing judges and Justices who the public believes have egregiously violated their ethical duties to have their day in court.

6. Constitutional Concerns

Congress imposing recusal rules, or a Code of Conduct, on the Supreme Court does not raise serious separation of powers concerns.[55]

Based on its Article III powers, Congress has considerable control over the Supreme Court's structure and its jurisdiction. For example, under the Exceptions Clause of Article III, Congress is specifically empowered to alter the Supreme Court's appellate jurisdiction and even determine what types of cases the Court can and cannot hear.[56] Congress has changed the size of the

[53] October Hearing.
[54] 28 U.S.C. § 455.
[55] Joanna R. Lampe, "A Code of Conduct for the Supreme Court? Legal Questions and Considerations," Congressional Research Service, Apr. 6, 2022 ("Some observers have argued that imposing a code of conduct upon the Supreme Court would amount to an unconstitutional legislative usurpation of judicial authority. . . . On the other hand, some commentators emphasize the ways that Congress may validly act with respect to the Supreme Court, for example through its authority to impeach Justices and decide whether Justices are entitled to salary increases. By extension, according to this argument, requiriug the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress's authority.")
[56] U.S. Const. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.")

Supreme Court by statute on several occasions.[57] Congress also has the authority to raise justices' salaries, and, in extraordinary cases, remove justices via impeachment.[58]

Pertinent for today's conversation, Congress already has enacted legislation that imposes financial disclosure and recusal requirements and gift and outside earned income restrictions on Supreme Court Justices.[59] As Chief Justice Roberts noted, "the Court has never addressed whether Congress may impose those requirements on the Supreme Court," and the Justices "comply with those provisions."[60] CREW believes that imposing these and other ethical requirements on Supreme Court Justices is constitutional, appropriate, and necessary.

Finally, Congress has exercised its Constitutional authority to subject members of the Supreme Court to the nation's criminal laws. Though they interpret and sometimes strike down the law, Supreme Court Justices are not above it. Not only may Congress subject the Supreme Court to criminal laws writ large, Congress can and has subjected the Supreme Court to anti-corruption law: it is illegal for a Supreme Court justice to take a bribe, for example.[61] In fact, bribery is a similar crime to conflicts of interest under Section 208: in both cases a public official is betraying the public trust in service of their own personal gain.

Conclusion

Public service is a public trust. This is more than a maxim; it is the standard to which the American people hold all public servants. Federal judges have the power to make and unmake our laws, to uphold or overturn our civil rights. Not only do we repose in them this awesome power, we also give them the singular privilege of lifetime tenure. In return, we demand only that they conduct themselves according to the standards of ethical conduct that their position of immense trust demands.

The current ethical rules that apply to lower court judges have not effectively deterred significant conflicts of interest. The patchwork system of ethics standards, rules and suggestions that loosely apply to the Supreme Court is also not doing the job. It is time for Congress to step in and impose some accountability on the federal judiciary: it is absurd that we subject a low-level

[57] U.S. Const. art. III; Caprice Roberts, "The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Law Resort," 57 Rutgers L. Rev. 107, 166 (June 4, 2005); Joanna R. Lampe, "Court Packing;: Legislative Control over the Size of the Supreme Court," Congressional Research Service, Dec. 14, 2020.
[58] U.S. Const. art. III, § 1 ("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 Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.") See Lampe.
[59] Ethics in Government Act of 1978, 5 U.S.C. app. § 101(f)(10); § 109(10); 28 U.S.C. § 455. *See* also *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979) (rejecting a claim by a class of federal judges that the Ethics in Government Act's financial disclosure requirements were unconstitutional as applied to the federal judiciary).
[60] 2011 Year-End Report on the Judiciary.
[61] 18 U.S.C. § 201.

career GS-9 civil servant to a higher standard of ethical conduct than we do a justice of the Supreme Court. It is far past time that the high court develops a Code of Conduct.
But it is not enough that the Supreme Court simply write a Code of Conduct. The Code of Conduct must actually address the pressing problem that Justices behave in ways that cause the public to question their impartiality. We have proposed various ways that a Code of Conduct should address some of the central iterations of this problem. But these are not the only ways that Justices call their impartiality into question. It is incumbent upon the Justices to develop a Code of Conduct comprehensive enough that the public can have confidence that the institution will live up to its position of trust.

I look forward to answering your questions and working with the Committee moving forward.

Mr. JOHNSON of Georgia. Thank you, Mr. Sherman.
Mr. Paoletta, you may now begin.

STATEMENT OF MARK R. PAOLETTA

Mr. PAOLETTA. Chair Johnson, Ranking Member Issa, and Members of the Subcommittee, thank you for this invitation to testify at this hearing, titled "Building Confidence in the Supreme Court Through Ethics and Recusal Reforms." Unfortunately, the title does not reflect what this hearing is about. If confidence in the court is lacking, it is not due to issues of ethics or recusals. Rather, the confidence in the court is undermined by the coordinated campaign by the corporate media and Democrats to smear conservative justices with the goal of delegitimizing the court.

Why now? Because liberals fear that the court finally has a working conservative majority that may sweep away a number of long-time liberal landmark cases that cannot stand up to more rigorous constitutional scrutiny. In this effort, Democrats and the media are trying to threaten, intimidate, destroy, and remove any of the justices who may constitute this new majority.

If you think this is hyperbole, perhaps a brief reminder is in order.

Democrat Senator Chuck Schumer stood on the steps of the Supreme Court in March 2020 directly threatening Justices Kavanaugh and Gorsuch as the court heard oral argument on an abortion case. He said,

> I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions.

Less than a year earlier, Democrat Senator Sheldon Whitehouse, the lead Senate sponsor of this proposed legislation, filed an amicus brief in a Second Amendment case pending before the Supreme Court, where he threatened the court that the court better drop the case or face the consequences. He wrote,

> The Supreme Court is not well. And the people know it. Perhaps the court can heal itself before the public demands it be "restructured in order to reduce the influence of politics."

Now, we are now in the middle of the latest attack in the 40-year war on Justice Clarence Thomas, this time an all-out assault on the justice and his wife Ginni for so-called ethical transgressions such as Justice Thomas allegedly failing to recuse because of his wife's activities. It is a false and malicious attack on two good people.

The Left hates Justice Thomas because he is a Black conservative who has never bowed to those who demand that he must think a certain way because of the color of his skin. The racist attacks have repeatedly sought to portray Justice Thomas as dependent on White people.

From Judge Larry Silberman on the D.C. Circuit to Justice Scalia on the Supreme Court—

Mr. LIEU. Mr. Chair, this is completely out of order. I don't hate Justice Thomas, nothing about his race.

Mr. JOHNSON of Louisiana. Let the Witness finish his testimony. This is not inappropriate at all; this is regular order.

Mr. JOHNSON of Georgia. The Witness shall proceed.

Mr. PAOLETTA. Always his wife. It is despicable.

Justice Thomas triggers the Left, exposing their racism. Thirty years later, Justice Thomas is still standing strong, considered by many to be our greatest justice.

It appears that the Left also really hates Ginni Thomas because she is an outspoken, unapologetic conservative woman.

Justice Thomas has acted ethically and honorably at all times. To date, he has no reason to recuse himself from any case because of his wife's opinions or activities. The new recusal standards being applied to Justice Thomas have no grounding in the law or in precedent.

Judge Stephen Reinhardt, a liberal icon from the Ninth Circuit, did not recuse from a case challenging a ban on same sex marriages, even though his wife, who is the head of an ACLU chapter, had spoken out against the ban, and her organization had even filed, joined two amicus briefs in the court below. Judge Reinhardt wrote that his wife's, and this is a quote, "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues."

Judge Reinhardt concluded that, as Gabe said, "a reasonable person would not believe he would be partial simply because of his wife's or her organization's views." Judge Reinhardt also determined that his wife had no "interest" in the outcome of this case "beyond the interest of any American with a strong view concerning the social issues that confront this nation." Sound familiar?

When Judge Reinhardt voted exactly as his wife and the ACLU had advocated, nobody accused him of being a puppet of his wife. In fact, Professor Stephen Gillers, co-panelist, filed a brief defending Judge Reinhardt, writing,

> A spouse's views and actions, however passionately held and discharged, are not imputed to her spouse. A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty.

Justice Ruth Bader Ginsburg's husband's law firm appeared several times before the Supreme Court, and Justice Ginsburg never recused herself. In fact, she voted in favor of Marty Ginsburg's colleague's client. Based on the law and precedent, Judge Reinhardt and Justice Ginsburg properly did not recuse. These, and other examples in my written testimony, prove that Justice Thomas is correct in not recusing from any case to date because of his wife's activity.

More troubling, in 2016, Justice Ginsburg directly attacked candidate Donald Trump. She called him a faker, trashed him for not releasing his taxes, and opined that she feared living in America if Trump were elected. Talk about undermining the legitimacy of the court.

She did not recuse from cases involving the Trump Administration, including one where President Trump was challenging the subpoena to release his taxes. Of course, she voted against President Trump. Despite Justice Ginsburg's dangerous foray into presidential politics to prevent Donald Trump from being elected, no Democrat called for hearings or talked of impeaching her for these partisan attacks or her refusal to recuse from cases involving President Trump.

Mr. JOHNSON of Georgia. The gentleman was interrupted for his comments. He needs to finish.

Mr. PAOLETTA. There is nothing wrong with ethics and recusal at the Supreme Court. The justices are ethical and honorable public servants. Moreover, to support any reform legislation right now would be to validate this vicious attack on the Supreme Court.

Thank you.

[The statement of Mr. Paoletta follows:]

Mark R. Paoletta
Partner, Schaerr Jaffe LLP

Written Testimony

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

Hearing on
BUILDING CONFIDENCE IN THE SUPREME COURT THROUGH ETHICS AND RECUSAL REFORMS
April 27, 2022

Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee,

Thank you for this invitation to testify at this hearing, titled "Building Confidence in the Supreme Court Through Ethics and Recusal Reforms." Unfortunately, the title does not reflect what this hearing is really about. If confidence in the Court is lacking, it is not due to issues of ethics or recusals. Rather, confidence in the Court is undermined by the coordinated campaign by some Democrats and their allies in the corporate media to smear conservative Justices with the *goal* of delegitimizing the Court. Why now? Because some liberals fear that the Court finally has a working originalist majority that may sweep away a number of liberal precedents that cannot stand up to more rigorous constitutional scrutiny. And in this effort, Democrats and the media are trying to threaten, intimidate, destroy, and remove any Justice who may constitute this conservative working majority.

If you think this is hyperbole, perhaps a brief reminder is in order. Democrat Senator Chuck Schumer stood on the steps of the Supreme Court in March 2020 threatening Justices Kavanaugh and Gorsuch as the Court heard oral argument on an abortion case: "I want to tell you Gorsuch. I want to tell you Kavanaugh. You have released the whirlwind and *you will pay the price*. You won't know *what hit you* if you go forward with these awful decisions."

Less than a year earlier, Democrat Senator Sheldon Whitehouse, the lead sponsor of this Supreme Court ethics reform legislation, and other Democrat Senators filed an amicus brief in a Second Amendment case pending at the Supreme Court, where Senator Whitehouse threatened that the Court better drop the case or face the consequences. He wrote: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"

And now, we are in the middle of the latest attack in the forty-year war on Justice Clarence Thomas, this time an all-out assault on the Justice and his wife Ginni for so-called ethical

transgressions, such as Justice Thomas not recusing because of his wife's political opinions and activities. It is a false and malicious attack on two good people.

Many on the Left hate Justice Thomas because he is a black conservative who has never bowed to those who demand that he must think a certain way because of the color of his skin. They tried to destroy him during his confirmation hearings, then tried to mock and marginalize him with racist attacks when he first joined the Court. And now, thirty years later, Thomas is still standing strong, considered by many to be our greatest Justice.

The *New Republic's* Michael Tomasky, for example, wrote that Justice Thomas should be impeached because he did not recuse from the Obamacare case after his wife had opined that Obamacare was "a disaster." But Tomasky's views are driven by politics and outcome, not by law or ethics. And they also are absurd, as a spouse having opinions on issues that may come before the Court has never been the basis for recusal by any other justice or judge. Undaunted by facts, many Democrats and the press portray Ginni Thomas's work as a threat to the Court's integrity. Welcome to feminism 2022—conservative women must shut up and stay in the kitchen, or at least out of politics. And that is actually what Tomasky suggested that Justice Thomas tell his wife.

Justice Thomas has acted ethically and honorably at all times. To date, Justice Thomas has had no reason to recuse himself from any case because of his wife's opinions or activities. The recusal standard that the Left is applying to Justice Thomas has no grounding in the law or in precedent. Rather, it is an entirely outcome-driven effort to change the results of cases that may come before the Supreme Court and to delegitimize past cases decided by the members of the Court with whom the current critics disagree.

The opinions and political activity of a spouse or other family member are not, and should not be, the basis for requiring a judge or justice to recuse themselves. The relevant part of the judicial recusal statute requires federal judges to recuse from cases when a family member is a party or litigant to a case, when the judge knows a family member has "an interest that could be substantially affected by the outcome of a proceeding," or when a judge's "impartiality might reasonably be questioned."

Federal judge Stephen Reinhardt, a liberal icon on the Ninth Circuit, refused to recuse from a case in 2011 regarding a ban on same sex marriages, even though his wife, who at the same time was the head of the ACLU Southern California chapter, publicly expressed her opposition to this ban and her organization joined two amicus briefs opposing the ban in the district court below. Judge Reinhardt wrote that his wife's "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues." Judge Reinhardt concluded that a reasonable person would not believe he would be partial simply because of his wife's or her organization's views. Judge Reinhardt also determined that his wife had no "interest" in the outcome of this case "beyond the interest of any American with a strong view concerning the social issues that confront this nation." That may sound familiar, as it is the same explanation that Thomas's defenders have offered.

When Judge Reinhardt voted exactly as his wife and the ACLU/SC had advocated, nobody accused him of being a puppet of his wife. Rather, left-leaning members of the press applauded this working couple arrangement. In fact, Professor Stephen Gillers, a well-known judicial ethics expert, filed a brief defending Reinhardt, writing: "[A] spouse's views and actions, however passionately held and discharged, are not imputed to her spouse, and Judge Reinhardt is not presumed to be the reservoir and carrier of his wife's beliefs. ... A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty."

D.C. Circuit Judge Nina Pillard likewise participated in a case in which her husband, David Cole, the ACLU's national legal director, publicly advocated a specific outcome. For example, Cole praised a district court judge's decision rejecting President Trump's challenge to a congressional subpoena for his taxes. The D.C. Circuit panel affirmed this ruling, and then Judge Pillard, sitting on an en banc panel, voted against a petition for rehearing. Thus, she voted the same way her husband had advocated in his article.

David Cole had been prolific in his commentary on major hot button issues in the Trump Administration, including immigration, LGBTQ, treatment of Guantanamo Bay detainees, and election law issues. He has been appropriately activist in carrying out his work as the ACLU's legal director, but no one called for Judge Pillard to recuse from all cases related to the Trump Administration because of her husband's antipathy toward that Administration. Of course, were Judge Pillard a conservative, many on the Left would be demanding her recusal, resignation, or impeachment.

Judge Reinhardt and Judge Pillard were correct not to recuse, but given these examples, there is no basis for Justice Thomas to recuse because his wife expressed an opinion on an issue or generally worked with groups that, without her involvement, separately filed amicus briefs with the Court. Judge Reinhardt's wife publicly stated she is against a ban on same sex marriages; her group joined two amicus briefs in the court below. David Cole said Trump was required to turn over his taxes to a congressional committee. Ginni Thomas said Obamacare is a disaster. Why do Judges Reinhardt and Pillard not have to recuse, and Justice Thomas does?? What is the difference other than that Justice Thomas is a black conservative whose opinions and jurisprudence, and the separate political views of his wife, displease the chattering classes and many Democrats in Congress?? I would urge you to read Judge Reinhardt's opinion and Professor Gillers's brief on these matters and try to draw any principled distinction between the cases that would require Justice Thomas to recuse.

Gabe Roth of Fix the Court recently complained, "With Ginni Thomas, it's been part of a pattern and practice; a lot of folks are tired of that activism and are concerned that it could potentially be bleeding into the conservations she has with her husband." Is Gabe Roth tired of David Cole's activism? Has he publicly criticized David Cole? Is he worried that Cole and Judge Pillard are talking about cases for which he has expressed an opinion on an issue that will come before her? I am unaware of him expressing any concerns.

Or what about Ed Rendell, who was Mayor of Philadelphia, Governor of Pennsylvania, and the head of the Democrat National Committee, while he was married to federal judge Marjorie Rendell? Did judicial ethics experts grow tired of his political activity or advocacy? Were these experts concerned that his views would be imputed to his wife?

One unsettling aspect of the current attacks on Justice Thomas is the unsubtle view that Justice Thomas is intellectually dependent on the white people around him. For example, Jane Mayer and Jill Abramson wrote that, on the D.C. Circuit, "Thomas developed an unusually close friendship with – some would say reliance on – his fellow jurist Laurence Silberman." Next, he was a puppet of Justice Scalia, unable to think for himself and blindly voting with Justice Scalia, another racist trope driven by the Left, including again, Jane Mayer and Jill Abramson, who wrote that Thomas "frequently seemed content to let Scalia write the dissenting opinion, to which he merely added his silent assent."

Thomas is the most independent-minded justice to sit on the Court, voting by himself in dissent in his first conference meeting in 1991 and persuading several other justices, including Justice Scalia, of his views. For many years, Thomas has written the most opinions per year of any other justice. His superb memoir, *My Grandfather's Son*, makes it abundantly clear that Thomas has fiercely resisted being told what to think or do his entire life. Yet the Left persists with this racist smear.

For example, in Philip Bump's recent piece in the *Washington Post*, he writes that "Mayer's piece dances around the question of how much influence Ginni Thomas has over her husband," and Bump references a quote Mayer uses from a 1991 *Washington Post* piece: "The one person [Clarence] really listens to is Virginia." And then Bump adds another quote from the 1991 story: "He depends on her for advice." Bump (and Mayer) use these quotes to imply that Thomas is dependent on Ginni's views and opinions for his views. Similarly, in Michael Kranish's attack on the Thomases in the *Washington Post*, he quotes democratic operative Mark Fabiani wondering aloud whether there is "a single opinion that Justice Thomas has ever written that is inconsistent with his wife's far right-wing views?" Justice Thomas certainly triggers the Left to reveal their racism.

The current attacks on the Thomases show that ethics charges are being weaponized for political purposes. If these standards being applied to the Thomases were applied to Justice Ruth Bader Ginsburg, she would have violated these standards many times over.

Justice Ginsburg's husband Marty Ginsburg practiced at a law firm that appeared several times before the Supreme Court, and she never recused herself. She even voted in favor of her husband's colleague's client. The press does not like to deal with the Marty Ginsburg example, so they have dishonestly reported that he left his law firm for teaching when Justice Ginsburg became a judge.

Marty Ginsburg's client Ross Perot endowed a chair in Marty's name at a law school after Marty solved a complex tax question, and Justice Ginsburg never recused when Ross Perot or his company EDS appeared before the court.

Jane Ginsburg wrote a legal article on a case pending before the Supreme Court, the petitioner cited Jane's article in his brief, and RBG voted exactly as her daughter advocated. One court watcher, in reviewing the decision, wrote that "Justice Ginsburg--perhaps influenced by her daughter . . . copyright scholar Jane Ginsburg . . . ends up as a copyright hawk."

Under the current law and precedent, Justice Ginsburg should not have recused in these matters. But neither should Justice Thomas based on his wife's opinions or activities to date.

Some on the Left and in the corporate media have raised concerns that Justice Thomas did not recuse from cases where a group that had received an award from Ginni Thomas subsequently filed an amicus brief with the Court. This is laughable. By way of comparison, Ginsburg never recused from cases in which the National Organization of Women (NOW) filed amicus briefs at the Court, despite Justice Ginsburg having served on the Board of Directors for the NOW Legal Defense fund in the 1970s. Justice Ginsburg even donated an autographed copy of her VMI opinion to the pro-abortion NOW Political Action Committee, which auctioned off the opinion at a fundraiser in 1997. In 2004, she spoke at a lecture named after her for the NOW Legal Defense Fund, and two weeks before that lecture, Justice Ginsburg voted in favor of a position advocated by the NOW Legal Defense Fund in an amicus brief. I am unaware of any Democrat on this Committee or in Congress raising significant concerns about Justice Ginsburg's conduct.

Most troubling, Justice Ginsburg also directly attacked Donald Trump on multiple occasions during the 2016 presidential campaign. Justice Ginsburg called him "a faker" and criticized him for not disclosing his tax returns. She even voiced concerns about Trump being president.

Left wing journalist Mark Joseph Stern wrote that "what Ginsburg is doing right now—pushing her case against Trump through on-the-record interviews—is not just unethical; it's dangerous." Stern added:

> Given all of these compelling reasons that Ginsburg should have refrained from speaking her mind about Trump, why did she take the risk? It seems clear that Ginsburg has made a very conscious decision to cash in her political capital after years of holding her fire. The justice is 83, and while she remains healthy and sharp, she probably won't sit on the court for much longer. She won't be impeached—Supreme Court justices must do much worse to suffer *that* sorry fate—and she can't be voted out. In effect, Ginsburg has nothing to lose but her good name. And that, it seems, is what she has decided she is willing to risk if it might potentially rally her admirers against Trump's looming peril. . .
>
> And so, sensing the menace that Trump undoubtedly poses to her country, Ginsburg abandoned judicial propriety to wrestle in the mud with a candidate she detests. It is not pretty, it is not pleasant, and it may not even be that smart. But it may be the one thing the justice can do to help prevent a President Trump. And to her mind, that alone may make it worthwhile.

Ultimately, however, Stern seems to be making excuses for Justice Ginsburg's behavior, notwithstanding the concerns he raised. And while he also noted that there could be legitimate calls for Justice Ginsburg to recuse from all cases involving the Trump Administration, Justice Ginsburg never recused from any such case. She even sat on a case where President Trump was challenging a congressional subpoena for his tax returns. Of course, she voted against President Trump.

If Justice Ginsburg's personal foray into presidential politics was insufficient to trigger the ethical handwringing of the Left, it is difficult to take seriously the current outrage over the political opinions of Justice Thomas's wife. He is not his spouse, and he is not her puppet. Justice Ginsburg, by contrast, directly expressed her own political views in an effort to influence a Presidential election. I am unaware of any Democrat currently on this Committee or their allies in the corporate media having called for hearings or talking of impeaching Justice Ginsburg in light of her overtly partisan conduct and refusal to recuse from Trump-related cases, and specifically the tax-related case. But we sit here today because Justice Thomas did not recuse from cases in which his wife expressed political opinions or worked with groups that made comments or filed amicus briefs on various issues that come before the Court.

Lost in all of this discussion is the fact that, contrary to much reporting by the corporate press, a federal law on recusal applies to the Supreme Court. 28 U.S.C. § 455 sets forth when a judge or justice should recuse. In 1993, seven members of the Supreme Court issued a Statement on Recusal Policy regarding family members, in which the seven Justices developed a policy implementing section 455. And that is what they follow today.

The seven Justices wrote that with respect to a family member being a lawyer involved with litigation, they would only recuse if that family member/lawyer was appearing before the Supreme Court as part of a litigation team or was making money from the outcome of litigation. In other words, a family member could have served as a lawyer on a team (not as the lead lawyer) in a lower court, but if they do not appear before the Supreme Court and are not being compensated with respect to the litigation, the Justice would not recuse. Thus, based on this Statement implementing section 455, Justice Thomas has properly never recused based on his wife's opinions or activities.

The proposed legislation under consideration today would require the Supreme Court to adopt a Code of Conduct, and if it does not, the Code adopted by the Judicial Conference for the lower courts, shall apply to the Supreme Court. Chief Justice Roberts has noted that Justices already consult the Code and other sources in making recusal decisions. As Russell Wheeler, a Brookings fellow who was the long-time Deputy Director for the Federal Judicial Center, has noted, "The Judicial Conference has no authority to require that [lower court] judges comply with the Code. The Code makes clear that . . . it is advisory. . . . The notion nevertheless persists that the Code 'binds' lower court judges as would a statute, and that a Code for the Supreme Court would similarly 'bind' the justices."

Whether or not it is a good idea for the Court itself to adopt a more robust or proscriptive Code of Ethics, a statue purporting to bind the Court on such matters may run afoul of the separation of powers.

And I would note that one of the Senators pushing hardest for a Code to apply to the Supreme Court would run afoul of that Code if it were applied to him. The Code urges Judges to not be a member of a club that discriminates. Senator Whitehouse belonged to a private club that appears to exclude black members. He claims he "transferred" his membership to his wife, who now belongs to the club, and he attends through her membership. Rules for thee, not for me.

With respect to the bill's provisions that the entire Supreme Court shall sit as a panel to review recusal motions from a party against one of the Justices, there are serious questions whether that would pass constitutional muster. A recusal decision is a judicial ruling, and Congress would be mandating how the Supreme Court, established by the Constitution, shall issue judicial decisions. Once again, regardless of the wisdom (or lack thereof) of such procedures, the choice regarding how to decide motions and cases is for the Court itself, not Congress, to make.

On a more practical side, parties may flood the Court with recusal requests to sideline a Justice who the party fears may rule against their position. Perhaps a party files a recusal claim, based on Senator Whitehouse's claims, that conservatives Justices are bought and paid for by dark money and cannot be fair and open-minded on matters pertaining to every issue under the sun. Perhaps non-parties will try to join in the spectacle with their own requests or briefs. Under this provision, the Court will have to meet and decide on these recusal requests.

Unlike lower courts, there are only Nine Justices and one recusal could severely hamper the functioning of the Court. Justices have a "duty to sit," and should only recuse when required. As Justice Scalia wrote in properly refusing to recuse in the Cheney litigation, "My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons." And even where the Court rejects a requested recusal, having to rule on many such requests will divert attention from the more pressing substance of the Court's work.

With respect to requiring a Justice to specify in writing why he or she is recusing, this provision also may not survive judicial scrutiny. A recusal decision is a judicial ruling, and therefore, Congress would be mandating the manner by which a Justice makes his or her ruling. It could also be the camel's nose in the tent, whereby Congress may then pass a law requiring the Supreme Court to issue a written ruling on every denial of cert, complete with a requirement that they explain why the petition was denied. Such congressional micro-managing of the judicial function is troubling and quite possibly unconstitutional.

There is nothing wrong with ethics or recusals at the Supreme Court. The Justices are ethical and honorable public servants and occasionally recuse themselves where the situation warrants. But the trigger for this new proposed legislation is a ginned-up smear attack on Justice Thomas and his wife. Continually blasting the Court for so-called "ethical" transgressions has of course led the American people to have a lower view of the Court. Perhaps the self-fulfilling nature of

the hyperbolic claims about the loss of public confidence in the Court is the very point of the current attacks and proposals for "reform."

To support any reform legislation right now would be to validate these vicious political attacks on the Supreme Court.

Mr. JOHNSON of Georgia. Thank you, Mr. Paoletta.
Next, Professor Gillers, you may begin, sir.

STATEMENT OF STEPHEN GILLERS

Mr. GILLERS. Thank you, Mr. Chair. Thank you for inviting me.

When I talk about judicial ethics to continuing legal education classes, hundreds of lawyers, or in class, I always wind up saying there are nine judicial officers in the whole country who are not governed by an ethics code. This is counterintuitive because students or lawyers in the audience say, well, aren't those the judicial officers who should most be governed by an ethics code? How could this be true?

I explain how the Codes Committee of the Judicial Conference chooses not to adopt a code of conduct for the justices. Maybe it cannot. Maybe its position is correct.

Someone will ask, well, what about Congress? Here we are.

I say it is not so clear that Congress can do that. I think there are serious separation of powers questions over whether or not Congress can adopt an ethics code for the court which is, like Congress, created by the Constitution. Anyway, it would achieve nothing because you could legislate that the code for the lower Federal court judges does apply to the justices, and then nothing will happen.

So, the question comes back, well, what about the court? Can't the court adopt an ethics code for itself? The answer is, of course it can. It adopted a rule governing when justices will recuse because of the presence of a lawyer relative in the case back in 1993. It could adopt an ethics code. Yet, it hasn't.

It seems to me there is ground here for nonpartisan agreement.

Why hasn't it done so? Well, one reason is, and I think Chief Justice Roberts worries about in any way implying that the court is subordinate to Congress by adopting a code after being told by Congress to adopt a code. I understand that.

Why can't he and the court adopt a code without that pressure? Well, they could say we are doing it because we're doing it, we are not doing it because Congress wants us to do it.

The route to getting a code is a separate issue from the content of the code or whether there should be a code. Some have said, well, it will create an increased risk of a 4–4 court. That is wrong. Risk of a 4–4 court arises out of the recusal statute that does apply to the justices.

If you look at the code of conduct for U.S. judges, I don't think there is another provision there that by itself could lead to recusal. There are things that a justice might do that would violate another provision and warrant recusal under the statute. So, the danger of a 4–4 court is already with us because of the statute, not because of the code.

The final reason I hear is, well, who will police compliance? Who will police compliance with the code? The answer is, nobody. I think the answer has to be, nobody.

I disagree with the idea that the other eight justices can police compliance with the recusal statute. The bill doesn't even anticipate that they will police compliance with the code. So, one might

ask—and people have asked—well, what is this all about then? Is it just about appearances?

The answer is, yes, it is just about appearances. Appearances are really important in my world. We sometimes treat appearance issues as Emily Post for the legal profession. We like to talk about it, but it's not really needed. It is needed. Appearances backed up by promises of compliance will achieve a great deal.

Section 455 is itself all about appearances. Not corruption, not bribery, which we deal with in another way. So, too, a code with buy-in from the justices will help us persuade the American people, who are surprised at the absence of one, that it is an institution in which they can put their confidence.

[The statement of Mr. Gillers follows:]

TESTIMONY OF STEPHEN GILLERS

ON H.R. 7426
BEFORE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
APRIL 27, 2022

Since 1978, I have been teaching legal and judicial ethics at New York University School of Law, where I am now Elihu Root Professor of Law and was vice dean from 1999-2004. I am the author of a popular casebook on the subject, first published in 1985 and now in its 12th edition. I have lectured throughout the country and abroad on the ethics rules, broadly defined, governing lawyers and judges in the United States. The c.v. I submitted contains my academic and many popular publications since 1978 with one exception. My article, "Because They Are Lawyers First and Foremost: Ethics Rules and Other Strategies to Protect the Justice Department From A Faithless President," is in press and will be published later this year.

The main focus of my testimony is the bill's direction to the United States Supreme Court to adopt an ethics code for itself. I will also briefly discuss certain of the bill's amendments to 28 U.S.C. §455 and issues surrounding amicus briefs in the circuit courts and the Supreme Court.

At the outset, I want to stress the importance of the subcommittee's work. The courts that Article III of the Constitution authorizes or creates have been a remarkable American success story, for which we are indebted to the foresight of the Framers. The judiciary's twin commitments to the rule of law and political independence, in fact and appearance, are essential to public confidence in its work, which must never be taken for granted. In each generation, Congress, the Executive, and the legal profession, among others, must act to protect that confidence.

A Code of Conduct for the Supreme Court

The Judicial Conference of the United States has adopted a Code of Conduct for U.S. Judges but not for the justices. Whether that omission is a choice or a correctly perceived lack of authority is not obvious. But the consequence is that the justices alone among federal judicial officers (and nearly all state judges in courts of record) are not governed by what, for shorthand, we can call an ethics code. We should not expect the public to understand and accept that omission. It is not good for the Court or the nation.

And there is no reason for it. Correction is cost free.

Just to be clear, the Code of Conduct is not the same as §455, the recusal statute, which is law and explicitly includes the justices. The Code of Conduct has a recusal rule, too. It is the same as §455. But the Code has much else that §455 does not. And recusals, when they occur, will properly rely on the statute, not the code.

Congress should not write an ethics code for the justices, who must do so themselves. The bill's instruction to the Court in section 2 to write a code of conduct is fine as an expression of Congress's will, but seems to me unenforceable. One hopes that the Court would agree.

I suggest in this regard that the bill delete language in section 2 that would apply the Code of Conduct for U.S. Judges to the justices if they do not adopt one for themselves. The inclusion of this "or else" language may discourage the Court's cooperation in order to avoid an implied concession that the Court is subordinate to Congress on the question. In any event, if the Court does ignore Congress, Congress can act later to apply the Judicial Conference's then current code to the justices if so advised. One hopes this will not be necessary.

One reason offered for *not* creating a code of conduct for the Court is the desire to avoid recusals and an evenly divided (4-4) court. But a code of conduct violation would not be a basis for recusal or even discipline, which requires that a judge "have engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 18 U.S.C. §351. The "violation of a Canon does not necessarily amount to judicial misconduct." *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 292 (3d Cir. 2009).

Since a justice's violation of a code of conduct provision would not lead to a 4-4 Court – only the recusal statute can do that – what other reason is there to oppose a code for the justices? Two are mentioned.

First is separation of powers. This is not a reason to object to a code of conduct for the Court but a concern for how we get one. I doubt that Congress can prescribe ethics rules for the Supreme Court, which unlike other federal courts is created by Article III itself. It would be best not to have to confront that question. The Court should adopt an ethics code itself because it is the right thing to do and concedes nothing about congressional authority.

A second reason sometimes offered to oppose a code of conduct for the justices is that it would have no enforcement mechanism. The current bill describes none. But with no enforcement mechanism, one might ask, "What's the point? Is this a debate about appearances?"

Yes, it is about appearances, but appearances backed by commitment, which matter a great deal. Since at least the mid-1950s, the Supreme Court has in numerous decisions emphasized that "justice must satisfy the appearance of justice. "Offutt v. United States, 348 U.S. 11, 14 (1954)(Frankfurter, J.).

So applying many, perhaps most, provisions of the current code of conduct to the justices should be uncontroversial because it will be the Court itself that does so, because no authority will review whether a justice has violated a code provision, and because doing so does not create a risk of a 4-4 Court.

Some code provisions that could be incorporated in a code of conduct for the Court are, by way of example, the prohibition against belonging to a discriminatory club in canon 2C; the provision that forbids a judge to "publicly endorse or oppose a candidate for public office" (canon 5A(2)); and the prohibition in canon 2B against "lend[ing] the prestige of the judicial office to advance private interests of the judge or others."

The public may wonder what legitimate reasons a justice could have to resist application of these and other requirements to the Court? There are none. Doing so will demonstrate the Court's commitment to comply with the same rules that bind all federal judges and detract not at all from the independence of the Court or its ability to fulfill its constitutional role.

Recusal Provisions

Section 3 of the bill would make the full Supreme Court the "reviewing panel for a motion seeking to disqualify a justice" under §455. I believe this is unwise. First, I doubt that the other eight justices will ever implement that assignment. Second, having justices review and potentially reject a colleague's refusal to recuse could harm collegiality among them. Third, the power lends itself to the possibility of abuse, or the appearance of abuse, if elimination of a justice can change the Court's ruling.

Section 3 of the bill would also add three provisions to §455(b) to require a justice's or judge's recusal. These are subparagraphs (6), (7), and (8). These provisions do not contain a state of mind requirement. The absence of a state of mind requirement split the Court 5-4 when it was asked to construe §455(a) in *Liljeberg v. Health Services*

Acquisition Corp., 486 U.S. 847 (1988). This omission must be corrected if these provisions remain.

While the information in proposed subparagraph (6) should be known to the judge or easy to discover, information described in proposed subparagraphs (7) and (8) may not be. Subparagraph (7) requires recusal if there has been "any" lobbying contact and the bill's definition of "substantial funds" as used in subparagraph (7) may not be easy to apply.

Subparagraph (8) goes too far. It would require recusal, for example, based on work or volunteer activities lasting more than "6 consecutive months" by the judge's adult child or his or her spouse during the prior six years. Apart from the dubious wisdom of this basis for recusal, what is the judge's duty to investigate? And do we want to create an incentive for litigants to investigate a judge's relatives?

I generally support the addition of subparagraph (6) because it is tethered to information already required to be reported by the Ethics in Government Act and so available to the judge and the parties. Although the newly defined terms "supervisory capacity" and "affiliate" will create some ambiguity and may require additional investigation, the law firms representing the litigants will have the incentive to do it. However, recusal under subparagraph (6) is not conditioned on a minimum dollar amount (as little as a few hundred dollars may appear in a judge's report), the time of receipt (many years ago?), or the identity of the donor, all of which may bear on the need for recusal. These variables should be addressed or the recusal question left to the application of §455(a) after disclosure.

It seems to me that there is an alternative to the categorical recusal rules in subparagraphs (7) and (8). It is to require the judge who knows of the facts they describe, especially if they are not easily discoverable, or who discovers them as part of his or her duty to be informed of certain potentially disqualifying information, to disclose them to the parties. In other words, the court and the parties should address and resolve recusal issues based on information described in these provisions in the context of particular litigations rather than have Congress do so a priori.

Supporting that resolution is the salutary addition of paragraph (g) to §455 to require that a judge inform the parties of a "condition requiring disqualification." A notice requirement is a good idea because the judge may know things that support recusal of which the parties are unaware. But the notice should occur even if the judge does not believe recusal would be required so long as a party could reasonably argue otherwise.

That gives the party an opportunity to make a recusal motion and perhaps persuade the judge that recusal is required, or failing that, to make a record for appeal.

Section 3 would expand a judge or justice's duty to "be informed" by adding a duty to be informed about "*any* interest that could be substantially affected by the outcome of the proceeding." (Emphasis added.) That's too broad. The intention may be to identify a substantial effect on interests of those persons described in paragraphs (b)(4) and (b)(5)(iii).

The recusal statute should not be an obstacle course for judges, tempting though it may be to anticipate new situations (or to respond to recent ones momentarily in the news) that are not now specifically covered by §455(b). Balance is needed. An effort to capture multiple variations in legislative language carries its own costs, both in court time and in the danger of overbreadth and false positives. Further, although recusal at the Supreme Court is in the news today and will be again, the recusal statute will overwhelmingly affect the anonymous cases of lower court judges. We are legislating mainly for them and the lawyers who appear before them.

Section 455(a)'s generic basis for recusal when a judge's impartiality might reasonably be questioned provides much flexibility and should suffice if, as we must assume, the men and women who become federal judges will have a proper regard for the necessity of public confidence in the tribunals they serve and will act accordingly. It bears stressing that a judge's decision to recuse says nothing negative about her integrity or fairness. It does the opposite.

Amicus Briefs

Unclear in authorities is whether and when the identity of an amicus will require recusal. Where it does, the solution should be to strike the amicus brief rather than remove the judge. But when will that be so? (This inquiry is distinct from the aim of section 5 of the bill, which in the interest of transparency requires disclosure of the identities of certain contributors to an amicus or to the cost of an amicus brief.)

Consider some possibilities:

- A relative of a judge submits an amicus in his or her own name.
- A non-profit organization to which a judge's relative is a major contributor or where the relative is an officer submits an amicus brief.

- A business entity or trade association in which a judge's relative is active or an officer submits the amicus brief.

- A law firm in which a judge's relative is a partner submits an amicus brief on behalf of a client. The relative is not on the brief but does related work for the client.

In these and other instances, should the brief be struck to avoid recusal? How should we define "relative?"

Section 4 of the bill instructs the Judicial Conference and the Supreme Court to propose rules that would address questions like these. I support that assignment. It is better to have uniform answers to these questions than piecemeal responses from individual courts.

Clarence and Virginia Thomas

Spouses of justices can be politically active, including on issues that may or will come before the Court, without thereby requiring recusal. We don't impute the political conduct or views of a justice's spouse to the justice. This has long been my view, including in stories about Virginia Thomas. See Jackie Calmes, "Activism of Thomas's Wife Could Raise Judicial Issues" (N.Y. Times, Oct. 8, 2010). More recently, see Kevin Daley, "EXCLUSIVE: Ginni Thomas Wants To Set the Record Straight on January 6" (Wash. Free Beacon March 14, 2022).

But the analysis changes if the spouse's interest is not a general one shared with members of the public at large, but a direct or personal interest in how a case is decided. Usually that will happen when the spouse's interest is financial, which is easy to understand, but it does not have to be financial.

The amicus brief in which I and others joined supporting Stephen Reinhardt's denial of a recusal motion in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011)(opinion of Judge Reinhardt), is instructive and consistent with my views regarding the Thomases. *Perry* was a challenge to a state prohibition on same sex marriage. Ramona Ripston, Judge Reinhardt's wife, was the longtime executive director of the Southern California CLU. Ms. Ripston and the CLU opposed the prohibition.

Virginia Thomas is not in the same position as Ms. Ripston. As I wrote in the Wall Street Journal (Apr. 1, 2022), responding to a columnist who drew a false comparison between the two situations:

The Thomas and Reinhardt situations differ in key ways. First, cases that come to the Supreme Court may reveal communications by Ms. Thomas that she and her husband prefer to keep secret. That is not conjecture, as the recent disclosure attests. Justice Thomas cannot decide those cases. Ms. Ripston had no such privacy interests in the case before her husband.

Second, judges aren't disqualified because of a spouse's public views. Here, however, Ms. Thomas sought greater influence in the legal battle by advising Mr. Meadows, who was influential in steering the effort to upset the Biden win, including through appeals to the Supreme Court. Ms. Thomas joined that effort from the inside, giving her the kind of interest in the litigation that requires Justice Thomas's recusal. Nothing comparable appears in the Reinhardt example.

I have long defended the right of judicial spouses, including Ms. Thomas specifically, to join public debates on issues that could come before their husbands or wives without affecting their ability to sit. Attention to the details of the two situations, rather than superficial similarities, reveals that this time the Thomases went too far.

The Southern California CLU had joined an amicus brief in the lower court but it was not an amicus in Judge Reinhardt's court. If it had been, as Judge Reinhardt correctly said, he would have been recused. By contrast, the Trump team – Mrs. Thomas's team -- anticipated and then filed appeals to the Supreme Court and Justice Thomas did not recuse.

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Thank you for the opportunity to testify.

Mr. JOHNSON of Georgia. Thank you, Professor Gillers.

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

I will note the fact that in law school I was always taught that lawyers and judges should avoid even a hint or an appearance of impropriety. For judges, impartiality is on top of that.

I would like to also recognize the fact that there is immense popular support for a Supreme Court code of ethics. This has come from every quarter: Ethics professors, Members of Congress, analysts, and commentators on all sides of the political spectrum, from the progressive Left to the avowed and life-long conservatives.

A recent poll found that 71 percent of voters favor a code of ethics, including 76 percent of Democrats, and 63 percent of Republicans. Few policies are able to attract majorities that are so decisive.

Mr. Roth, your organization has been working on this issue for nearly a decade. Have you ever seen so much high-profile public support for a Supreme Court code of ethics as we do now?

Mr. ROTH. I think the support has actually been, been consistent over time. I have polled this question for since 2012 when I ran a group called Coalition for Court Transparency that was just singularly focused on broadcast, and then it became Fix the Court to focus on other issues.

It always polls in the 70s or 80s, always polls across partisan lines. Then, that is just a simple quantitative question.

When you do qualitative, it is kind of like what Professor Gillers said, folks are surprised that the Supreme Court don't have a code of conduct. So, once they realize that, whether in quantitative or qualitative, they are generally supportive, regardless of their political valence.

Mr. JOHNSON of Georgia. Thank you.

Mr. Roth, it seems like the only individuals who do not support a code of ethics for the Supreme Court are apparently Mr. Paoletta and also the members of the Supreme Court itself.

Are you aware of any other significant opposition to the code of conduct applying to Federal—to justices of the Supreme Court?

Mr. ROTH. No, I am not.

To me what is interesting is that in 2019, Justice Kagan was testifying about the budget, and the Supreme Court's budget, and she was asked about a code of conduct. She said Chief Justice Roberts is thinking about implementing one.

So, this has been on the justices' mind for a while now. There hasn't been any updates to that statement in 2019. This is definitely something that has been on the justices' mind. I think that after many, maybe this year or maybe some more years of congressional pressure it will happen.

Mr. JOHNSON of Georgia. Thank you.

Professor Gillers, many of the current Supreme Court justices were judges of the lower courts where they were subject to more stringent ethical standards. Yet, when they get to the high court they act, they start acting in ways they could not have acted when they were on the Circuit or District Courts.

Why do you think that is? Is there any merit to the notion that justices Act in ethically murky ways simply because they can?

Mr. GILLERS. Well, I hope not. Gabe would know more about what they do that is questionable.

Why do people who are promoted from a circuit to the Supreme Court Act differently, if they do Act differently? Of course, there is no superior. Right? When no one is watching and no one can tell you did wrong, as the Supreme Court could tell every lower court judge they do wrong, you may not feel as conscientious about complying with the same rules that used to apply to you, but now do not.

Mr. JOHNSON of Georgia. Thank you.

Mr. Sherman, does this make sense that judges get a promotion and, as a result, are subject to less oversight, less regulation even as they make more and more consequential, wide-ranging decisions?

Mr. SHERMAN. It certainly doesn't from an ethics standpoint. The justices on the Supreme Court, their decisions can't be appealed, their recusal decisions can't be appealed. Yet, they have not just a lower standard but no standard, and certainly no transparency with respect to how they—their recusal decisions.

It has created significant concerns about the court's impartiality.

Mr. JOHNSON of Georgia. Thank you.

Mr. Paoletta, you gave a number of examples of ethical lapses perpetrated by Democratic-appointed justices of the Supreme Court. Yet, you sit here today opposed to the U.S. Supreme Court being bound by a code of ethics itself.

Can you explain why you make the case for a code of ethics, but then you don't want one?

Mr. PAOLETTA. The examples I used, Mr. Chair, I actually said they didn't violate the recusal laws.

Mr. JOHNSON of Georgia. Well, let me ask this question. Are there any violations that a sitting Supreme Court justice can make that violate the code of ethics that is applicable to lower court judges?

Mr. PAOLETTA. Again, I think Justice, Chief Justice Roberts—

Mr. JOHNSON of Georgia. In other words, if they do something—

Mr. PAOLETTA. Yeah. Chief Justice Roberts, I guess—

Mr. JOHNSON of Georgia. —that applies to lower court judges—

Mr. PAOLETTA. Yeah.

Mr. JOHNSON of Georgia. —that they, as Supreme Court justices, are doing it, isn't it the same ethical lapse?

Mr. PAOLETTA. Right.

I think my concern, Mr. Chair, is that this is being done now. Gabe may say it has been going on for a long time. I find it curious that this is happening right now in the court in the context of the, sort of the controversy over Justice Thomas.

Chief Justice Roberts has said that they consult the code of ethics. As Professor Gillers says, it is not binding. The code of ethics is not a binding document, it is guidance. As he says, it is very—

So, they already consult. Chief Justice Roberts has said that every justice consults the code of ethics.

Mr. JOHNSON of Georgia. You don't disagree with the fact that there is a need for a code of conduct for Supreme Court justices? You don't disagree with that, do you?

Mr. PAOLETTA. So, I think it, I think the Supreme Court should answer that question in terms of—and I think Professor Gillers is right, I don't think it would be—

Mr. JOHNSON of Georgia. If they fail to answer that question, as they have historically, does it mean that there should not be a code of ethics that applies to them?

Mr. PAOLETTA. I think what the Supreme Court is doing now, in terms of their own, the justices consulting a code of ethics and the code of ethics is working well enough, is working fine.

Mr. JOHNSON of Georgia. Okay. Got you. Thank you.

We will next go to the gentleman from Louisiana, Mr. Johnson, for five minutes.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

Let's just be very blunt and clear about what is happening here today, as Mr. Paoletta just indicated. It is very clear that our Democrat colleagues, and many Democrats across the country, are continuing to bully and intimidate the Supreme Court now that there is a conservative majority. I mean, that is clear.

Judicial ethics is obviously a subject worthy of our examination, but the Democrats' goal in this hearing is clearly to attack Justice Clarence Thomas. We have heard over and over, as occasioned by the recent news events. Democrat attacks on Justice Thomas and his wife Ginni are overly and overtly partisan, and clearly wrong.

If anybody thinks that the charge that Democrats are attempting to bully and intimidate the court is hyperbole, just Google. Google the video of the comments that Mr. Paoletta mentioned. Just one instance, March 22, Senator Chuck Schumer.

I am going to say it again, he threatened conservative justices on the highest court in this country on the steps of the Supreme Court while the court was hearing oral arguments in the June Medical Services case, Louisiana abortion case which, ironically, I was the trial court litigator on that case before it got to Congress years ago.

This is what he said, this is Chuck Schumer, okay, leading Democrat in the U.S. Senate, he says,

> I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released a whirlwind. You will pay the price. You won't know what hit you if you go forward with these awful decisions.

Staggering that a Member of the U.S. Senate, a leader of the U.S. Senate would say such a thing about our third branch and the justices who serve there.

Mr. Paoletta, while Democrats continue their public smear campaigns against conservative justices, they, obviously, fail to call out the egregious behavior of liberals, judges, justices, and politicians.

Isn't it true that during Justice Ginsburg's tenure on the court, her own daughter drafted an amicus brief in a case before the court, and the petitioners in the case cited that brief numerous times?

Mr. PAOLETTA. That is correct.

Mr. JOHNSON of Louisiana. Did she recuse herself from that matter?

Mr. PAOLETTA. She did not.

Mr. JOHNSON of Louisiana. In 2016, Justice Ginsburg made public comments criticizing then presidential candidate Donald J.

Trump, calling him a faker, and questioning why candidate Trump had yet to overturn his tax returns.

Do you know whether Justice Ginsburg recused herself from matters involving the Trump Administration or President Trump's tax returns?

Mr. PAOLETTA. She did not.

Mr. JOHNSON of Louisiana. My Democratic colleagues regularly like to complain about conservative judges and justices speaking at Federalist Society events—this is a drumbeat that we hear all the time—as if somehow, they are engaging in grand conspiratorial discussions.

Isn't it true that Justice Sotomayor, for example, is scheduled to appear at the American Constitution Society, which is the Left's version of the Federalist Society, at their national convention this summer?

Mr. PAOLETTA. Correct.

Mr. JOHNSON of Louisiana. I haven't heard any public outcry about that. Maybe we should start a petition and ask her not to do that.

Despite these, and countless other examples, Democrats would like one set of standards to apply to conservative justices like Justice Thomas, and not liberal justices and judges.

Mr. Paoletta, why do you think congressional democrats only train their ire on the conservative judges appointed by Republican Presidents?

Mr. PAOLETTA. Again, I think this is a concerted effort to undermine the legitimacy of the court right now with this conservative working majority.

With respect to the Justice Ginsburg example with her daughter, in fact a court watcher noticed and said that in reviewing the decision that Justice Ginsburg, perhaps influenced by her daughter's opinion—law review article, came out a copyright hawk which looked like she was influenced by her daughter's opinion or article.

So, I think it is just an effort to delegitimize the court.

Mr. JOHNSON of Louisiana. You are probably aware, I know Members of this Subcommittee are, that H.R. 2584, the Judiciary Act, which is co-authored by Representatives Nadler and Chair Hank Johnson, would add four justices to the court to give liberals a 7–6 majority. Shows their great concern about that.

The Judicial Conference's most recent recommendation asked Congress to create 77 new District Court judgeships. Our Chair of the Subcommittee, Chair Hank Johnson, introduced a bill to create 203.

So, it seems apparent there is a long list of actions and activities that they have taken, and statements they have made. I am running out of time. I don't have the time to list it all here. It is quite clear that there is a grave concern on their part that we do have a conservative majority this time around. They are taking these desperate attempts to change the rules, change the count of judges, change the court itself because they are so deeply concerned about that.

I just think it is just readily apparent. I think it needs to be pointed out because it is so obvious. I am grateful for the clarity and conviction of your testimony.

Appreciate all our Witnesses being here. I yield back.

Mr. PAOLETTA. Can I just add?

Mr. JOHNSON of Georgia. Sure. I have time.

Mr. PAOLETTA. Yeah. I mean, the talk from a lot of advocates that the court, that conservatives are bought and paid for by dark money is really just so offensive. It shows up in some of the testimony here. The idea, and Senator Whitehouse is the one who pushes this the most, which is that these five or six justices are bought and paid for by dark money on the conservative side is absolutely offensive to me.

Mr. JOHNSON of Louisiana. Unbelievable, unbelievable.

Thank you, I yield back.

Mr. JOHNSON of Georgia. We will now hear from the gentleman from New York for five minutes.

Chair NADLER. Thank you, Mr. Chair.

Professor Gillers, whom I have admired for many years, and not just because he teaches at NYU in my district, seems to think that anything we may do about a code of ethics for the Supreme Court is unconstitutional and unenforceable.

Would you comment on that, Mr. Sherman?

Mr. SHERMAN. Thank you for the question, Congressman.

Well, as another Witness who appeared before the Committee in October, Professor Jamal Greene of Columbia, testified Congress has broad constitutional authority to provide that ethics rules apply to the Supreme Court justices. I think there are some questions about enforcement, which I agree with Professor Gillers need to be explored. I think there are mechanisms that can be put in place to address any constitutionality concerns.

There are a number of options to do that for creative thinkers in Congress and at the court.

Chair NADLER. Thank you.

I would like to talk about justices' speaking engagements. These can create conflicts or the appearance of conflicts in a number of ways.

The first has to do with closed-door remarks made to audiences advancing a particular political agenda.

Mr. Sherman, do you think Supreme Court justices should have to give their public speeches in public?

Mr. SHERMAN. Yes. I think they should have to give their public speeches in public. They need to be mindful of the appearance and impartiality concerns that can arise from giving speeches to folks behind closed doors and can publicly post that information.

Most importantly, I think it highlights the need for a clear standard that is publicly disclosed so that everyone knows what it is, and that the justices have clarity and consistency across their behavior.

Chair NADLER. Thank you.

Mr. Roth, another concern with speeches made by Supreme Court justices is that they are often accompanied by lavish gifts of travel and accommodation. Often these gifts of travel and accommodations go unreported because the judiciary's interpreting the Ethics in Government Act as requiring very narrow disclosures.

Can you tell us more about the kinds of gifts that justices typically receive as part of their speaking engagements, and why that can create an appearance of impropriety?

Mr. ROTH. Sure.

So, a few years ago my organization sent some public records requests to public universities to try to figure out what type of perks they were getting. We found that, for example, Justice Thomas was flown on a private plane to teach at the University of Florida.

Justice Alito was offered a private plane to give a speaking—to give a speech at the opening of the University of South Carolina. A hurricane canceled that flight and he just ended up taking business class.

Justice Sotomayor, when she gave the commencement address in Rhode Island in 2016, was offered 11 hotel rooms at the State's fanciest hotel for her, her security detail, and some family friends.

So, this is a problem across the board. I think that part of the 21st Century Courts Act says that the justices should follow the travel rules that Members of Congress do when they have to report within 30 days of coming back from a trip who paid for the trip and how much it cost.

Chair NADLER. Thank you.

Mr. Roth, in a related issue to justice speeches is the kind of conferences that justices and many lower judges—many lower court judges are invited to attend. These conferences are frequently organized by groups pushing an ideological or industry-biased agenda, and they are often used to introduce new, previously unknown, or fringe legal theories into the mainstream and into the tops of judges' minds.

There is a name for this kind of behavior: *Lobbying.* If the justices of the Supreme Court do not have to disclose these attempts to influence them, should they?

Mr. ROTH. Absolutely. I think there is a few things.

One, a lot of these speeches sometimes—to go back to what Don said, the Supreme Court justices there is a site on *supremecourt .gov* where justices can publicize what they said, to whom, and when. That page hasn't been updated for five years. The last people to do it, were Stevens and Ginsburg.

So, yes, that, what they are saying, to whom, and when, should be publicly available. Certain justices live stream their events. Barrett recently live streamed an event. Thomas recently did, but Alito and Gorsuch didn't. It is just, again, every justice should be required to follow the same set of rules. The fact that they are not, just makes the appearance of impropriety.

Chair NADLER. Thank you.

Mr. ROTH. Makes us think that they are doing something behind closed door, actually.

Chair NADLER. Thank you.

Mr. Sherman, your written testimony mentioned a draft Advisory Opinion No. 117, which would have prohibited lower court judges from being members of judicial advocacy groups like the Federalist Society and the American Constitution Society. That opinion would not have applied to the Supreme Court.

Should the Supreme Court adopt a code of conduct that includes a similar prohibition on membership in these kinds of groups?

When justices are members of outside political groups seeking to influence the Federal judiciary and interpretation of Federal law, does this create the impression that justices are not deciding cases impartially on the merits?

Mr. SHERMAN. Absolutely.

Chair NADLER. Thank you.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

We will now go to the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chair.

Mr. Paoletta, the gentleman next to you, Mr. Sherman, in his statement cited that the prohibition or the recusal standard should include both spouses and children as to their stocks, bonds, ownership, and conflicts.

First, is that reasonably possible? I have a 42-year-old son. Should I have to recuse myself because my son has an interest in some company using the same standard that is currently the Congressional standard or the Executive standard?

Mr. SHERMAN. Congressman, thanks for the question. I testified on this topic with respect to Congress two weeks ago. I think the standard should be the same. That members of the Federal judiciary should be banned from owning—

Mr. ISSA. Okay.

Mr. SHERMAN. —and trading individual stocks, to include their dependent children and their spouses, not their adult children.

Mr. ISSA. Okay. So, the President flying Hunter Biden on his aircraft to take him to Eastern Europe or to China where he did these business and made millions of dollars, as he got off of Air Force Two with the President, would that or wouldn't that be a conflict the way you are looking at it since Hunter Biden was only dependent on drugs, not on his father?

Mr. SHERMAN. So, I'm not familiar with the example that you're providing. Again, I would note, as I said, the conflict concern is most significant. I think the focus of the prohibition should be on dependent children and spouses, in addition, to obviously the principals.

Mr. ISSA. Okay. Mr. Paoletta, the concept that you would be recused when there is only nine Justices because of anything that your spouse said, did or had in the way of ownership on lower courts if a judge is pushed off or recused either from a three judge panel or from being actual presiding judge, a replacement judge is brought in. Is there any provision for the Court to do that, for the high Court?

Mr. PAOLETTA. There's not, Congressman. The Court addressed this in 1993 by issuing a statement of recusal policy where they interpret, so again this is the Supreme Court interpreting section 455 where they say that we're not going to recuse ourselves from family members who are involved with cases below the Court.

So, they could be involved at the District Court level and at the Court of Appeals level so long as they're not the lead attorney, right? So long as—

Mr. ISSA. So, in other words don't appear in front of me.

Mr. PAOLETTA. Right. Don't appear. So, if you take those examples and apply it to the Thomas situation, right, or even with re-

spect to the Reinhardt situation, they're at the lower court. They're not before the judge.

Then with respect to kind of statements that Ginni Thomas has made, this fits squarely in the statement of recusal policy that the Supreme Court has adopted, which is implementing 455. So, with respect—

Mr. ISSA. So, if there's no understood standard, it wouldn't apply. In the Reinhardt case, this is an adjudicated case.

Mr. PAOLETTA. Yes.

Mr. ISSA. This is a well thought out case that squarely would seem to say that the accusations about Justice Thomas' recusal requirement because of his wife is in no way even as close as it was with Reinhardt, wouldn't you say?

Mr. PAOLETTA. Yes. She was actually commenting on a specific case that was pending. Her organization filed two briefs, two amicus briefs, that went up to her husband. So, Ginni Thomas commenting on—again, one of the things I object to is a statement by some critics that because Ginni Thomas, Michael Tomasky from the New Republic, as I have in my written statement, he said that because Ginni Thomas said that Obamacare was a disaster that Justice Thomas has to recuse. That's absolutely absurd. He's calling for his impeachment because he didn't recuse from a case where she made that sort of comment.

If you apply that sort of logic to what happened in the Reinhardt case, again, I never thought I'd read an opinion from Professor Gillers as much in terms of his filing and defending Reinhardt on that, they're not even anywhere close to what happened in the Reinhardt case, or, as I've talked about in my written testimony, Judge Pillard on the D.C. Circuit, where her husband, who is the Legal Director of the ACLU, specifically reviewed the *Trump* v. *Mazars* case and that went up to her on an en banc appeal.

Mr. ISSA. In the remaining time, Mr. Gillers, since you've been cited a couple of times, would you like to comment on why you seem to be on two different sides of this issue?

Mr. GILLERS. Thank you. I don't believe that Justice Thomas would have to recuse from the Obamacare case because his wife vocally, publicly, emphatically, and repeatedly objected to Obamacare because we do not impute her public position to her husband for purposes of recusal. That's the same thing that happened in the Reinhardt case. It's the same thing with David Cole and Nina Pillard. End of story. Mr. Issa. Thank you. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you. The gentleman from California, Mr. Lieu is now recognized.

Mr. LIEU. Thank you, Chair Johnson, for holding this important hearing. The United States Supreme Court does not have an army. The Court cannot raise money. The Court cannot pass laws. The only power the Supreme Court has is from the belief of the American people that it interprets the laws in a fair and impartial manner.

Unfortunately, as a result of some of the conduct of some Justices, they have acted more like partisan hacks than judges. Let's just go through some of these examples.

Last year Justice Amy Barrett attended a dinner with the Republican leader of the Senate and a dozen of his friends and then gave a speech.

This year, Justice Gorsuch went to an event that was closed to the press with other people, including Republican Governor Ron DeSantis and former Republican Vice President Mike Pence.

Justice Alito, in 2019, attended a Madison dinner with other politicians and Republican donors.

This year Justice Thomas in the United States Supreme Court alcove took a picture with Republican candidate Herschel Walker for Senate and the Walker campaign then sent that picture out.

Mr. Sherman, what do you think is the damage to the Court's reputation if people perceive it as a partisan institution instead of an impartial institution?

Mr. SHERMAN. Well, I think, as Mr. Nadler said, the Court's currency is its credibility and impartiality is the reason, or the perception of impartiality is what gives the Court its authority.

If the American people begin to believe that the Federal Courts are not impartial, not only does it damage our concept and conception of democracy, but if people feel like they cannot go to the Judicial Branch for relief, my fear is that they will rely on extrajudicial means to resolve disputes.

This is not just simply some judges who are taking pictures with politicians or not recusing from cases where there's a financial interest, these are fissures that will undermine the entire foundation of the Court. The highest court in the land needs to have the highest ethical standards. Right now, they have none.

Mr. LIEU. Thank you. The American public now knows this. According to Gallup, they have been tracking Supreme Court ratings. A little over six months ago, there was an article that said approval of the U.S. Supreme Court down to 40 percent, a new low.

This February, Axios reported Supreme Court approval rating tanks. It's not even just partisan behavior, we have just straight up unethical behavior. So, Mr. Roth, you have compiled this list of ethical lapses by Supreme Court justices, and there are number of them. Man, oh, man, you look at Justice Clarence Thomas, his list is like two to three times as long as anybody else. So, let's just go through some of this.

Justice Thomas accepted private plane rides and gifts, including a bible once owned by Frederick Douglass valued at $19,000 from Financier Harlan Crow. Crow also donated half a million dollars to help Thomas' wife, Ginni Thomas, establish Liberty Consulting. Is that appropriate, Mr. Roth?

Mr. ROTH. No, it's not. It's unique to Justice Thomas. There's not a similar situation with any of the other Justices along with what you—according to what you cited.

Mr. LIEU. Now, let's talk about dark money. Justice Clarence Thompson attended a Koch Industries retreat in Palm Springs, California, at a time when Koch was bank rolling several litigants before the Supreme Court. This isn't even the appearance of dark money. This is Justice Thomas going into the eye of the hurricane of dark money. Mr. Roth, was that appropriate?

Mr. ROTH. It's not appropriate, no.

Mr. LIEU. Now, I don't care how crazy Justice Thomas' wife is or the crazy things she engages in. I do care if he attempts to cover up her crazy actions related to the January 6 insurrection. That is a problem.

There was a January 6 Congressional Committee investigating this, a bipartisan Committee. The Department of Justice has indicted people because of the January 6 attack on our capitol. Ginni Thomas has been sending text messages regarding January 6 to a Chief of Staff of the White House. Then when Justice Thomas votes no on a case about disclosure of documents related to January 6, that is a problem. He should have recused himself.

Let me just end by saying the entire Congressional Branch, we have a code of ethics. We have an Ethics Committee. The Executive Branch has a code of ethics. Only the nine Justices do not. They need one. I yield back.

Mr. JOHNSON of Georgia. The gentleman from Texas, Mr. Gohmert, is now recognized for five minutes.

Mr. GOHMERT. Thank you. I know one of the canons for Federal judges, and of course it's been discussed that it is probably unconstitutional for another branch or even lower judges to prepare canons of ethics that bind the Supreme Court. Canon Number 4 says in part a judge should not participate in extrajudicial activities that reflect adversely on the judge's impartiality.

Mr. Paoletta, can you think of judges on the Supreme Court that have given indications in addition to just the ones you've mentioned in your testimony of where they are going to go on rulings?

Mr. PAOLETTA. I think I have a little bit more faith in Justices in terms of speaking before groups, and it not affecting their decision-making.

I do point out in my written testimony that Justice Ginsburg never recused from a case from the National Organization of Women when they filed amicus briefs despite her serving on the board of NOW in the 1970s. She donated an autographed copy of her VMI opinion to be auctioned off for a fundraiser for the NOW PAC.

She spoke in 2004 at a lecture named after her for the NOW Legal Defense Fund and two weeks before that lecture she voted in favor of a position advocated by the NOW Legal Defense Fund in an amicus brief.

So, we can talk about the Justices, but Justice Ginsburg never seems to come up in terms of the concerns about a Justice doing political things or entering the political fray. As I said in my oral testimony, she literally entered the 2016 Presidential campaign to stop Donald Trump from being President of the United States. That was her intended purposes. I think that was unprecedented in modern times.

Mr. GOHMERT. I do recall that.

It is interesting though, if you're a liberal Justice on the Supreme Court and family members even participate in a brief before the Court, well, you're fine. That's okay. We don't see that as any problem.

Let me tell you, when you come in here and you talk about the credibility to attack Justice Thomas and he is the only name that

you mention, you have got credibility problems. That's just the way it is.

Let me also tell you, gee, one of the most far-reaching opinions ever issued in my opinion by the Supreme Court was the *Obergefell* case that really forced on States that they must recognize same-sex marriage. Well, here's an article that talks about, and of course, the argument of the case April 28, 2015, was decided June 26, 2015.

In May, Justice Ginsburg presided over a same-sex wedding in advance of the Supreme Court's decision. In fact, when she pronounced the marriage, as the *New York Times* reported, not that we can trust them, but that she said, with a sly look and special emphasis on the word Constitution, Justice Ginsburg said that she was, "pronouncing the two men married by the powers vested in her by the Constitution of the United States."

It would seem to me that was giving an indication to quote, "Canon 4" of what the Judge's feelings were on that case, and not one of you ever brought that up. That didn't bother anybody at all even thought it was such a far-reaching case.

Justice Thomas knows what all my very conservative dear Black friends know is, nobody is treated more brutally in this country than a conservative Black. It's just like Justice Thomas said at his hearing, he was the victim of a high-tech lynching. I would submit anyone that continues that abuse is further contributing—

Mr. JONES. Will the gentleman yield?

Mr. GOHMERT. No. Is further contributing to the same high-tech lynching. Yes, I've got seven seconds.

Mr. PAOLETTA. I just want—can I just clarify on this—this photo that has been mentioned a couple times. I think it's in Gabe's list and all of that, that photo that Justice Thomas appeared in with Herschel Walker, was part of a group that he hosts at the Supreme Court, the Horatio Alger Association, of which he's a member, and of which Herschel Walker was just inducted. Okay?

It's an incredible organization with people across the political spectrum. People who have overcome difficult circumstances. They have a reception up at the Supreme Court. That's why he was taking a photo with Herschel Walker. It wasn't related to his campaign.

Mr. GOHMERT. Herschel is a conservative, too. That's [inaudible].

Mr. JOHNSON of Georgia. The gentleman's time has expired. Now, I'll go to the gentleman from New York, Mr. Jeffries, for five minutes.

Mr. JEFFRIES. I thank the distinguished Chair for your leadership for convening this hearing. I thank all the Witnesses, particularly Professor Gillers from my alma mater, NYU. Great to see you and thank you for your presence here today.

My distinguished colleague from Texas just made the observation that Justice Thomas has been subjected to a high-tech lynching is quite extraordinary. I believe, Mr. Paoletta, you've echoed a similar sentiment.

I think the quote is, "many on the Left hate Justice Thomas because he a Black conservative who has never bowed to those who demand that he must think a certain way because of the color of

his skin." What evidence to you have to support that incendiary charge?

Mr. PAOLETTA. When Chair Bennie Thompson calls him an Uncle Tom because of his views on voter ID and affirmative action, when, in fact, more Black Americans support voter ID. With respect to affirmative action in college education, 62 percent are opposed to it. So, that is the most vile, disgusting thing you can say. So, yes that's the evidence of just

Mr. JEFFRIES. Reclaiming my time.

You're claiming my time. You're claiming my time.

Mr. PAOLETTA. Yes.

Mr. JEFFRIES. There are a lot of vile, disgusting things that can be said.

Mr. PAOLETTA. Well, you just asked me for an example.

Mr. JEFFRIES. The notion that is, right, when some Members on this side of the aisle and others have been called the N word throughout different points of our life belies the point that you have a particular bias. It's an overstatement, which is not surprising when you look at the balance of your testimony.

If Chair Bennie Thompson has an observation to make, he's entitled to free speech. You apparently believe that Ginni Thomas, regardless of how many conflicts she has, is entitled to her own political opinions as well.

Mr. PAOLETTA. Can I give you another example?

Mr. JEFFRIES. No. Let me go to Professor Sherman and Mr. Roth because this notion that Clarence Thomas is being singled out because he's a Black conservative, whatever that means, I think is belied by the fact that if you look at example after example, there seems to be troubling instances where he's making rulings in cases where his wife has a clear interest.

In 2010, Ginni Thomas was the President and CEO of a dark-money group called Liberty Central. It stood to benefit from the outcome of the Citizens United decision. Mr. Roth, did Justice Thomas recuse himself from that case?

Mr. ROTH. He did not.

Mr. JEFFRIES. Okay. That same group apparently paid Ginni Thomas $120,000 per year to actively lobby for the repeal of the Affordable Care Act. She was paid to try to bring about an outcome that was at issue in the *National Federation of Independent Business* v. *Sebelius* case. Mr. Roth, did Justice Thomas accuse himself from that case?

Mr. ROTH. He did not nor any of the other Obamacare cases.

Mr. JEFFRIES. In 2017, a group called the Center for Security Policy filed an amicus brief with the Supreme Court to support Trump's outrageous Muslim ban. At the same time that this amicus brief was filed, Ginni Thomas was being paid roughly $200,000 in consulting fees, according to IRS documents. Did Justice Thomas recuse himself from that case, *Trump* v. *Hawaii*?

Mr. ROTH. He did not.

Mr. JEFFRIES. Then we've got the most recent example in a parade of horribles. It's interesting how my friends want to focus on Justice Ruth Bader Ginsburg, may she rest in peace. We got someone who is actually on the Supreme Court right now making decisions actively in cases where his wife has clear interests.

Text messages reveal that Ginni Thomas was in active communication with the former White House Chief of Staff as it relates to perpetuating the big lie that Donald Trump somehow won the 2020 election, notwithstanding no evidence to suggest that in fact is true and was involved in trying to push this forward.

There's a case that takes place to try to reduce those communications with Mark Meadows in the White House. Justice Thomas is the only Justice who decides that those documents should not be released. His wife's documents should not be released. Every other conservative Justice in that case voted that those documents should be released. Do you think it might have been appropriate for Justice Thomas to recuse himself in that particular case?

Mr. ROTH. Yes. His wife's interests were clearly implicated in that case.

Mr. JEFFRIES. Thank you, sir. Thank you for your testimony. I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you. The gentleman from Florida is now recognized for five minutes, Mr. Gaetz.

Mr. GAETZ. Thank you, Mr. Chair. It's quite something to hear my colleagues reflect that we shouldn't be able to observe conditions regarding Justice Ginsburg because she's left the Court when they impeached a President who had already left the oval office.

Mr. Paoletta, I wanted to give you an opportunity to extend your remarks regarding instances of racism that you believe Justice Thomas encountered as a consequence of his skin color and his politics.

Mr. PAOLETTA. Sure. I think it's the—I have it in my written testimony, too. It's this narrative that Justice Thomas is a lackey of Justice Scalia, of Judge Silverman, when he's on the court, and the writing was all that he was incapable of being a justice, which is so belied by the facts. He's the most independent thinking Justice probably in history. He writes the most opinions per year of any Justice.

When the documents came out from Justice Blackmun, it showed that from his very first conference, he voted in dissent on his own and brought three or four Justices over to him in the first case that they dealt with. At times—

Mr. GAETZ. I'm sorry. Is it an attempt to try to invoke a racist trope that Black people are not as intelligent and thus are more persuadable?

Mr. PAOLETTA. Yes. If you look at the current attacks on Justice Thomas where Philip Bump writes that Mayer's piece dances around the question of how much influence Ginni Thomas has over her husband. The one person Clarence really listens to is Virginia.

Michael Kranish's piece in the *Washington Post* quotes, "Democratic operative Mark Fabiani wondering aloud whether there is a single opinion that Justice Thomas has ever written that is inconsistent with his wife's far right-wing views." So, he is following her.

It's just the most offensive thing in the world when you look at—when you read a lot of court watchers who are serious about the court, they know that Justice Thomas is the leader of the originalist wing and brought Justice Scalia over to his side probably more than Justice Scalia ever brought Justice Thomas over to his views on the areas where they disagreed.

Mr. GAETZ. When someone calls a Black person an Uncle Tom, is that a racist attack?

Mr. PAOLETTA. Yes. I think it is. I think it's a disgusting attack.

Mr. GAETZ. Do any of the other panelists dispute that testimony? Does anyone think that there's a non-racist way to call a Black person an Uncle Tom?

How should we think about the fact that the Chair of the January 6 Committee, the Chair of the Homeland Security Committee just use what all you concede is a racist attack against Justice Thomas.

Mr. PAOLETTA. Congressman Jefferies asked me for an example. I gave it to him. I'll let others just address it. I just think it is indicative of the hatred that is directed towards Justice Thomas for his views, which in fact, if you look, I wrote an article on this of comparing Justice Jackson and Justice Thomas' views on a number of issues in terms of polling.

By and large, Black Americans rank and file agree, I think, on abortion, guns, and voter ID, across the Board. Yet, somehow, he's portrayed as being an Uncle Tom or a sellout or whatever the disgusting characterizations are. It's just this continual attack on Justice Thomas. Thank God he's had the backbone to never bend in the face of these attacks. I think this hearing is a continuation of that.

Mr. GAETZ. As we think about—

Mr. PAOLETTA. Everyone is focused on Justice Thomas.

Let me just address the January 6 case where that case has to do with Executive Privilege over internal White House documents between the President and his closest advisors. It had nothing whatsoever to do with Ginni Thomas' communications with Mark Meadows. Those wouldn't be covered by Executive Privilege.

So, Justice Thomas was voting on documents that were not at all related to his wife. So, that's why I say, up until this point, there could be cases down in the future, as every Justice does, when the case comes before the Court and they look at the litigants, they look at the parties, they look at what's at issue, they decide whether they recuse.

Mr. GAETZ. So, that I understand your testimony, you believe it's a racist trope to designate Justice Thomas as like uniquely unintelligent or persuadable. You believe it's a racist trope to call him an Uncle Tom. You believe that this Committee is a continuation of that effort?

Mr. PAOLETTA. Yes. I believe it was—yes. I believe it started when he first came to town in 1980. He joined the Reagan—

Mr. GAETZ. Let's hope it ends. I yield back.

Mr. JOHNSON of Georgia. We will now turn to the gentleman from Arizona, Mr. Stanton, for five minutes.

Mr. STANTON. Thank you very much, Mr. Chair. I thank you to the esteemed panel of Witnesses who have joined us here today as we draft and consider legislation focused on a code of ethics for the Supreme Court. I hope you know that your knowledge, testimony, and contributions to this process are vital to this Committee's work, and we do greatly appreciate your time.

Throughout this Congress, this Subcommittee has methodically addressed many longstanding concerns with the Federal bench

from the diversity of judges to recusal for conflict of interest and workplace misconduct in the judiciary. We've taken on some pretty serious issues to modernize the court system.

It's clear today that the American people do share a crisis of confidence in the Supreme Court. Recent polling suggests that public approval of the Supreme Court is at an all-time low. Only about half of Americans say that they have at least a fair amount of trust in the United States Supreme Court.

Mr. Roth, in your opinion, should Congress and the Justices Act now to do what they can to restore faith in the institution of the Court?

Mr. ROTH. I think we're past the time of the Justices acting. They've known about these issues for years, and they've done nothing time and again when they've been faced—whether when Jim Sensenbrenner was Chair, Bob Goodlatte was Chair, Lamar Smith was Chair, they just, they haven't done anything.

So, it's really, as we've learned recently with the Courthouse Ethics and Transparency Bill that Congressman Ross and Issa wrote that just passed the House, final passage today, it's really up to Congress to take that step and draft the legislation to modernize the judiciary because left to its own devices, the judiciary is not going to fix itself.

Mr. STANTON. I agree with that sentiment completely. Mr. Sherman, ethics codes are common sense in part because they are so commonplace across so many professions. Can you tell us about other ethic rules applicable to other government employees, for example, in the Executive Branch?

Mr. SHERMAN. Absolutely. So Executive Branch employees, even low level ones, have lots of requirements and accountability including conflict of interest statute, 18 U.S.C. 208, a criminal statute which bars them from engaging in matters where they can have an impact on their or their family's financial holdings.

Both Congress and the Federal judiciary are exempt from that provision although I would note that the House and Senate have a code of ethical conduct and face accountability from voters. What we have with the Supreme Court is they are not subject to the criminal conflict of statute.

Their disqualification statute has no enforcement mechanism or penalty at all. We really leave it up to litigants to enforce ethical compliance only through raising objections after they've been the victims of a conflict of interest. That's not a way to promote ethics in our third branch of government.

Mr. STANTON. Now, you discussed the ethics policy as it relates to the Executive Branch. Is there anything that we—lessons learned from the ethics policies in the Executive Branch that should be applicable to the Supreme Court?

Mr. SHERMAN. Well, I think there are a number of steps that we can take. I think one positive step was the bill that was passed today, which brings the ethics regime for the Federal judiciary closer to the Congressional STOCK Act, which obviously has its own problems that I've previously testified about. I think it's a step in the right direction.

I would note that there are bills that would extend the criminal conflict of interest statute to apply to the Federal judiciary. I think

that would be a positive step. I think banning Federal judges, their families, and dependent children from owning and buying individual stocks is an easy and clear way to address financial conflicts.

Mr. STANTON. Mr. Chair, to follow-up, what does it say about the Supreme Court that it refuses to adopt an ethics code for itself?

Mr. SHERMAN. I'll take it. I think it says to the American public that the Supreme Court and the Justices of the Supreme Court are above and not subject to any standards. I mean, we just had a scandal of 131 judges that violated their legal and ethical obligations, some of whom said they didn't even know what they were, and the Chief Justice took a pass on reform. That's unacceptable.

Mr. STANTON. I really appreciate those outstanding answers. So, obviously I'm supportive of moving forward with a code of ethics for the Supreme Court. With that, I yield back.

Mr. JOHNSON of Georgia. The gentleman yields back. The gentleman from Ohio, Mr. Chabot, is now recognized for five minutes.

Mr. CHABOT. Thank you, Mr. Chair. Thank you to all the Witnesses for being here today.

Mr. Chair, the American people are frustrated. They are aggravated. They are tired from the pandemic to the supply chain debacle, from the botched withdrawal from Afghanistan to other chaos at our Southern border, from record high gas prices to 41-year high inflation rate that we're seeing right now that's driving up the cost of virtually everything that the average person nowadays has to buy. They have had to weather crisis after crisis.

After all they've endured, they just want to see their elected officials show some common sense, maybe some compassion, and implement policies that will help them and their families to make ends meet. That's what they'd really like to see us dealing with.

Instead, they get yet another hearing designed to distract them from the Biden Administration's policies that have failed them utterly again and again. Today, they're supposed to believe that a respected Supreme Court Justice, who has served on the highest court in the land, with distinction I would add, for over three decades now is suddenly unable to make his own decisions regarding the law without consulting his wife.

The whole premise of this hearing is absurd on its face. However, what appears to be an absurdity at first glance takes a much more insidious turn when placed in context of recent attempts by the Democrats to smear Republican-nominated Supreme Court Justices.

We're about a year and a half removed from the effort in the Senate to convince the American people that Justice Amy Coney Barrett, for example, who had a long and distinguished career as a lawyer and as a scholar and, yes, as a judge, would somehow be subservient to her husband when it came to matters of the law.

Most reasonable Americans through that was absurd as well. However, as the old saying goes, fool me once. It now appears that my colleagues on the other side of the aisle have a problem with strong assertive women when those women don't agree with them. Instead, I'm engaging those women in a debate on the issues they've decided. It's better to attack their motives and of all things question their independence from their husbands.

I can't believe that I have to say it out loud in this day and age, but intelligent, accomplished women who are allowed to have their own thoughts and opinions independent of their husbands, that's the way it ought to be and that's the way it is all over the country. The fact that we are even discussing this topic is frankly beneath the dignity of this Committee, and I've been on the Judiciary Committee now for 26 years. It's 2022 for crying out loud. It's not 1952.

Mr. Chair, the American people aren't stupid. They see this charade for what it is. It's really about abortion when it comes to our Supreme Court Justices nowadays, at least the way the Left looks at these things.

A couple weeks ago, when we all learned that Justice Ketanji Brown Jackson had represented numerous pro-abortion groups over the years, there wasn't a peep, not one from the other side about her recusing herself from abortion cases before the Court. I didn't hear anything from the Left.

However, because Justice Thomas and Justice Barrett do not embrace abortion on demand, they must endure all sorts of attacks and vitriol from the radical Left including apparently this bizarre accusation that they are incapable of thinking for themselves independent of their spouses. It's, frankly, an insulting line of attack. I'm deeply disturbed it's being entertained here today.

As for my questions, Mr. Paoletta, let me ask you. What do you think about the idea being floated by Democrats that a Supreme Court Justice should recuse his or herself from a case based upon their spouse's opinion on that issue?

I know you've already commented on that here today, but not everybody has asked you that question, yet let me ask you. Take whatever time you want to comment.

Mr. PAOLETTA. Thank you, Congressman. I think it's absolutely inappropriate, particularly, at the Supreme Court level, where the Justices have a duty to sit. If one of them recuses because of convenience or because they want to have an extra safe line, it damages the Court as every single Justice I think has commented over the years from Justice Ginsburg to the recusal statement that the Justices issued in 1993.

People have their own—couples have their own professional careers. My wife is a partner at a law firm. We've been working our whole life. She's got her job. I got my job. I can decide—you know, if I were a judge and there's—that's the thing. There are hundreds of people, judges at the State, local, and Federal level who have spouses who have a separate professional career who are in the public square.

I mentioned Ed Rendell. Ed Rendell was the Mayor of Philadelphia, the Governor of Pennsylvania, and the Chair of the Democrat National Committee, and his wife was a judge. I think that's great. I don't have any problem. I want to make sure I—Justice Ginsburg not recusing is fine with me with respect to her husband at the law firm because he wasn't making money, and he wasn't involved. I'm just using it as an example of a double standard, but no. I don't think a spouse having her own views and commenting on things in the public square that come before the Court is any basis at all for a Justice, in particular, to recuse from a case.

Mr. CHABOT. Thank you, Mr. Chair. My time has expired. I yield back.

Mr. JOHNSON of Georgia. The gentleman from Tennessee, Mr. Cohen, is now recognized for five minutes.

Mr. COHEN. Thank you. Mr. Chair, I'd like to ask you a question first. My friend, Mr. Johnson, said that all of a sudden, the Democrats are having this hearing because they want to beat up on Clarence Thomas. When did you first introduce this bill?

Mr. JOHNSON of Georgia. I introduced this bill in the 116th Congress, two years ago.

Mr. COHEN. That was quite a bit before all this controversy about Justice Thomas and his wife, right?

Mr. JOHNSON of Georgia. Yes, it was. Actually, I took this bill up from the late Louise Slaughter, a representative from New York, who first introduced the legislation in the year 2013.

I thought it was an important piece of legislation then, and I think it's even more important now.

Mr. COHEN. It is. You got ahead of me on this one.

Mr. JOHNSON of Georgia. Well, sometimes you have seniority over me because of your initials so it feels good.

Mr. COHEN. Thank you, sir. Mr. Roth, let me ask you a question. Take me back a bit. Mr. Thomas, Justice Thomas, was first brought on the Court in 1991. Is that correct?

Mr. ROTH. Correct.

Mr. COHEN. When was the first time he ever spoke in the Supreme Court, asked a question?

Mr. ROTH. I know that he was famous for not asking questions during oral argument because he did not find it a valuable exercise for him to take that time.

I remember being in the courtroom on a Leap Day when he asked a question. So, that would have been February 29, 2016. I think he asked questions in 2008 or 2009. It wasn't a common occurrence until the seriatim questions were implemented in 2020.

Mr. COHEN. When did Justice Scalia die?

Mr. ROTH. February 13, 2016.

Mr. COHEN. He started talking more after Justice Scalia died maybe?

Mr. ROTH. Well, I think the—I mean, the question he asked when I was in the courtroom definitely echoed something that Justice Scalia would have asked. It was about domestic violence and guns. It had some echo there, which I thought was a nice homage to the late Justice.

A few years later, because of the pandemic we're doing live audio, and every justice gets to ask a question. Clarence Thomas has decided to participate in that. He's asked a question pretty much in every hearing since May 2020.

Mr. COHEN. Most every justice does ask questions, do they not?

Mr. ROTH. Correct.

Mr. COHEN. Has there ever been anybody, other than the movie Silent Bob, has there ever been a Justice like Clarence Thomas?

Mr. ROTH. The hot bench of the Supreme Court where there's this back and forth of the Justices that dates back to 50 or 60 years ago. I really don't know what happened before that. I don't have a good sense.

Mr. COHEN. Okay. Thank you, sir. It just astonished me. Mr. Paoletta, I heard you say something to the effect, I think what now your written testimony says 30 years later, Thomas is still standing strong, considered by many to be our greatest Justice. Who are the many?

Mr. PAOLETTA. I'll get you a number of—Tom Goldstein—

Mr. COHEN. Tom who?

Mr. PAOLETTA. Tom Goldstein—

Mr. COHEN. Goldstein.

Mr. PAOLETTA. —a practitioner before, he said, "Justice Thomas is considered our greatest Justice for bringing new ideas into the Court."

I find it—so, let me just ask you a question, Congressman. Do you think that his not asking questions—

Mr. COHEN. Many, just wait a minute, sir. I've got—many is plural. Tom Goldstein is not a triplet.

Mr. PAOLETTA. I've spoken with many practitioners who say he's our greatest Justice. I can give you a list.

Mr. COHEN. Give me a list. I am ready.

Mr. ISSA. If the gentleman would yield, I would be glad to add my name to that list whenever it is delivered.

Mr. COHEN. Thank you. I was giving you all are a given. The fact is this doesn't have to do with Clarence Thomas. It doesn't have to do with Ms. Ginsburg. It has to do with ethics.

I think everybody should agree. The Supreme Court, which is the most powerful institution in our government should have ethical guidelines. If they have conflicts, they should recuse themselves or they should disclose them. There have been instances shown where Justice have had conflicts, and they haven't recused, and they haven't disclosed.

Now, most of what we talked about Justice Ginsburg and this Ninth Circuit gentleman whose wife was on the ACLU, nobody got paid any money. Regardless of all that, if there are conflicts, they should disclose them. There should be such laws.

I got no—Scalia came before—Justice Scalia came before when I was Chair of this Subcommittee and talked to us. He was big on Owira. There couldn't be a nicer Witness that we ever had.

Scalia was a gentleman and a scholar, and he taught us a lot. He cared about Owira, and he cared about the Court. He came with Breyer, and the two got along great. Breyer could have been Ginsburg. I mean, they were just all buddy and buddy and wonderful.

Mr. JONES. Will the gentleman yield?

Mr. COHEN. Who was it that asked? Sure. Go ahead.

Mr. JONES. I would also just make the observation that there's been a conservative majority on the Supreme Court since approximately 1972 when Nixon got four appointments.

So, the idea that somehow, we are all of a sudden raising issue of ethics because there is a conservative majority on the Supreme Court is plainly belied by the facts, and I think we should dispense with making those representations moving forward if we want to be held favorably in the eyes of people who want to judge all the information in a neutral fashion.

Mr. COHEN. Thank you. I'll close. The bottom line is we ought to have ethics. I don't care what anybody did wrong. That doesn't make what somebody else did right. It doesn't change the fact that the Supreme Court ought to be honest and disclose it. I'm a big fan of Justice Roberts, too. Aye.

Mr. JOHNSON of Georgia. The gentleman from Wisconsin, Mr. Fitzgerald, is recognized for five minutes.

Mr. FITZGERALD. Thank you, Mr. Chair. In March of 2020, Senator Schumer declared,

> I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions.

This was just before the Court was about to hear the major abortion case.

These comments I think reflect the significant escalation in some type of threat. I think many of us were puzzled even by what he was saying in front of that group on the steps of the Supreme Court. Then later, Senator Whitehouse talked about packing the Court in response to not making specific types of judgments and decisions.

My point is in bringing that up is that there is always a political component, certainly because you have Senate confirmation and that process, which couldn't get any uglier than what we saw with Justice Kavanaugh.

The one thing I would like to ask about, and Mr. Paoletta, you can comment, please. There is ethics and recusal. Then there's also what I would call a code of conduct. We talked earlier about the standard that Members of Congress are held to. There's also disclosure and just reporting kind of what a Justice might be involved in on a day-to-day basis.

So, I think there's a little bit of confusion. I think the nuances are—they're there. I don't know that anybody is asking for politics to be removed because I don't think you can do it quite honestly. I just don't think it's going to happen.

So, is there any lesser standard or anything that could kind of be utilized to make the point that listen, these are wonderful people that are on the Supreme Court. They are living their lives, and there should be some leeway in what's granted to them. They should not be harassed by the political class. They should not be harassed by electeds. They should be treated differently.

I know on the Wisconsin Supreme Court, 10-year terms. Everyone runs for office. There are different standards that need to be viewed. I'm just wondering if you have comments on that thought in general.

Mr. PAOLETTA. Well, look, again, I think the recusal statute applies to the Supreme Court. So, in terms of recusals, in my view it's there already. The code of conduct is a guidance document.

I guess even in the context of a code of ethics and listening to some of the panelists, their view is showing up before the Federalist Society and not streaming your speech is some sort of ethical violation. I just fundamentally disagree with that.

I look at the code of ethics as it exists. It says a judge may engage in extrajudicial activities including law related pursuits and civic, charitable, educational, religious, social, financial, fiduciary

and governmental activity, speak, write, lecture, and teach on both law-related and nonlegal subjects.

The Federalist Society is a 501(c)(3) educational group. No matter how anyone wants to describe it, that's what it is. It's been an incredibly good force in the United States in terms of the development of the legal system.

Now, there's the American Constitution Society, ACS. It's great that Justices go and speak there. I'm looking at Mr. Stewart's testimony. It says concerns about undue influence are further magnified when an organization is viewed as having close ties to and an extraordinary influence over several members of the Supreme Court, including by getting them to accept legal arguments that were previously outside the mainstream.

Again, these are incredibly accomplished Justices that this thing is saying, this statement is saying, somehow, they are in the throes of this organization. In terms of the law students who have grown up in this great organization and engaged in the law—and if you've ever been a Federalist Society, they have lots of liberals there. They have lots of libertarians. They have lots of conservatives. It's a great debating society.

I've never been to an American Constitutional Society. I think it's probably the same. Those are great organizations. Under the code of conduct, as I read it, and you gentlemen could disagree with me, you would be allowed to do that. You would be allowed to—but every time these representations are made about the Justices speaking at the Federalist Society, it's somehow bad. It's good. It's permitted by the code of ethics.

If it were, again, I think the Justices consult the code of ethics. They are living their lives and engaging in the legal community in a good way.

Mr. FITZGERALD. Thank you. I yield back.

Mr. JOHNSON of Georgia. The gentleman from California is recognized for five minutes.

Mr. SWALWELL. Thank you. I thank the Chair for hosting this important and certainly timely hearing. I want to start with Mr. Sherman.

Mr. Sherman, as Congress considers what legislation is appropriate in the area of judicial ethics and recusal, I think it would be valuable to look at the various standards that we might apply to government officials and the interest those standards promote.

It seems to me that in easy cases an action might be clearly unlawful because it violates the plain text of the law. For example, when Mr. Paoletta, the gentleman seated to your right, was the general counsel of the Office of Management and Budget under President Trump.

He asserted that office could bar the Defense Department from providing $214 million that Congress clearly appropriated to help Ukraine defend itself against Russia. That would have been really helpful for them to have that money. The Government Accountability Office concluded that Mr. Paoletta and his office clearly violated a Federal statute called the Impoundment Control Act and that Mr. Paoletta's assertions had "no basis in law." I'd like to enter that GAO report into the record.

[The information follows:]

MR. SWALWELL FOR THE RECORD

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Office of Management and Budget—Withholding of Ukraine Security Assistance

File: B-331564

Date: January 16, 2020

DIGEST

In the summer of 2019, the Office of Management and Budget (OMB) withheld from obligation funds appropriated to the Department of Defense (DOD) for security assistance to Ukraine. In order to withhold the funds, OMB issued a series of nine apportionment schedules with footnotes that made all unobligated balances unavailable for obligation.

Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law. OMB withheld funds for a policy reason, which is not permitted under the Impoundment Control Act (ICA). The withholding was not a programmatic delay. Therefore, we conclude that OMB violated the ICA.

DECISION

In the summer of 2019, OMB withheld from obligation approximately $214 million appropriated to DOD for security assistance to Ukraine. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, div. A, title IX, § 9013, 132 Stat. 2981, 3044–45 (Sept. 28, 2018). OMB withheld amounts by issuing a series of nine apportionment schedules with footnotes that made all unobligated balances for the Ukraine Security Assistance Initiative (USAI) unavailable for obligation. *See* Letter from General Counsel, OMB, to General Counsel, GAO (Dec. 11, 2019) (OMB Response), at 1–2. Pursuant to our role under the ICA, we are issuing this decision. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, § 1015, 88 Stat. 297, 336 (July 12, 1974), *codified at* 2 U.S.C. § 686. As explained below, we conclude that OMB withheld the funds from obligation for an

unauthorized reason in violation of the ICA.[1] *See* 2 U.S.C. § 684. We also question actions regarding funds appropriated to the Department of State (State) for security assistance to Ukraine.

OMB removed the footnote from the apportionment for the USAI funds on September 12, 2019. OMB Response, at 2. Prior to their expiration, Congress then rescinded and reappropriated the funds. Continuing Appropriations Act, 2020, Pub. L. No. 116-59, div. A, § 124(b), 133 Stat. 1093, 1098 (Sept. 27, 2019).

In accordance with our regular practice, we contacted OMB, the Executive Office of the President, and DOD to seek factual information and their legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from General Counsel, GAO, to Acting Director and General Counsel, OMB (Nov. 25, 2019); Letter from General Counsel, GAO, to Acting Chief of Staff and Counsel to the President, Executive Office of the President (Nov. 25, 2019); Letter from General Counsel, GAO, to Secretary of Defense and General Counsel, DOD (Nov. 25, 2019).

OMB provided a written response letter and certain apportionment schedules for security assistance funding for Ukraine. OMB Response (written letter); OMB Response, Attachment (apportionment schedule). The Executive Office of the President responded to our request by referring to the letter we had received from OMB and providing that the White House did not plan to send a separate response. Letter from Senior Associate Counsel to the President, Executive Office of the President, to General Counsel, GAO (Dec. 20, 2019). We have contacted DOD regarding its response several times. Letter from General Counsel, GAO, to Secretary of Defense and General Counsel, DOD (Dec. 10, 2019); Telephone Conversation with Deputy General Counsel for Legislation, DOD (Dec. 12, 2019); Telephone Conversation with Office of General Counsel Official, DOD (Dec. 19, 2019). Thus far, DOD officials have not provided a response or a timeline for when we will receive one.

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[1] On October 30, 2019, Senator Chris Van Hollen asked the Comptroller General about this matter during a hearing before the Senate Committee on the Budget. *Chief Financial Officers Act of 1990: Achieving the Vision: Hearing Before the Senate Committee on the Budget,* 116th Cong. (2019), (statement of Sen. Van Hollen), *available at* https://www.budget.senate.gov/chief-financial-officers-act-of-1990-achieving-the-vision (last visited Jan. 13, 2020). We also received a letter from Senator Van Hollen regarding this matter. Letter from Senator Chris Van Hollen to Comptroller General (Dec. 23, 2019).

BACKGROUND

For fiscal year 2019, Congress appropriated $250 million for the Ukraine Security Assistance Initiative (USAI). Pub. L. No. 115-245, § 9013, 132 Stat. at 3044–45. The funds were available "to provide assistance, including training; equipment; lethal assistance; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine." *Id.* § 9013, 132 Stat. at 3044. The appropriation made the funds available for obligation through September 30, 2019. *Id.*

DOD was required to notify Congress 15 days in advance of any obligation of the USAI funds. *Id.* § 9013, 132 Stat. at 3045. In order to obligate more than fifty percent of the amount appropriated, DOD was also required to certify to Congress that Ukraine had taken "substantial actions" on "defense institutional reforms." John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, div., A, title XII, § 1246, 132 Stat. 1636, 2049 (Aug. 13, 2018) (amending National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, div. A, title XII, § 1250, 129 Stat. 726, 1068 (Nov. 25, 2015)). On May 23, 2019, DOD provided this certification to Congress. Letter from Under Secretary of Defense for Policy, to Chairman, Senate Committee on Foreign Relations (May 23, 2019) (DOD Certification) (noting that similar copies had been provided to the congressional defense committees and the House Committee on Foreign Affairs). In its certification, DOD included descriptions of its planned expenditures, totaling $125 million. *Id.*

On July 25, 2019, OMB issued the first of nine apportionment schedules with footnotes withholding USAI funds from obligation. OMB Response, 1–2. This footnote read:

> "Amounts apportioned, but not yet obligated as of the date of this reapportionment, for the Ukraine Security Assistance Initiative (Initiative) are not available for obligation until August 5, 2019, to allow for an interagency process to determine the best use of such funds. Based on OMB's communication with DOD on July 25, 2019, OMB understands from the Department that this brief pause in obligations will not preclude DOD's timely execution of the final policy direction. DOD may continue its planning and casework for the Initiative during this period."

Id.; *see id.*, Attachment. On both August 6 and 15, 2019, OMB approved additional apportionment actions to extend this "pause in obligations," with footnotes that, except for the dates, were identical to the July 25, 2019 apportionment action.[2] *Id.*,

[2] The initial apportionment footnote made USAI funds unavailable for obligation until August 5, 2019. OMB Response, Attachment. OMB did not sign the next (continued...)

at 2 n. 2. OMB approved additional apportionment actions on August 20, 27, and 31, 2019; and on September 5, 6, and 10, 2019.[3] *Id.* The footnotes from these additional apportionment actions were, except for the dates, otherwise identical to one another. *Id.*, Attachment. They nevertheless differed from those of July 25 and August 6 and 15, 2019, in that they omitted the second sentence that appeared in the earlier apportionment actions regarding OMB's understanding that the pause in obligation would not preclude timely obligation. *Id.* The apportionment schedule issued on August 20 read as follows:

> "Amounts apportioned, but not yet obligated as to the date of this reapportionment, for the Ukraine Security Assistance Initiative (Initiative) are not available for obligation until August 26, 2019, to allow for an interagency process to determine the best use of such funds. DOD may continue its planning and casework for the Initiative during this period."

Id., Attachment. The apportionment schedules issued on August 27 and 31, 2019; and on September 5, 6, and 10, 2019 were identical except for the dates. *Id.* On September 12, 2019, OMB issued an apportionment that removed the footnote that previously made the USAI funds unavailable for obligation. OMB Response, at 2; *id.,* Attachment. According to OMB, approximately $214 million of the USAI appropriation was withheld as a result of these footnotes. OMB Response, at 2. OMB did not transmit a special message proposing to defer or rescind the funds.

DISCUSSION

At issue in this decision is whether OMB had authority to withhold the USAI funds from obligation.

(...continued)

apportionment until August 6, 2019. *See id.* On August 6, 2019, the amounts were made unavailable for obligation until August 12, 2019. *Id.* While the next footnote was issued on August 15, 2019 it stated that funds were unavailable for obligation "until August 12, 2019." *Id.* Despite the dates listed in each apportionment footnote, OMB provided that the "pause in obligations was *extended*" on both August 6, 2019 and August 15, 2019. *See* OMB Response, at 2, fn. 2 (emphasis added).

[3] The apportionment footnote issued on August 20, 2019 made USAI funds unavailable for obligation until August 26, 2019. OMB Response, Attachment. OMB did not sign the next apportionment until August 27, 2019. *See id.* Despite the date listed in the apportionment footnote, OMB provided that the "pause in obligations was *extended*" on August 20, 2019. *See* OMB Response, at 2, fn. 2 (emphasis added).

The Constitution specifically vests Congress with the power of the purse, providing that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Constitution also vests all legislative powers in Congress and sets forth the procedures of bicameralism and presentment, through which the President may accept or veto a bill passed by both Houses of Congress, and Congress may subsequently override a presidential veto. *Id.*, art. I, § 7, cl. 2, 3. The President is not vested with the power to ignore or amend any such duly enacted law. *See Clinton v. City of New York,* 524 U.S. 417, 438 (1998) (the Constitution does not authorize the President "to enact, to amend, or to repeal statutes"). Instead, he must "faithfully execute" the law as Congress enacts it. U.S. Const., art. II, § 3.

An appropriations act is a law like any other; therefore, unless Congress has enacted a law providing otherwise, the President must take care to ensure that appropriations are prudently obligated during their period of availability. *See* B-329092, Dec. 12, 2017 (the ICA operates on the premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold). In fact, Congress was concerned about the failure to prudently obligate according to its Congressional prerogatives when it enacted and later amended the ICA. *See generally,* H.R. Rep. No. 100-313, at 66–67 (1987); *see also* S. Rep. No. 93-688, at 75 (1974) (explaining that the objective was to assure that "the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress").

The Constitution grants the President no unilateral authority to withhold funds from obligation. *See* B-135564, July 26, 1973. Instead, Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided in the ICA. *See* 2 U.S.C. §§ 681–688. The ICA separates impoundments into two exclusive categories—deferrals and rescissions. The President may temporarily withhold funds from obligation—but not beyond the end of the fiscal year in which the President transmits the special message—by proposing a "deferral."[4] 2 U.S.C. § 684. The President may also seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority, by proposing a "rescission."[5] 2 U.S.C. § 683.

In either case, the ICA requires that the President transmit a special message to Congress that includes the amount of budget authority proposed for deferral or

[4] Budget authority proposed for deferral must be prudently obligated before the end of its period of availability. 2 U.S.C. § 684; B-329092, Dec. 12, 2017.

[5] Budget authority proposed for rescission must be made available for obligation unless, within 45 calendar days of continuous congressional session, Congress has completed action on a rescission bill rescinding all or part of the amount proposed for rescission. 2 U.S.C. § 683.

rescission and the reason for the proposal. 2 U.S.C. §§ 683–684. These special messages must provide detailed and specific reasoning to justify the withholding, as set out in the ICA. *See* 2 U.S.C. §§ 683–684; B-237297.4, Feb. 20, 1990 (vague or general assertions are insufficient to justify the withholding of budget authority). The burden to justify a withholding of budget authority rests with the executive branch.

There is no assertion or other indication here that OMB intended to propose a rescission. Not only did OMB not submit a special message with such a proposal, the footnotes in the apportionment schedules, by their very terms, established dates for the release of amounts withheld. The only other authority, then, for withholding amounts would have been a deferral.

The ICA authorizes the deferral of budget authority in a limited range of circumstances: to provide for contingencies; to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or as specifically provided by law. 2 U.S.C. § 684(b). No officer or employee of the United States may defer budget authority for any other purpose. *Id.*

Here, OMB did not identify—in either the apportionment schedules themselves or in its response to us—any contingencies as recognized by the ICA, savings or efficiencies that would result from a withholding, or any law specifically authorizing the withholding. Instead, the footnote in the apportionment schedules described the withholding as necessary "to determine the best use of such funds." *See* OMB Response, at 2; Attachment. In its response to us, OMB described the withholding as necessary to ensure that the funds were not spent "in a manner that could conflict with the President's foreign policy." OMB Response, at 9.

The ICA does not permit deferrals for policy reasons. *See* B-237297.3, Mar. 6, 1990; B-224882, Apr. 1, 1987. OMB's justification for the withholding falls squarely within the scope of an impermissible policy deferral. Thus, the deferral of USAI funds was improper under the ICA.

When Congress enacts appropriations, it has provided budget authority that agencies must obligate in a manner consistent with law. The Constitution vests lawmaking power with the Congress. U.S. Const., art. I, § 8, cl. 18. The President and officers in an Administration of course may consider their own policy objectives as they craft policy proposals for inclusion in the President's budget submission. *See* B-319488, May 21, 2010, at 5 ("Planning activities are an essential element of the budget process."). However, once enacted, the President must "take care that the laws be faithfully executed." *See* U.S. Const., art. II, § 3. Enacted statutes, and not the President's policy priorities, necessarily provide the animating framework for all actions agencies take to carry out government programs. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (a federal agency is "a creature of

statute" and "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law. In fact, Congress was concerned about exactly these types of withholdings when it enacted and later amended the ICA. *See* H.R. Rep. No. 100-313, at 66–67 (1987); *see also* S. Rep. No. 93-688, at 75 (1974) (explaining that the objective was to assure that "the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress").

OMB asserts that its actions are not subject to the ICA because they constitute a programmatic delay. OMB Response, at 7, 9. It argues that a "policy development process is a fundamental part of program implementation," so its impoundment of funds for the sake of a policy process is programmatic. *Id.*, at 7. OMB further argues that because reviews for compliance with statutory conditions and congressional mandates are considered programmatic, so too should be reviews undertaken to ensure compliance with presidential policy prerogatives. *Id.*, at 9.

OMB's assertions have no basis in law. We recognize that, even where the President does not transmit a special message pursuant to the procedures established by the ICA, it is possible that a delay in obligation may not constitute a reportable impoundment. *See* B-329092, Dec. 12, 2017; B-222215, Mar. 28, 1986. However, programmatic delays occur when an agency is taking necessary steps to implement a program, but because of factors external to the program, funds temporarily go unobligated. B-329739, Dec. 19, 2018; B-291241, Oct. 8, 2002; B-241514.5, May 7, 1991. This presumes, of course, that the agency is making reasonable efforts to obligate. B-241514.5, May 7, 1991. Here, there was no external factor causing an unavoidable delay. Rather, OMB on its own volition explicitly barred DOD from obligating amounts.

Furthermore, at the time OMB issued the first apportionment footnote withholding the USAI funds, DOD had already produced a plan for expending the funds. *See* DOD Certification, at 4–14. DOD had decided on the items it planned to purchase and had provided this information to Congress on May 23, 2019. *Id.* Program execution was therefore well underway when OMB issued the apportionment footnotes. As a result, we cannot accept OMB's assertion that its actions are programmatic.

The burden to justify a withholding of budget authority rests with the executive branch. Here, OMB has failed to meet this burden. We conclude that OMB violated the ICA when it withheld USAI funds for a policy reason.

Foreign Military Financing

We also question actions regarding funds appropriated to State for security assistance to Ukraine. In a series of apportionments in August of 2019, OMB withheld from obligation some foreign military financing (FMF) funds for a period of six days. These actions may have delayed the obligation of $26.5 million in FMF funds. *See* OMB Response, at 3. An additional $141.5 million in FMF funds may have been withheld while a congressional notification was considered by OMB. *See* E-mail from GAO Liaison Director, State, to Staff Attorney, GAO, *Subject: Response to GAO on Timeliness of Ukraine Military Assistance* (Jan. 10, 2020) (State's Additional Response). We have asked both State and OMB about the availability of these funds during the relevant period. Letter from General Counsel, GAO, to Acting Director and General Counsel, OMB (Nov. 25, 2019); Letter from General Counsel, GAO, to Secretary of State and Acting Legal Adviser, State (Nov. 25, 2019). State provided us with limited information. E-mail from Staff Attorney, GAO, to Office of General Counsel, State, *Subject: RE: Response to GAO on Timeliness of Ukraine Military Assistance* (Dec. 18, 2019) (GAO's request for additional information); E-mail from GAO Liaison Director, State, to Assistant General Counsel for Appropriations Law, GAO, *Subject: Response to GAO on Timeliness of Ukraine Military Assistance* (Dec. 12, 2019) (State's response to GAO's November 25, 2019 letter); State's Additional Response. OMB's response to us contained very little information regarding the FMF funds. *See generally* OMB Response, at 2–3.

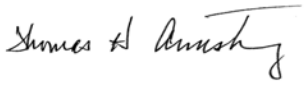
As a result, we will renew our request for specific information from State and OMB regarding the potential impoundment of FMF funds in order to determine whether the Administration's actions amount to a withholding subject to the ICA, and if so, whether that withholding was proper. We will continue to pursue this matter.

CONCLUSION

OMB violated the ICA when it withheld DOD's USAI funds from obligation for policy reasons. This impoundment of budget authority was not a programmatic delay.

OMB and State have failed, as of yet, to provide the information we need to fulfill our duties under the ICA regarding potential impoundments of FMF funds. We will continue to pursue this matter and will provide our decision to the Congress after we have received the necessary information.

We consider a reluctance to provide a fulsome response to have constitutional significance. GAO's role under the ICA—to provide information and legal analysis to Congress as it performs oversight of executive activity—is essential to ensuring respect for and allegiance to Congress' constitutional power of the purse. All federal officials and employees take an oath to uphold and protect the Constitution and its core tenets, including the congressional power of the purse. We trust that State and OMB will provide the information needed.



Thomas H. Armstrong
General Counsel

Mr. SWALWELL. In the most serious cases, the standard might hinge on what someone knew or their State of mind. For example, a person in Mr. Paoletta's position would be in jeopardy if that person had known that he was holding up the security assistance to Ukraine because President Trump thought it would help him get dirt on Mr. Biden, his political opponent.

It would be even worse if a person in Mr. Paoletta's position, despite his obligations as a government official, had specifically intended to help the President use public money for the President's own private gain.

This is precisely the point of an ethics rule to deal with issues of impropriety. It would also account for other situations like here, where Mr. Paoletta was responsible for responding to the public in Congressional inquiries about his own involvement in illegally holding up aid to Ukraine because President Trump thought it would help his reelection chances.

So, when Mr. Paoletta faced calls to recuse himself because of a conflict of interest, Mr. Paoletta refused. Now, there will always be questions about why Mr. Paoletta failed to give GAO the information it requested or why according to some sources. His answers conflicted with the blacked-out portions of documents whose redactions he reviewed.

I'd like to enter into the record a letter from Senator Chris Van Hollen asking Mr. Paoletta to recuse himself from that matter.

[The information follows:]

MR. SWALWELL FOR THE RECORD

CHRIS VAN HOLLEN
MARYLAND

SH-110 HART SENATE OFFICE BUILDING
WASHINGTON DC 20510
OFFICE (202) 224-4654
FAX (202) 228-0629

United States Senate

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March 12, 2020

Mark Paoletta
General Counsel
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Mr. Paoletta,

Recent revelations show a lack of candor in your response to the Government Accountability Office (GAO) inquiry into the withholding of funds for the Department of Defense (DOD) Ukraine Security Assistance Initiative. I am writing to request that you recuse yourself from ongoing inquiries into the Trump Administration's withholding of aid to Ukraine, including GAO's ongoing inquiry into the hold on State Department funding for Ukraine. Furthermore, it would be appropriate for you to resign your role as the Designated Agency Ethics Official for the Office of Management and Budget (OMB).

In an independent decision, GAO found that the OMB violated the Impoundment Control Act by withholding funds from Ukraine that Congress had appropriated for the DOD Ukraine Security Assistance Initiative.[1] During the course of GAO's inquiry, you asserted to GAO in writing that, "In fact, at no point during the pause in obligations did DOD [Office of General Counsel] indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year."[2]

Recent reporting by Just Security reveals that this statement, at best, was highly misleading. The DOD Office of General Counsel emailed you personally to raise concerns about the hold jeopardizing the ability of DOD to obligate Ukraine Security Assistance Initiative funds before they expired. This message stated that its purpose was to "underscore" the discussions between OMB official Michael Duffey and DOD official Elaine McCusker, who repeatedly raised concerns about the hold preventing timely obligation of the Ukraine aid.[3]

Furthermore, you appear to have willfully disregarded DOD warnings about this. In a different email revealed by Just Security, Elaine McCusker stated, "OMB lawyers continue to consistently mischaracterize the process — and the information we have provided. They keep repeating that this pause will not impact DOD's ability to execute on time."[4] The withdrawal of Ms. McCusker's nomination to be Under Secretary of Defense (Comptroller) raises further concerns about sidelining those who provide facts that Trump Administration officials such as yourself do not want to hear.[5]

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[1] Government Accountability Office. 2020. *Office of Management and Budget—Withholding of Ukraine Security Assistance.*
[2] Mark Paoletta. 2019. *RE: B-331564, Office of Management and Budget- Withholding of Ukraine Security Assistance.*
[3] Kate Brannen. 2020. *Exclusive: New Unredacted Emails Show How Deeply OMB Misled Congress on Ukraine.*
[4] Kate Brannen. 2020. *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns.*
[5] Politico. 2019. *White House withdraws nomination of Defense official who questioned Ukraine aid freeze.*

STATE OFFICES

MONTGOMERY COUNTY
111 ROCKVILLE PIKE
SUITE 960
ROCKVILLE, MD 20850
PHONE (301) 545-1500
FAX (301) 545-1512

ANNE ARUNDEL & SOUTHERN MARYLAND
60 WEST STREET
SUITE 107
ANNAPOLIS, MD 21401
PHONE (410) 263-1325

EASTERN SHORE
204 CEDAR STREET
SUITE 200C
CAMBRIDGE, MD 21613
PHONE (410) 221-2074

BALTIMORE REGION
1900 NORTH HOWARD STREET
SUITE 100
BALTIMORE, MD 21218
PHONE (667) 212-4610

WESTERN MARYLAND
32 WEST WASHINGTON STREET
SUITE 203
HAGERSTOWN, MD 21740
PHONE (301) 797-2826

PRINCE GEORGE'S COUNTY
1101 MERCANTILE LANE
SUITE 210
LARGO, MD 20774
PHONE (301) 322-6560

To date, the Trump Administration has blocked DOD from providing any information in response to GAO's inquiry, with DOD informing GAO that it could not provide a substantive response, "In light of the interagency equities at issue." While GAO was able to determine that withholding DOD Ukraine Security Assistance Initiative funding was illegal even without a response from DOD, all of the facts still have not come to light on this matter.

You also stonewalled the ongoing GAO inquiry into whether the Trump Administration violated the Impoundment Control Act by withholding other funds for Ukraine that Congress appropriated to the State Department for Foreign Military Financing. According to GAO, "OMB and State have failed, as of yet, to provide the information we need to fulfill our duties under the ICA regarding potential impoundments of FMF funds," a delay that impedes the GAO's ability to ensure that you are upholding the constitutional power of the purse.[6]

As the OMB official who responded to GAO's inquiry, you are personally responsible for the failure to provide a fulsome and honest response. You are also personally responsible for providing the faulty legal justification for OMB to implement President Trump's illegal hold on Ukraine aid – a justification that GAO stated "has no basis in law."[7] Therefore, you have a conflict of interest in overseeing OMB's response to inquiries that may call your previous actions into further question.

OMB's Designated Agency Ethics Official is responsible for providing advice and counseling regarding recusals to resolve a conflict of interest.[8] Given your own apparent conflict, it is untenable for you to continue to serve in this role. 87 percent of Designated Agency Ethics Officials are apolitical career civil servants – not political appointees such as yourself – due to the need to impartiality in this role.[9]

President Trump asserts that under the Constitution, "Article II allows me to do whatever I want."[10] As an attorney, I trust you know that the President is wrong. I hope that you also recognize how continuing to involve yourself in OMB's response to inquiries about withholding Ukraine aid creates – at a minimum – the appearance of a conflict of interest.

Sincerely,

Chris Van Hollen
United States Senator

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[6] Government Accountability Office. 2020. *Office of Management and Budget—Withholding of Ukraine Security Assistance.*
[7] Id.
[8] 5 C.F.R. § 2638.104.
[9] Office of Government Ethics, "Results from the 2018 Annual Agency Ethics Program Questionnaire" (2019).
[10] ABC News. 2019. *EXCLUSIVE: Trump cites lessons from Nixon, says he 'was never going to fire Mueller'.*

Mr. SWALWELL. So, Mr. Sherman, I appreciate you bearing with me on this. My question is this. Clearly, appearances matter when it comes to government ethics, but there are also other interests at play. Would you agree?

Mr. SHERMAN. Absolutely. I think particularly with the Supreme Court, appearance matters a great deal. Again, their authority and function derive from their impartiality. If there are issues that would lead a reasonable person to believe that Justices aren't impartial, that undermines the entire rule of law in the entire judicial system.

Mr. SWALWELL. What are the classes of cases where Congress should consider holding judges accountable for egregious ethics violations?

Mr. SHERMAN. Well, obviously, there is impeachment. That's in the constitution, and there's a process for that. Frankly, short of impeachment, there's not a lot of mechanisms existing for Congress or for any branch of government to hold members of the Supreme Court accountable for anything. We've seen that through rampant abuses that Mr. Roth and Mr. Paoletta have identified that there are no checks on the Supreme Court's ethics. That's why we need a code of conduct to hold them accountable.

Mr. SWALWELL. However, Mr. Sherman, lower court judges can be disciplined or disqualified from certain cases when acting unfairly without avoiding impropriety, engaging in political discourse, or not acting with the utmost integrity. So, there is a precedent for doing this with judges. So, can you explain how consequences are doled out to judges in the lower courts who do not adhere to the code of conduct?

Mr. SHERMAN. Well, I think there's a couple of different mechanisms. One is the process of appeal if a judge doesn't appropriately recuse himself. That's an option for litigants. There's also a process that goes through the judicial conference where there is an underlying investigation and members of the bench are recommended for disciplinary action if there are violations.

Mr. SWALWELL. Chair, I just want to note also that I have not gotten on to some of the legislation around this issue that you are working or signed on to some of the letters that you have issued that you've worked on this.

That's simply because I, in my personal capacity, have a case that I do believe will be in front of the Supreme Court, or it's high likeliness that it will be in front of the Supreme Court. I think would be inappropriate for me to use my legislative office to advance any issue or anything that could affect how the court recuses or does not recuse. So, don't read into it one way or the other, but I just want to put that on the record.

Mr. JOHNSON of Georgia. I thank the gentleman—

Mr. ISSA. Mr. Chair. Since the last questioning round impugned, clearly impugned the Witness, I would like to have him at least have a minute to respond if he would like.

Mr. JOHNSON of Georgia. I will give the Witness 30 seconds to respond.

Mr. PAOLETTA. Thirty seconds, okay. I stand by that opinion. We had complete legal authority to pause that money for 60 days. I will point out that this was after the Obama Administration re-

fused to provide stinger missiles to the Ukrainian people. It was a review that was signed off on up and down the chain in my office.

You mentioned the—so, GAO has disagreed with Executive Branch actions over the years, including finding that President Obama broke the law in exchanging the traitor Bowe Bergdahl for prisoners. He broke the law in that exchange. So, GAO has their opinion. They are Congress. They're not independent. Okay? So, the Executive Branch has its own legal opinions. OLC is the binding authority.

Mr. JOHNSON of Georgia. Your time has expired.

Mr. PAOLETTA. OLC, they didn't disagree with my opinion. So, I stand by that 100 percent.

Mr. JOHNSON of Georgia. The gentle lady from Minnesota, Ms. Fischbach. Excuse me, I'm sorry. The gentleman from North Carolina, Mr. Bishop, is recognized.

Mr. BISHOP. Thank you, Mr. Chair. I wasn't sure—my mic light was not coming on, so I think it's on though. You can hear me, right?

Mr. Paoletta, I wasn't here for your oral testimony. I read your testimony. I thought at the end that you had something here that was worth noting and then commenting on. You said but the trigger for this new proposed legislation is a ginned-up smear attack on Justice Thomas and his wife.

Mr. Cohen of Tennessee suggested that the legislation has been out there longer. I would suggest swapping the word hearing for legislation. I think the salient issue is the timing of this hearing. I do think that what you said is apt. This is a ginned-up smear attack on Justice Thomas.

It brought to my mind the fact that I don't think things have changed so much in the 31 years that have passed since this event in the photo behind me. There you go. You know the progenitor of the process of Borking Supreme Court nominees, the Hon. Edward Kennedy, he got Senator Strom Thurmond, a close friend and collaborator with the big guy in the middle.

On that occasion the core language that Justice Thomas used, if you will recall, at the end of his statement was from my standpoint as a Black American, as far as I'm concerned, it is a high tech lynching for uppity Blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a Committee of the U.S. Senate rather than hung from a tree. How little things have changed.

Wouldn't you say that this hearing and its focus on Justice Thomas, the demeaning way in which Justice Thomas is distinguished from other jurists have been pointed out in your paper and the comments that have been made about them, the notion that Justice Thomas is dependent on his wife, has much changed at all since that hearing, since the comments from Justice Thomas 31 years ago?

Mr. PAOLETTA. No. I am actually kind of shocked by Congressman Cohen's questions. I am not sure what he was driving at that Justice Thomas didn't ask a lot of questions. I do think he asked more earlier in his career. If you go back over the years with var-

ious justices, they didn't ask a lot of questions. I am a little concerned by what Congressman Cohen was trying to imply there.

Mr. BISHOP. So, the salient issue, again, seems not to be the timing of the legislation. It is the timing of the hearing. It is just like the well-timed warning outside the Supreme Court Building: You won't know what hit you. Right? That is what we are dealing with. That is what we are still dealing with today.

I think it just worth noting how much this country has depended on the fortitude of Justice Thomas to withstand this kind of unseemly treatment for all of those 31 years and what a debt of gratitude the country owes to him.

With that, I will yield back.

Mr. JOHNSON of Georgia. The gentleman from New York, Mr. Jones, is recognized.

Mr. JONES. Thank you, Mr. Chair, for holding this hearing and for introducing the 21st Century Courts Act, which I am very proud to co-lead with you and so many others on this Committee.

I am so glad we are finally having this hearing because the American people need to understand what the hell is going on with this far Right Republican majority on the Supreme Court of the United States. Contrary to the claims made by my Republican colleagues today, who by the way would have impeached Justice Thomas by now if he were a liberal justice, there is nothing normal about what is happening at the Supreme Court of the United States.

We have a Republican majority on the Supreme Court that is more corrupt than ever before, and none of those Republican justices is more corrupt than Justice Clarence Thomas, make no mistake about that.

In the early 2000s, he repeatedly declined to report hundreds of thousands of dollars that Right-wing organizations paid his wife, Ginni Thomas. Then Justice Thomas voted to advance the radical agenda of his spouse's far-Right employers with impunity. Now, it has come to light that Justice Thomas ruled on cases concerning the 2020 presidential election and the insurrection right here at the Capitol, even though his wife was conspiring with the White House to overturn President Biden's victory by any means necessary.

So, contrary to the claims made by the Ranking Member earlier today, no wonder public approval of the Supreme Court is at the lowest level it has ever been. It is not just the Republican party's—excuse me, the Republican majority's decision to take away fundamental rights like the right to an abortion. It is not just the Republican majority's decision to take away fundamental rights like the right to vote in this country. It is not just the Republican majority's decision to undermine your right to join a union in this country.

It is not just the Republican majority's clear intention to make it more difficult for our Government to prevent gun violence this term. It is also the blatant corruption at the Supreme Court of the United States.

So, I would submit to everyone that enough is enough. In the United States of America, no one should be above the law, not even Supreme Court justices.

Mr. Sherman, let me ask you some yes or no questions to piece together what we have heard today. Federal law requires that "Any justice of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," correct?

Mr. SHERMAN. Yes.

Mr. JONES. Now, do you think it might be reasonable to question whether Justice Thomas, the spouse of someone who repeatedly urged the White House to overturn that free and fair 2020 election could impartially participate in proceedings about the way forward, attempt to overturn the 2020 election, proceedings that may well reveal evidence of his spouse's high-level role in a criminal conspiracy?

Mr. SHERMAN. Yes. Absolutely.

Mr. JONES. Yet in *Trump* v. *Thompson*, Justice Thomas was the only justice who voted to deny the January 6 Select Committee access to White House records about the insurrection that might have included Ginni Thomas' text messages with Donald Trump's former Chief of Staff, Mark Meadows. Of course, he was the Chief of Staff at the time.

So, what Justice Thomas did was not just unethical; it was illegal. It was in violation of the recusal statute. There is no doubt about that, not among people of good conscience and sound intelligence. Yet, as you have testified, nobody could compel Justice Thomas to recuse because the statute lets each justice decide for themselves, correct?

Mr. SHERMAN. Yes.

Mr. JONES. So, the only person who decided that Clarence Thomas didn't need to recuse himself from cases concerning the insurrection was Clarence Thomas himself, correct?

Mr. SHERMAN. Correct.

Mr. JONES. How could that possibly be consistent with the bedrock legal principle that no one should be the judge in their own case?

Mr. SHERMAN. It is not, and it is not even consistent with Clarence Thomas' prior recusal practices. There is no standard, so we will never know.

Mr. JONES. How would the 21st Century Courts Act change that?

Mr. SHERMAN. Well, I think it would do a number of things, including allowing for transparency in the recusal process, extending the criminal conflict of interest statute to the Federal Judiciary, which would put some skin in the game for the justices, and obviously require them to create a code of conduct, which has been sorely lacking and obviously is desperately needed.

Mr. JONES. You stand by your claim, as has been articulated by scholars throughout the legal academy, that Congress is well within its authority in enacting legislation that would, among other things, implement a binding code of ethics on the Supreme Court justices.

Mr. SHERMAN. I do. I believe that if the Court were to challenge that, it would further undermine their credibility in a very dangerous way.

Mr. JONES. You won't have any argument from me on that.

I yield back.

Mr. JOHNSON of Georgia. The gentleman from Wisconsin, Mr. Tiffany, is now recognized for five minutes.

Mr. TIFFANY. Thank you, Mr. Chair. I yield my time to the Ranking Member, Mr. Issa.

Mr. ISSA. Thank you. I thank the gentleman for yielding. I want to pick up where things were left off a little bit. There was an earlier set of questions about Justice Thomas' not asking questions. I am trying to understand something about Justice Thomas, because I have known him for a long time. He has been a figure in Washington for civil rights before he was a justice on the Supreme Court.

Let me go through a couple of these things. Is it that he is too strident, strong willed, and immovable as a justice that he never listens? Is that why he doesn't ask questions?

Mr. PAOLETTA. No. I think that is the exact opposite, and I think he has said that the "gotcha" type questions is more of showmanship on the Court where the various justices are kind of arguing among themselves, not really—and using the litigants as a cutout to ask the questions.

So, no, I think Justice Thomas listens to questions. Again, when you look at his jurisprudence, it is as independent as any justice up there. So—

Mr. ISSA. Let me go to the opposite side, then. Is he so pliable and without a core set of values that he could be easily influenced by somebody close to him?

Mr. PAOLETTA. Absolutely not. That is anathema to Justice Thomas' entire life.

Mr. ISSA. Now, I have seen, I don't know, 18 or 20 or maybe a little more justices go through confirmation process in my life, and a chunk of that during my service in 22 years. Can you name any justice on the Supreme Court, now or in the recent past, who lacks both a broad history of thinking and decision-making sufficient to have high confidence that they make their own decisions? Can you think of even one justice that you would say lacked that ability?

Mr. PAOLETTA. No.

Mr. ISSA. Then why is it that Justice Thomas seems to be the one that is being questioned here for one of those two, either too strident or too Gumby-like, and not at all the level of intellect that every other justice seems to be given as a granted by everyone on this panel as far as I can tell?

Mr. PAOLETTA. I think it is—why? I think there is a racism that is directed at Justice Thomas. If I could just read from a book from 1994, 1995, which is called "Strange Justice," by Jane Mayer and Jill Abramson. They said,

> When Thomas got on the Court, he developed an unusually close friendship with—some would say reliance—on his fellow jurist, Laurence Silberman. Thomas served on the Court. He is generally quiet during oral argument, according to clerks. In a departure from normal practice, the Administration took an active role in helping Thomas pick his clerks. Most were carefully culled from the best law schools, and many of them were Federalist Society alums. If draft opinions needed a little embellishment, according to the clerks from other chambers, Thomas leaned especially heavy on them .... Several clerks from other chambers remember Thomas as a slow writer.

This is just pure racism. That is what this is.

Mr. ISSA. So, what you are seeing is decades of attacks on Justice Thomas because he is Black.

Mr. PAOLETTA. Conservative, yes.

Mr. ISSA. Conservative, a bad combination.

Mr. PAOLETTA. Yes.

Mr. ISSA. Let me go—

Mr. SHERMAN. Congressman, might I offer a response?

Mr. ISSA. In just a second. One follow-up. We, on this Committee, have in the past offered and gone through with articles of impeachment for judges for their conduct. We do so based on not the same standard as the Executive Branch. We do so based on that provision that includes good behavior, correct?

Now, if, without a written set of documents saying this is what a judge must do, or with one, in either case, wouldn't the removal of a justice from the high court be (1) based on impeachment as the only tool to remove him; and (2) based on our belief that they had violated high crimes, misdemeanors, or the "good behavior"?

Mr. PAOLETTA. Correct.

Mr. ISSA. So, even though it might be helpful for Congress to have a set of standards, and even though we could label that set of standards over them, at the end of the day, isn't the standard for removal of a justice exactly the same?

Mr. PAOLETTA. Yes.

Mr. ISSA. Thank you.

I thank the gentleman. Yield back.

Mr. JOHNSON of Georgia. Votes have been called about 30 minutes ago, and there are still a few voters who have not voted yet.

Mr. ISSA. We are among them.

Mr. JOHNSON of Georgia. We are among them, so we must depart at this time. We will return in about 55–60 minutes. If you all will hang loose until then, we would greatly appreciate it.

With that, we will recess.

[Recess.]

Mr. JOHNSON of Georgia. We will resume this hearing.

I have waited for some minutes now, maybe 5–7, for any of my colleagues to reappear. None having done so, I am left—oh, Ms. Ross. Okay. All right. So, we do have a colleague. Representative Ross, I will yield to you five minutes.

Ms. ROSS. Mr. Chair, I believe you are on mute. We can't hear you.

Mr. JOHNSON of Georgia. You cannot hear me? Okay. Testing, testing. Okay. Can you hear me now? Testing, testing. Representative Ross, can you hear me? I don't think you can.

We will recess for just a couple of moments to work out this technical glitch.

[Recess.]

Mr. JOHNSON of Georgia. Okay. We are now back into session. Call this Committee meeting back to order.

First, let me apologize to the Witnesses. I told you when we left at about after 4:15 p.m. that it would be about 55 minutes to an hour, and it ended up being about two hours. For that, I deeply apologize. I know you are busy and have things to do, so we appreciate you sticking around.

There is one additional Member who has come back to offer questions to you. It is Representative Ross. Before I go to her, I just wanted to congratulate her on today's Senate passage of her legislation, hers and Representative Issa's legislation, the Courthouse Ethics and Transparency Act, which will proceed to President Biden for his signature.

Congratulations to you, Representative Ross. You may begin with five minutes of questions.

Ms. ROSS. Well, thank you, Mr. Chair. Thank you for your leadership and for being a co-sponsor of the bill, along with Mr. Roy.

I want to thank the panelists for joining us today and for your patience. I hope somebody else comes to ask a question or my questions are worth your time. I value your suggestions and insights into how we can improve the integrity of the Supreme Court.

It is only appropriate that the highest court in our judicial system be held to the highest ethical standards. Let's remember, as you have all said, these are lifetime appointments. So, there is no check on what they do other than the extreme action of impeachment.

For years we have seen the Supreme Court justices avoid recusals, and this compromises their ability to interpret the law impartially and without influence. I am grateful of the work that this Committee has done, especially with the Courthouse Ethics Act that Chair talked about. I am grateful that was both bipartisan and bicameral.

It is an important first step toward an impartial judiciary through the creation of financial transparency requirements for Federal judges. We must do much more to ensure that the Supreme Court operates in a way that shows no favor and is free from external influences that place unbiased interpretation on the law into question.

This means putting the mechanisms in place to guarantee that justices recuse themselves properly from cases and are held accountable when they do not, and avoid conflicts in the first place. I hope that Congress will move forward and establish a Supreme Court code of ethics if the justices themselves are unwilling to do so. Of course, that would be the first choice.

So, what I would like to do is I have two questions very quickly, Mr. Roth, because I would like to get to my second question. We talked about the Courthouse Ethics Bill. Do you believe it will succeed in getting judges and justices to be more aware and mindful of potential conflicts? If you could be brief, that would be great—

Mr. ROTH. Yes.

Ms. ROSS. —so I can do my second question.

Mr. ROTH. Sure, yes. Absolutely. I think that there is a lot of embarrassment that followed *The Wall Street Journal* story and the fact that your bill carried through. They are already changing their habits, and we will see some divestments in the coming years, and I think it will be a big step in the right direction towards financial accountability.

Ms. ROSS. Thank you so much. Mr. Gillers, you said in your testimony,

> I have long defended the right of judicial spouses, including Ms. Thomas specifically, to join public debates on issues that could come before their

husbands or wives without affecting the ability to sit on cases. Attention to detail, rather than superficial similarities, reveals that this time the Thomas' went too far.

You have said that the revelation that Ginni Thomas actively communicated with Mark Meadows regarding the results of the 2020 election was a game changer. Could you explain this to us and what distinguishes that activity from freedom of speech?

Mr. GILLERS. About 12 or 15 years ago, I began to get questions from the press about Virginia Thomas' activism and the affect, if any, on her husband's ability to sit. I always said they live in different spheres, and we do not impute ideology between spouses. We impute financial interests but not ideology.

Oftentimes the reporter was incredulous, but that was and is my position. It may not always help with public confidence in the judiciary, but each has a right to his or her own professional life.

When I was called by *The New Yorker* in January, I maintained that position. If you read the article again, you will see that although I wasn't happy with—and am not happy with the extent of Virginia Thomas' activism because I believe it hurts the Court, but she has a right to do it, and if she wants to do it, that is her prerogative.

So, I did not say, and would not say, and the article does not go so far as to say—

Ms. ROSS. What about the issue of the communications with Mr. Meadows?

Mr. GILLERS. So, then what happened is, in March, Meadows' texts appeared. The game changer was she was—Virginia Thomas was now not merely voicing her opinion, but she joined the "Stop the Steal" effort with the strategy ultimately, as it turned out to be true, to go to the Supreme Court, to go to her husband on the Court, and the rest of the Court.

So, when she shifted from voicing her views publicly to becoming an insider, a player in the "Stop the Steal" effort by going to the senior partner, if I may, of that effort—Mark Meadows—with 21 texts in one month, and we may find out that there was even more thereafter—when she did that, she had an interest in the cases in the Supreme Court as an insider, and because she has an interest in not seeing future disclosures of what she may consider private communications about ways to stop the results of the election. That changed it for me after all those years.

Ms. ROSS. Well, thank you very much.

Mr. Chair, thank you for your indulgence, and I yield back.

Mr. JOHNSON of Georgia. Thank you.

Mr. Paoletta, I would ask if you will have a response to that.

Mr. PAOLETTA. Ginni Thomas expressed her concerns about the election to Mark Meadows, her long-time friend. When you see other—again, it is in the context of—I don't think she is on any team. I think she was expressing her views, just like Judge Reinhardt's wife filed a brief, actually tried to intervene, talked to the lawyers before, so I would assume that is kind of behind the scenes of arguing that case on Proposition 8 on the same-sex marriage issue.

So, I don't see any difference between the Reinhardt case. I know Professor Gillers is trying to make that distinction, but I don't see any distinction there. She sent some texts.

Mr. JOHNSON of Georgia. Well, assuming that there is no distinction, doesn't it still call into question whether or not there is a need for a code of ethics?

Mr. PAOLETTA. Well, again, my view is that Reinhardt was proper in not recusing, just like Justice Thomas was proper in not recusing. So, that is my view.

Mr. JOHNSON of Georgia. When should a justice recuse?

Mr. PAOLETTA. When they are—in my view, it is when your spouse or family member has—

Mr. JOHNSON of Georgia. So, in accordance with the statute?

Mr. PAOLETTA. In accordance with the statute, you are a party to the case, you are a litigant right before the case. As Professor Gillers points out in his opinion on the Reinhardt thing, Ms. Ripston was not a party or a lawyer before the Court, and that is the key, and she didn't have a financial interest. Ginni Thomas has no financial interest in there, just like he says.

The interest that she has is she cares about election fraud, just like the interest that Ramona Ripston had was on Proposition 8, and stopping the same-sex marriage ban.

So, to me there is no distinction between the two. In fact, I would say that Ginni Thomas was further away. I mean, Ramona Ripston ran the ACLU organization, and she was involved with getting briefs put together, maybe minimally. I didn't do my own investigation, but at least her own husband says that she was involved with the beginnings of it.

They actually filed a brief—two briefs—in the court below. That is taking a position on a case that is now before her husband.

So, I will give the other one that I have talked about a lot which is Judge—

Mr. JOHNSON of Georgia. It still did not require Reinhardt to recuse in that circumstance. What is your opinion about that, Professor Gillers?

Mr. GILLERS. There are two very important differences between the Reinhardt situation—

Mr. JOHNSON of Georgia. Microphone.

Mr. GILLERS. Sorry. There are two very important differences between the Reinhardt situation and the Thomases.

(1) Ramona Ripston had no worry that the decision of the Reinhardt court would reveal confidential information that she exchanged in private in texts. There was no threat to Ramona Ripston of that.

(2) Ripston and the ACLU were not before her husband. They did not file an amicus brief in the Ninth Circuit. However, the case before Judge Thomas had the team that Ms. Thomas joined before him.

Mr. PAOLETTA. Okay. When you talk about team, what does "team" mean?

Mr. JOHNSON of Georgia. All right.

Mr. PAOLETTA. I am sorry.

Mr. JOHNSON of Georgia. We won't get into it tat for tat between Witnesses.

Mr. PAOLETTA. Okay. Sorry.

Mr. JOHNSON of Georgia. I will let you conclude, and then I will go to Congressman Jordan.

Mr. GILLERS. Ms. Thomas could have done a number of things after the election was called. She could have talked to her friends. She could have gone to social media. She could have gone to the blogosphere. She could have written an op ed. Where did she go? She went to the man who would predictably run the operation.

Mr. JOHNSON of Georgia. A party to the litigation, essentially.

Mr. GILLERS. Sorry?

Mr. JOHNSON of Georgia. A party to the litigation, essentially.

Mr. GILLERS. Yes. She became part of the litigation, and that litigation would predictably get up to the Supreme Court, which it did, and her husband.

Mr. JOHNSON of Georgia. Okay. Thank you.

Representative Jordan, you are recognized.

Mr. JORDAN. Thank you, Mr. Chair. I would ask unanimous consent to first enter into the record a paper by Thomas Jipping, senior legal fellow at the Edwin Meese III Center for Legal and Judicial Studies at the Heritage Foundation on the subject of the hearing today.

Mr. JOHNSON of Georgia. Without objection.

[The information follows:]

MR. JORDAN FOR THE RECORD

"Building Confidence in the Supreme Court Through Ethics and Recusal Reform"

Subcommittee on Courts, Intellectual Property, and the Internet

United States House of Representatives

April 27, 2022

Thomas Jipping
Senior Legal Fellow
Edwin Meese III Center for Legal and Judicial Studies
The Heritage Foundation

Introduction

"If men were angels," wrote James Madison, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[1] Those controls include the separation of powers into three branches, with checks and balances between them, and a judiciary designed to be the "weakest" and "least dangerous branch."[2] In this system, the "complete independence of the courts" is "peculiarly essential."[3]

No one, however, likes to be told that they may not do something, least of all Congress or a president intent on pushing a political agenda. The separation of powers, judicial independence, and other features of our system of government designed to limit power easily become restraints to overcome rather than principles to be embraced. There is an active campaign underway today to promote the view that the Supreme Court is an inherently political institution, to denounce unfavorable decisions as necessarily "partisan," and even to demonize individual Justices deemed less likely to favor certain political interests. This campaign cloaks itself in the rhetoric of "reform," "ethics," or "balance," taking advantage of the public's shallow knowledge of our system of government in general, and of the judiciary in particular.

That campaign appears to be working. Two recent polls found that more than 60 percent of Americans believe that the Supreme Court decides cases primarily by politics rather than law,[4]

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[1] The Federalist No.51 (Madison).
[2] The Federalist No.78 (Hamilton).
[3] *Id.*
[4] See John Kruzel, Solid Majority Believes Supreme Court Rulings Based More on Politics Than Law, The Hill, October 20, 2021 (Grinnell College poll), https://thehill.com/regulation/court-battles/577444-solid-majority-believes-supreme-court-rulings-based-more-on-politics/; Bryan Metzger and Oma Seddiq, More Than 60% of Americans Say the Supreme Court is Motivated By Politics, While Just 32% Believe They Rule Based on Law: Poll, Business Insider, November 19, 2021 (Quinnipiac poll), https://www.businessinsider.com/61-percent-think-supreme-court-motivated-politics-not-law-poll-2021-11.

while overall approval of the Supreme Court is at its lowest level in decades.[5] In addition, the trend continues toward believing that the Supreme Court should base its rulings on "what the Constitution means in current times."[6] These developments contribute to viewing judicial independence as optional rather than necessary, as a means to an end rather than an end in itself.

The Separation of Powers and Judicial Independence

Justice Antonin Scalia wrote that America's founders "viewed the principle of separation of powers as the absolutely central guarantee of a just government."[7] He echoed James Madison, who wrote in *The Federalist* No.47 that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."[8] The Massachusetts Constitution affirms that it is the difference between a "government of laws" and one "of men."[9] In addition to the general separation of powers, the Founders saw judicial independence as critical to the liberty that the system of government they designed was to promote.

Attempts to manipulate the judiciary were among the "injuries and usurpations" by the King of Great Britain that justified the United States declaring independence in 1776.[10] It has also been called "the most essential characteristics of a free society,"[11] the "backbone of the American democracy,"[12] and one of the "crown jewels" of our system of government.[13] The Constitution addresses King George's threats by providing that federal judges' terms are unlimited[14] and that Congress may not diminish judicial compensation.[15] As the judiciary has become much more powerful than it was designed to be, however, threats to its independence have multiplied in number, some of them sophisticated and others threatening brute political force.

Threats to Judicial Independence

Court-Packing, Chapter 1. Court-packing involves Congress creating additional, but unnecessary, Supreme Court seats that can be quickly filled with Justices likely to decide certain

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[5] See Jeffrey M. Jones, Approval of U.S. Supreme Court Down to 40%, a New Low, Gallup News, September 23, 2021, https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

[6] See Kristen Bialik, Growing Share of Americans Say Supreme Court Should Base Its rulings on What Constitution Means Today, Pew Research Center, May 11, 2018, https://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today/. This is result is up from a similar poll in 2011. See Tanya Roth, Pew Poll: How Should SCOTUS Interpret the Constitution?, FindLaw, July 8, 2011, https://www.findlaw.com/legalblogs/supreme-court/pew-poll-how-should-scotus-interpret-the-us-constitution/.

[7] Morrison v. Olson, 487 U.S. 654,697 (1988) (Scalia, J., dissenting).

[8] The Federalist No.47 (Madison).

[9] Quoted in Morrison, 487 U.S. at 697.

[10] Declaration of Independence.

[11] Sam J. Ervin, Jr., Separation of Powers: Judicial Independence, 35 Law & Contemp. Probs. 108,121 (1970).

[12] Penny J. White, An American Without Judicial Independence, 80 Judicature 174,174 (1997).

[13] William H. Rehnquist, The Future of the Federal Courts, Washington College of Law Centennial Celebration, April 9, 1996, https://www.law.cornell.edu/supct/justices/rehnau96.htm.

[14] U.S. Constitution, Article III, Section 1. Judges on courts created by Congress under the authority granted by Article III of the Constitution serve "during good Behaviour." See David F. Forte, Good Behavior Clause, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/3/essays/104/good-behavior-clause.

[15] U.S. Constitution, Article III, Section 1. See David F. Forte, Judicial Compensation Clause, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/3/essays/105/judicial-compensation-clause.

cases, involving particular issues, in a politically more favorable way. American history has witnessed three chapters in this strategy to change the Supreme Court as an institution in order to change its decisions.

Chapter 1 began when President John Adams and the Federalists lost the election of 1800 and, before leaving office the next March, quickly passed the Judiciary Act of 1801. It created new lower court positions and reduced the Supreme Court from six to five seats by providing that the next vacancy remain unfilled. A year later, as President Thomas Jefferson and the Democrat-Republican congressional majority discussed legislation to repeal the earlier Judiciary Act, Rep. John Bacon of Massachusetts proposed going a step further by adding two or three more Supreme Court seats. Both sides soundly rejected the idea because, as Senator Williams Wells, a Federalist from Delaware, put it, the plan would "destroy the independence of the judges."

Court-Packing, Chapter 2. Chapter 2, which is much more familiar to many Americans, opened with the 1932 election of President Franklin Roosevelt. During his first term, the Supreme Court declared unconstitutional several significant laws enacted to address the Great Depression.[16] In May 1935, four days after the Court unanimously struck down the National Industrial Recovery Act, Roosevelt held a press conference in which he criticized the Court for refusing to interpret the Constitution "in the light of present-day civilization." He wanted the Court to "create or enlarge constitutional power" so that Congress could achieve its objectives.[17]

The 1936 election delivered a landslide re-election and overwhelming Democratic majorities in Congress. Roosevelt determined that if the Supreme Court would not comply on its own, he would create a Court that would. He proposed adding up to six more Supreme Court seats. Roosevelt did not see any obstacles to such legislation; Senate Democrats exceeded the two-thirds threshold for avoiding a filibuster than required by Senate rules.

In June 1937, however, the Senate Judiciary Committee, which had a 14-4 Democratic majority, opposed Roosevelt's bill for same reason that both parties had done so in 1802. The committee report recommended rejecting the bill because it would "undermine the independence of the courts"[18] and "expand political control over the judicial department."[19] Significantly, the report clarified the purpose behind Court-packing and emphasized the importance of judicial independence.

The committee report candidly identified what everyone understood to be the objective of Court-packing: "neutralizing the views of some" justices by "overwhelm[ing] them with new

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[16] These include Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (provision of the National Industrial Recovery Act); Railroad Retirement Bd. v. Alton Railway Co., 295 U.S. 330 (1935) (Railroad Pension Act); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act); Louisvbille Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (Frazier-Lemke Act); United States v. Butler, 297 U.S. 1 (1936) (provision of the Agricultural Adjustment Act); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act).

[17] Press Couference #209, transcript at 2 (March 31, 1935).

[18] Reorganization of the Federal Jndiciary, Hearing before the Senate Comuittee on the Judiciary, 75th Congress, 1st Session, Report No.711 (June 76, 1937), at 1.

[19] *Id.*

members."[20] The report firmly stated, however, that the long-term independence of the judiciary was more important than the current legislative agenda. "Even if every charge brought against the so-called 'reactionary' members of this Court be true," the Judiciary Committee said, "[it] is immeasurably more important…than the immediate adoption of any legislation however beneficial."[21]

As an aside, Roosevelt did not have wait long to change the Supreme Court through the normal appointment process. In less than six years, he replaced eight of the nine Supreme Court justices appointed by previous presidents, including the justices, dubbed the "Four Horsemen,"[22] who most consistently resisted changing the Constitution's meaning to facilitate Roosevelt's expansive federal economic agenda.

Twice, in 1802 and in 1937, Congress rejected the same proposal – adding Supreme Court seats not to facilitate the Court's work but to change its decisions – for the same reason, because judicial independence is more important than the politics of the moment. Destroying an essential feature of our system of government, the cornerstone of our constitutional system, was too high a price for some short-term political objectives.

Court-Packing, Chapter 3. Unfortunately, those chapters were not enough to permanently close the book on Court-packing. A real commitment to the separation of powers and judicial independence should mean that Congress seeks to do its work within those constraints. Instead, current Court-packing advocates want to forge a Supreme Court that will facilitate the left's political agenda. To that end, members of Congress have recently introduced legislation to add four seats to the Supreme Court.[23]

The Court-packing schemes promoted in 1937 and today have three parallels and two differences. The first parallel is the most obvious. Court-packing has a single purpose, reacting to unfavorable Supreme Court decisions by proposing to change the Supreme Court itself as quickly as possible. Second, Roosevelt urged that the Supreme Court interpret the Constitution "in light of present-day civilization," the same view that, according to the polls cited above, a majority of Americans now appear to hold. Third, today as in 1937, the public's belief that the Supreme Court should adjust its approach to constitutional interpretation does not extend to changing the Supreme Court as an institution. A February 1937 Gallup poll showed that Americans were evenly divided on Roosevelt's plan,[24] and opinion trended against it thereafter.[25]

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[20] *Id.* at 14.
[21] *Id.* at 8.
[22] These were Justices Willis Van Devanter, appointed in 1911 by President William Howard Taft; James McReynolds, appointed in 1914 by President Woodrow Wilson; George Sutherland, appointed in 1922 by President Warren G. Harding; and Pierce Butler, appointed in 1923 by Harding.
[23] H.R. 2584 and S. 1141, the Judiciary Act of 2021, were both introduced on April 15, 2021.
[24] See Gregory A. Caldeira, FDR's Court-Packing Plan in the Court of Public Opinion, Appendix I (Aug. 4, 2004), available at http://epstein.wustl.edu/research/ courses.LAPSCaldeira.pdf.
[25] *Id.* at Appendix III.

Contemporary polls show opposition has risen from 54 percent in September 2020[26] to 66 percent in November 2021.[27]

One difference between the Court-packing schemes is the support of the President. Roosevelt himself initiated the 1937 legislation and publicly campaigned for it.[28] President Joe Biden, however, opposed Court-packing as a Senator, calling it a "terrible, terrible mistake" and a "bonehead idea." During most of the 2020 presidential campaign, Biden appeared to reject Court-packing, even saying that it would make the Court lose "any credibility."[29] And the Supreme Court Commission that he appointed last year not only failed to endorse Court-packing, but its hearings and final report highlighted longstanding arguments against it.[30]

A second difference is the involvement of outside organizations. The American Bar Association led the national opposition to Roosevelt's Court-packing plan and appointed a special committee to present its views to the Senate Judiciary Committee. Sylvester C. Smith, chairman of that committee, presented the results of its polling of lawyers in every state: 86 percent of ABA members,[31] and 77 percent of nonmembers,[32] opposed Roosevelt's Court-packing scheme. The primary objection, Smith explained, was that it "violates of necessity the spirit of judicial independence, the basis of our Constitution."[33]

Today, the ABA won't take a position on Court-packing. Instead, a coalition of left-wing groups demand that new Justices be added to change Supreme Court decisions on issues from union organizing and voting rights to abortion, LGBTQ rights, climate change, health case, and the Second Amendment.[34] In other words, they want to expand the Supreme Court for the very reason that Congress and the American people rejected doing so in the past: to remove judicial independence as an obstacle to a political agenda.

The ABA's silence is disturbing not only because it contrasts so sharply with its opposition to Roosevelt's Court-packing plan, but also because the ABA more recently has been a strong defender of judicial independence. Concerns about judicial independence led to it creating the ABA Commission on Separation of Powers and Judicial Independence. Its July 1997 report outlined new developments that might undermine judicial independence such as "strident criticism" of judicial decisions by public officials, including the Senate Majority Leader,

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[26] See *Sept. 21-24, 2020, Washington Post-ABC News Poll*, September 27, 2020, https://wapo.st/3CdDBqE.
[27] See James Freeman, Mason-Dix Poll: Americans Still Don't Like Court-Packing, *Wall Street Journal*, November 10, 2021, at https://www.wsj.com/articles/mason-dixon-poll-americans-still-dont-like-court-packing-11636576314.
[28] Thomas Jipping, Court Reform Commissions, Past and Present, Legal Memorandum No.287, July 15, 2021, at 8.
[29] The October Democratic Debate Transcript, Wash. Post (Oct. 16, 2019), https://www.washingtonpost.com/politics/2019/10/15/october-democratic -debate-transcript/ (last accessed June 21, 2021). Biden's position became murkier during the campaign's final month, with him alternately saying that he was "not a fan of court-packing" and that "you will know my opinion on court-packing the minute the election is over." See Jipping, *supra* note 28, at 8-9.
[30] Presidential Commission on the Supreme Court of the United States, Final Report, December 2021, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.
[31] *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong., Part 5 (1937), at 1459.
[32] *Id.* at 1460.
[33] *Id.* at 1461.
[34] Press Release, Reform the Supreme Court to Rebuild America, https://bit.ly/3ttcCn2.

followed by calls for certain judges to resign or be impeached.[35] The ABA report also warned of increasing calls for "congressional micro-management of the judiciary." A quarter-century later, these warnings appear almost prescient as even bolder efforts are now underway.

Threatening the Supreme Court. While Roosevelt wanted to change the Supreme Court's overall approach to interpreting the Constitution, he expressed this view in reaction to decisions that had already been made. Today, advocates are threatening Court-packing if the Supreme Court does not decide *pending* cases to their liking. In August 2019, for example, five Democratic Senators filed an amicus brief in a case that, in its current form, challenges New York's requirement that law-abiding citizens have "proper cause" to carry a firearm outside the home without a license. The Senators' brief closed with these ominous words: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.' Particularly on the urgent issue of gun control, a nation desperately need it to heal."[36]

This statement is reflective of the current campaign against judicial independence in two ways. First, it asserts that any decision that these Senators would consider unfavorable must have been the result of "the influence of politics." The possibility that an impartial interpretation and application of the Second Amendment would lead to a different outcome simply does not exist. Second, these Senators claim that the "public knows" this. This framing tries to tap into, but also promotes, the view that the Supreme Court and, by extension, other courts decide cases based on politics rather than the law. Third, this brief attempts to make its threat sound less serious by calling Court-packing "restructuring," as if they seek simply to rearrange what exists rather than create something entirely new. Strangely, however, none of the Senators who signed onto this brief have co-sponsored the Judiciary Act of 2021, the current bill that would add four seats to the Supreme Court.

Threatening Supreme Court Justices. According to the American Bar Association, "Judicial independence means that judges are not subject to pressure and influence and are free to make impartial decisions based solely on fact and law."[37] Criticizing judicial decisions does not, by itself, threaten judicial independence.[38] In fact, members of the Supreme Court have written that public scrutiny and potential criticism can encourage judges to be "careful in their decision and anxiously solicitous to do exact justice."[39] It is not difficult, however, to see what falls on the other side of the line.

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[35] An Independence Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence, July 4, 1997, at i-ii, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/indepenjud.pdf.

[36] Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amicus Curiae in Support of Respondents in New York State Rifle & Pistol Assoc., Inc. v. City of New York, No. 18-280 (2019), at 18. Joining Senator Sheldon Whitehouse on this brief were Senators Mazie Hirono (D-HI), Richard Blume3nthal (D-CT), Richard Durbin (D-IL), and Kirsten Gillibrand (D-NY).

[37] American Bar Association, Rule of the Law and the Courts, August 22, 2019, https://bit.ly/3rQJyWE.

[38] See Pat McGuigan, The Right of the People to Critique Judicial Rulings: Implications for Citizen Activism, 22 Okla. City U. L. Rev. 1223 (1997).

[39] Quoted *id.* at 1229 (Chief Justice William Howard Taft).

On March 4, 2020, for example, the Supreme Court heard arguments in *June Medical Services v. Russo*, a case challenging a Louisiana law requiring abortionists to have hospital admitting privileges. The same, as the argument was underway, current Senate Majority Leader Charles Schumer stood on the Supreme Court steps and shouted: "I want to tell you Gorsuch, I want to tell you Kavanaugh, you have unleashed the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[40] This goes beyond the "strident criticism" by the Senate Majority Leader that concerned the ABA in 1997; this appears instead to be the judicial equivalent of jury-tampering.

The spin following Senator Schumer's threat was more than a little strained. His spokesman claimed, for example, that by referring to "Gorsuch" and "Kavanaugh," and by using "you" no less than seven times in two sentences, Senator Schumer was really speaking to Republican Senators about the election that was, at the time, still eight months away.[41] The media were not fooled, reporting that Schumer's threat was directed squarely at "President Donald Trump's court appointees."[42] The next day, then-Majority Leader Mitch McConnell stated the obvious: "There is nothing to call this except a threat, and there is absolutely no question to whom…it was directed. Contrary to what the Democratic leader has since tried to claim, he very, very clearly was not addressing Republican lawmakers or anyone else. He literally directed the statement to the Justices by name."[43]

Attacks on individual Justices, like Schumer's threats, may demand that they vote a particular way in a particular case. Others, however, seek to prevent Justices from participating in certain cases at all, to demonize their entire judicial service, or even to remove them from the bench. Rep. Alexandria Ocasio-Cortez (D-NY), for example, demanded that Thomas resign from the Court or face impeachment for declining a blanket recusal commitment from any case related to the 2020 election or the events of January 6, 2021.[44] Demands like this escalated with news media reports that Virginia "Ginni" Thomas had exchanged text messages with then-White House Chief of Staff Mark Meadows regarding efforts to resist accepting the 2020 election

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[40] See Ian Millhiser, The Controversy Over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained, Vox, March 5, 2020, https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat.

[41] See Zack Budryk, Schumer's Office Says He Was Referencing Justices Paying "Political Price," The Hill, March 4, 2020, https://thehill.com/homenews/senate/486029-schumers-office-says-he-was-referencing-justices-paying-political-price/.

[42] See, e.g., Pete Williams, In Rare Rebuke, Chief Justice Roberts Slams Schumer for "Threatening" Comments, NBC News, March 4, 2020, https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036.

[43] Congressional Record, March 5, 2020, at S1509. Chief Justice John Roberts responded: "Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous." Office of Public Information, Statement from Chief Justice John G. Roberts, Jr., March 4, 2020, at https://www.scotusblog.com/wp-content/uploads/2020/03/CJ-Statement-re-Schumer-remarks.pdf.

[44] See John Kruzel, Ocascio-Cortez to Clarence Thomas: Resign or Face Impeachment, The Hill, March 29, 2022, https://thehill.com/homenews/house/600145-ocasio-cortez-to-clarence-thomas-resign-or-face-impeachment/.

results; none of those messages, however, mentioned Justice Thomas or the Supreme Court.[45] A spouse's views or activities that are entirely divorced from any specific case do not approach even potentially constituting a Justice's own "Treason, Bribery, or other high Crimes and Misdemeanors," the Constitution's sole impeachment standard.[46] Ocasio-Cortez no doubt would prefer that Thomas was not on the Supreme Court, but her reckless demand is completely unconnected to the Constitution that she has sworn to support and defend.

Unlike the legislative branch, which has the power of the purse, or the executive branch, which has the power of the sword, the judicial branch must rely for its authority on "the perceived legitimacy of the courts and their role in our system of government."[47] This legitimacy, in turn, "rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law."[48] The title of this hearing implies that there is some kind of pre-existing lack of public confidence in the Supreme Court that requires "ethics and recusal reform" to address. The truth is that creating a false narrative about supposed ethics and recusal issues negatively affects public confidence in the Court.

The public, for example, has been led to believe that Congress has applied no recusal standards to the Supreme Court. Yet a federal 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." The statute actually lists specific categories of situations that require recusal.[49] The statute, however, focuses on the facts of particular cases rather than broad issues, subject matter, or connecting a dozen dots to create an imaginary connection to a case. That is the law on the books today.

Calls for Court "Reform." Eighty-five years ago, Attorney General Homer Cummings testified before the Senate Judiciary Committee in favor of President Franklin Roosevelt's Court-packing plan. He said: "The question of judicial reform is not a new one. Eminent judges, lawyers, statesmen, and publicists over periods of many years have complained of the defects of our judicial system and have sought to find remedies."[50]

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[45] See Analisa Novak, Why Ginni Thomas' Texts with Mark Meadows Could Be "A Tricky Area" for Congressional Investigators, CBS News, March 25, 2022, https://www.cbsnews.com/news/ginni-thomas-mark-meadows-text-messages/.

[46] U.S. Constitution, Article II, Section 4. See Stephen B. Presser, Standard for Impeachment, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/2/essays/100/standards-for-impeachment.

[47] Frances Kahn Zemans, The Accountable Judge: Guardian of Judicial Independence, 72 S. Cal. L. Rev. 625,626 (1999).

[48] Lewis F. Powell, Jr., Stare Decisis *and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281,286-87 (1990).

[49] These include where the judge has a "personal bias or prejudice concerning a party," a former colleague served as a lawyer in the case, the judge had "expressed an opinion concerning the merits of the particular case" or has a financial interest in the case, or the judge or a spouse is a party, lawyer, or material witness in the case.

[50] *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. (1937) (statement of Attorney General Homer Cummings). https://babel.hathitrust.org/cgi/pt?id=umn.31951d02113334i&view=1up&seq=5&q1=packing (last accessed March 4, 2022).

Court reform ideas or proposals come from many sources and take many forms.[51] Just last year, the Presidential Commission on the Supreme Court of the United States held multiple hearings with dozens of witnesses, and its report examined the debate over various reform ideas.[52] Framing policy or institutional change in terms of "reform" implies, without establishing, that some kind of change needs to be made, that some problem needs to be addressed. But that is not always the case; sometimes, "reform" turns out to be a solution in search of a problem or, worse, cover for an underlying agenda. Advocates for reform not only bear the burden of establishing a genuine problem that needs addressing but, when it comes to the courts, that a proposed reform will not undermine the separation of powers in general, and judicial independence in particular.

Judges and Representation. In a 1995 speech, Justice Stephen Breyer explained that "[t]he good that proper adjudication can do…is only attainable…if judges actually decide according to law, and are perceived…to be deciding according to law, rather than according to their own whim."[53] This requires a basic level of knowledge about our system of government in general, and the judiciary in particular, that current does not exist.

The latest annual survey by the Annenberg Public Policy Center, for example, showed that:

- Only a bare majority of Americans could name the three branches of government
- One-third knew the length of House and Senate members' terms
- Nearly one-fifth could not name a single right protected by the First Amendment
- Nearly one-fifth believed that Supreme Court decisions decided by a 5-4 margin are sent to Congress "for reconsideration"[54]

A public that knows little, or misunderstands a lot, about how the judiciary works is likely to evaluate courts and their decisions through the more familiar lens of politics and personal preference. This includes current demands for so-called "personal and professional diversity" in choosing judges. Biden has spoken in terms of groups being "represented" on the Supreme Court,[55] and Schumer argues that judges should apply the law "equitably" rather than "equally."[56] While the oath of judicial office pledges a judge to "administer justice without respect to persons, and to…impartially discharge and perform all the duties incumbent upon me,"[57] Vice President Harris defines equity as ensuring that everyone ends up in "the same place."[58] These are radically different concepts that a public unfamiliar with even the basics about the judiciary might fail to grasp.

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[51] See generally Jipping, *supra* note 28.
[52] Presidential Commission on the Supreme Court of the United States, Final Report, December 2021, at https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.
[53] Quoted and cited in Thomas L. Jipping, Legislating From the Bench: The Greatest Threat to Judicial Independence, 43 S. Tex. L. Rev. 141,152 (2001).
[54] https://www.annenbergpublicpolicycenter.org/2021-annenberg-constitution-day-civics-survey/.
[55] See, e.g., Harper Neidig, Biden Pledges to Nominate Black Woman to Supreme Court, The Hill, February 25, 2020, https://thehill.com/regulation/court-battles/484656-biden-pledges-to-nominate-black-woman-to-supreme-court/.
[56] Congressional Record, February 3, 2022, at S504.
[57] 28 U.S.C. §453.
[58] Harris tweeted this statement on November 1, 2020.

Conclusion

Judicial independence is more important, and the explicit and subtle threats to it are more troubling, than ever. Undermining judicial independence would deprive "the rule of law" of its meaning and disable that essential feature that distinguishes our judiciary from most others around the world. Court-packing, threatening the Supreme Court, attempts to demonize individual Justices, and other strategies reject what the Founders new was "peculiarly essential" to this system of government that has provided unparalleled liberty.

Mr. JORDAN. Mr. Paoletta, does it matter whether a Supreme Court justice asks questions or doesn't ask questions? Is that an ethical concern?

Mr. PAOLETTA. No, sir.

Mr. JORDAN. Yeah. Mr. Thomas, if he chooses to ask questions, God bless him. If he chooses not to, God bless him. He is a member of the Supreme Court. He can conduct himself as he wants and get to the decisions that he wants to get to. As was raised earlier I think by one of our colleagues on the Court, why do you think they would raise that?

Mr. PAOLETTA. To disparage Justice Thomas.

Mr. JORDAN. To keep doing what they started, what, 30 years ago?

Mr. PAOLETTA. Yeah.

Mr. JORDAN. Isn't this really, in your mind, Mr. Paoletta, this is about the Left continually coming after people who—conservative jurists who are being put on the Supreme Court. You can just go down the list, and the treatment that they—it started with Justice Thomas. Well, it started with Bork—we talked about that—but it started with Justice Thomas.

I remember, was it Justice Alito's wife who was in the row behind him I think, and moved to tears based on what they were doing to Justice Alito?

Mr. PAOLETTA. Yeah. I think they accused him of being a racist.

Mr. JORDAN. Yeah. Then, of course, we saw what they did—

Mr. PAOLETTA. Falsely accused him of—

Mr. JORDAN. Falsely accused. We saw what they did to Judge Kavanaugh. We saw what they did to Ms. Coney Barrett. Now, Justice Thomas, they are coming at him a second round. This is all about the Left's desire, and I said this in my opening statement—to pack the Court. Would you agree?

Mr. PAOLETTA. Yes. I would say they have been coming after him multiple times over the years. I think 2011 was the one with Obamacare, he needed to be impeached because Ginni Thomas designed to have an opinion and express it that it was a disaster, and Justice Thomas didn't recuse.

I think Professor Gillers agrees with me on that. These two gentlemen I think probably disagree with me that Justice Thomas should recuse. I think it is quite clear he shouldn't recuse.

Mr. JORDAN. Yeah. What do you think their ultimate motivation is? The Left's continual attacks. Just attacks that are so far out of the norm. Again, what happened to Judge Alito, what happened to Judge Thomas, what happened to Judge Kavanaugh, why are they so focused on this?

Mr. PAOLETTA. Number one, I think right now, I think they think the Court is going to be issuing a number of rulings that are going to wipe away a number of liberal, longstanding precedents.

I think it is—and to disparage to Court, and that is why I think that the poll numbers are down. One follows the other, okay? So, now they get to say the poll numbers are down; we need to do something with the Court.

I also think it is to send a message to the other conservative justices that nobody likes to be disparaged and caricatured—and de-

stroyed. It is not fun. You need to have an iron backbone like Justice Thomas does, in my opinion.

So, they know they will never bend him. I am certain of that, and I am certain that his opponents—they want to try to marginalize him, and they have failed at that utterly, in my view. I think it is to send a message to the newer justices that are up there.

Mr. JORDAN. That is always the goal. When the Left comes after people, when they try to disparage, when they put them in—what Bari Weiss described when she resigned from the—Bari Weiss wasn't on the Right. She was on the Left. When she resigned from *The New York Times*, because she couldn't offer an opinion that differed from the woke mob, she says because if you do, if you go against the group think, if you go—and you engage in wrong speech or wrong think, as she described it, you will face the digital Thunderdome. They will come after you, and it is all designed to chill speech of other individuals.

The Left is so—today's Left says, if you don't agree with them, you are not allowed to talk. If you try, they are going to call you names and try to cancel you. Again, don't take my word for it. Take someone on the Left—Bari Weiss' word for it.

You want to know how much they want to control speech and go after people who they disagree with? Just look at their reaction to what Elon Musk did this past week. The Left controls everything. They control everything. One platform on the social media—and all the social media platforms, one platform may now go to where they are actually fair, oh my goodness, the Left loses their mind because a guy who builds electric cars and believes in the First Amendment just bought a company. Wow.

So, that is what is at stake, and that is why this is so wrong, and they come after Justice Thomas in the name of ethics. It is so transparent what they are doing.

Mr. PAOLETTA. I agree with you. Justice Thomas has withstood it all, and he has been on the Court for 30 years, and he now has I think 15 or 16 former law clerks on the Federal bench, including Kat Mizelle, who just issued the order striking down the Biden mandates. So, his legacy is continuing on.

Mr. JORDAN. He is a great American and someone we should put up there as a role model for so many people, and yet the Left wants to come after him. It is wrong.

So, I appreciate you coming here today and defending him and defending the truth and the way our Constitution and the way our system is supposed to work.

With that, Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Jordan.

Mr. Sherman, how do you respond to the idea that it is somehow racist to express legitimate concerns about Justice Thomas' unethical conduct?

Mr. SHERMAN. Thank you for the question. Congressman, I firmly believe that multiple things can be true at the same time. I believe that Black men in America face racism, and that Justice Thomas likely has faced racism in his past. I also think that there is a litany of ethics abuses committed by Justice Thomas that raise significant questions about his conduct in his role as a Supreme Court justice.

I think his conduct with respect to the recusals in *Trump* v. *Thompson* and other cases that implicate not just his wife's conduct, (1) threaten our democracy; and, frankly, (2) differ from his approach to cases that have involved conflicts with his son. I think it is reasonable to question why Justice Thomas has chosen to recuse in cases where there is a minimal conflict risk with respect to his son, which I think was appropriate, but not chosen to recuse in a case where it is not just his wife's views, but it is that her conduct is implicated in the documents that were at issue.

The White House was talking about a Supreme Court strategy which would have to presume—include discussions about strategy with respect to Justice Thomas and certainly could have included information about Mark Meadows' communications with Ginni Thomas. So, I think it is highly pertinent for this committee, and I think it is, quite frankly, laughable to label those legitimate concerns as racist, just because Justice Thomas has faced racism in the past.

Mr. JOHNSON of Georgia. Thank you.

Mr. Roth, you have described Supreme Court justices taking lavish junkets, enjoying suites of rooms reserved for them and their guests, and generally enjoying benefits for which they do not have to pay and which they often do not have to disclose to the public.

Can you tell us why justices do not have to disclose these gifts?

Mr. ROTH. Sure. So, there is a personal hospitality exemption that the justices construed to be very broad. So, it is maybe not just staying, when Justice Ginsburg would go to New York, she would stay with her daughter, or Justice Breyer staying with his grandkids. The justices construe it to say—Justice Thomas construes it to say that, whenever he is flown on a private plane by a certain financier, who may be a friend of his but has also donated $5 million to the Republican Party, that counts as personal hospitality, and I don't have to put it on my annual financial disclosure report.

We know that even if it is not personal hospitality, and we think it is a trip that is covered by the Ethics in Government Act, which then translates to being reported on the financial disclosure report, we know that the justices are leaving things off them.

When we have done investigations into justices' trips, we have found instances where they are in a certain place at a certain time, speaking to a certain audience, and it is not personal hospitality, and it is not on the disclosure and we know that they have gotten those perks for free.

So, to me, it is just a pattern of many years of just saying, I am too good for this. I am above the law. Maybe the Ethics in Government Act doesn't apply to me. I think that through the 21st Century Courts Act and other legislation, we have an opportunity to change that.

Mr. JOHNSON of Georgia. Now, you have documented—your organization has documented numerous instances of Democratic-appointed justices engaging in these activities that they don't report and using this personal hospitality exemption to their benefit, to the detriment of the taxpayers and to the American people, who deserve to know who is paying for gifts for their Supreme Court jus-

tices. You have documented Democratically appointed and Republican appointed.

Mr. ROTH. Oh, yeah. Absolutely.

I mean, part of this is a numbers game, right? Since in my entire lifetime, and 15 years before that, there have been more Republican-appointed justices than Democratic-appointed justices, right?

So, it is just going to be natural that over time it is more likely that the Republican-appointed justices are going to have more of these potential ethical failings. So, it is not going after a specific justice or a specific party. I do think that some of the Justice Thomas examples are outside the mainstream of some of these instances of flouting the ethics rules.

This is something where we have seen over time both justices appointed by the Left and the Right have been "guilty" of these abuses. I think an ethics code and a recusal statute expansion would assist in ending that.

Mr. JOHNSON of Georgia. Mr. Sherman, are the types of inducements that justices receive coming from parties with business before the Court or from individuals seeking to influence the Court's rulings? Which, or both? Why would anyone try to offer free transportation, free hotel, and free meals? Why would anyone do that other than either they have business that is about to come before the Court or is in the bosom of the Court, and they are trying to influence the Court? Why else would they do this for justices?

They are doing it, by the way, claiming a tax deduction for business expense. So, the American people are paying for it, essentially. Why would any entity do that for a Supreme Court justice?

Mr. SHERMAN. I can't assign intentions to every entity, but it seems quite clear that the general motivation is, as you said, to ingratiate themselves with members of the Court, perhaps to introduce legal theories that may not be front of mind to have an audience for their members and their—and folks that support their legal ideology.

At bottom, whatever the motivations, it certainly creates an appearance problem that would lead a reasonable person to question the impartiality of justices that are going on these junkets, and, frankly, that aren't disclosing them, and that is exactly why the Supreme Court needs a code of conduct.

Mr. JOHNSON of Georgia. Professor Gillers, in light of what we have heard about these junkets and these trips, all-expense paid, not reported in many instances, what affect does this have on our democracy?

Mr. GILLERS. Well, of course, our point of reference is ordinary people and the kinds of connections they will make. So, the public will see this as giving the donor certain, however slight, but certain advantages before the recipient of the largesse. It is a cheap investment.

We talk about suites and travel, but in terms of the amounts of money at stake for people who litigate commercial cases in the Supreme Court, it is a pittance. So, from the public's point of view, remember, the public cannot do this. From its point of view, it looks like there is a thumb on the scale. That may not be literally true. Maybe that is unfair as it turns out, but that is how it will appear, and appearances are important.

Mr. JOHNSON of Georgia. Well, thank you. I appreciate all the Witnesses for your testimony today. I would remind everyone that the hearing was entitled "Building Confidence in the Supreme Court Through Ethics and Recusal Reform." That was the title of our hearing. I think we have largely stood by that in terms of substance of the hearing, and I want to thank the Witnesses for their appearance today.

Without objection, all Members will have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 6:42 p.m., the Subcommittee was adjourned.]

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