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THE SUPREME COURT

Reforms, Tenure And Nominations

ELISABETH NAVARRO

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Preface

Should the United States Supreme Court, the highest court in the United States and one of the most powerful judicial bodies in the world, abide by a uniform and binding set of ethics rules? Federal courts wrote and adopted an ethics code to bind themselves to better conduct but that code does not apply to the Supreme Court. If the justices of the Supreme Court will not act to safeguard their constitutional responsibilities as impartial judicial officers, then it is up to Congress to make laws governing the Supreme Court.

Under prevailing interpretations of the Constitution and longstanding historical practice, Supreme Court Justices enjoy life tenure. Chapter 2 discusses proposals to alter Supreme Court Justices' tenure. Congress could consider whether to impose an age or a term limit, as well as how long the Justices' tenure will last.

Chapter 3 offers an overview of Judge Ketanji Brown Jackson's jurisprudence. It reviews broad areas of judicial philosophy that may apply in many cases, such as constitutional interpretation, statutory interpretation, and stare decisis.

Chapter 1

Building Confidence in the Supreme Court through Ethics and Recusal Reforms*

Committee on the Judiciary

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,

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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 circulating 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:]

House Panel to Explore Impeachment, Judicial Ethics in Wake of Ginni Thomas Texts

by E mily 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:]

Statement of the Project on Government Oversight, before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

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]

[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

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.

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

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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].

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]

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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.

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.

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

[7] Roberts, "2011 Year-End Report on the Federal Judiciary," 4 [see note 5].

[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.

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.

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

[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.

[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].

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 suggests otherwise — the court may be more inclined to seek common ground

[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.

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

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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.

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 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]

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[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 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.

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 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.

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[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].

[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.