

SUPREME COURT ETHICS REFORM

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED EIGHTEENTH CONGRESS

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SUPREME COURT ETHICS REFORM

TUESDAY, MAY 2, 2023

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room 216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Welch, Graham, Grassley, Cornyn, Lee, Cruz, Hawley, Cotton, Kennedy, Tillis, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order. Today, the Senate Judiciary Committee considers the issue of Supreme Court Ethics Reform.

Being a Federal judge is a position of great honor and power, but above all, it is public service. We entrust judges with administering equal justice under the law. It is critical to our democracy that the American people have confidence that judges cannot be bought, or influenced, and that they are serving the public interest, not their own personal interest.

Over the course of several decades, Congress and the judicial branch have created a system of ethics laws and standards for Federal judges that lay out the clear rules of the road. These rules promote transparency and disclosure. They place guardrails on conflicts of interest, provide mechanisms for investigation and enforcement, and ensure accountability for misconduct. They strengthen faith in the fairness of the courts and the judges who serve on them.

We are here today because the Supreme Court of the United States of America does not consider itself bound by these rules. I invited the Chief Justice to join this conversation. Last week, he sent me a letter declining to testify at today's hearing, and he said, quote, "separation of powers concerns and the importance of preserving the judicial independence."

The reality is that sitting Justices have testified at 92 congressional hearings since 1960. And I even offered the Chief Justice the opportunity to designate someone else on the Court to testify. But I'm more troubled by the suggestion that testifying to this Committee would somehow infringe on the separation of powers or threaten judicial independence. In fact, answering legitimate ques-

tions from the people's elected representatives is one of the checks and balances that helps preserve the separation of powers.

In his letter last week, the Chief Justice also sent what he called a Statement of Ethics Principles and Practices. It was a document that was attached to his letter. It is an extraordinary document, not in a good way. It makes clear that while the Justices are fine with consulting with certain authorities on how to address ethical issues, they do not feel bound by those same authorities.

Much of the document explains why Justices think they should not be treated the same as other Federal judges when it comes to ethics, and it stresses that recusal decisions are made by individual Justices alone, with no review of their discretion. The Chief Justice's letter and Statement of Principles are a defense of the status quo, but they are oblivious to the obvious.

Last month, we learned about a Justice who for years has accepted lavish trips and real estate purchases worth hundreds of thousands of dollars from a billionaire with interest before the Court. That Justice failed to disclose these gifts and has faced no apparent consequences under the Court's ethics principles. That Justice claims that lengthy cruises aboard a luxury yacht are personal hospitality and are exempt under current ethical standards from even being reported.

The fact that a Texas billionaire paid more than \$100,000 for a Justice's mother's home also seems to be an acceptable example because the Justice insists that he lost money in the transaction. How low can the Court go? One of our witnesses today is going to say that what I just described to you is hallucinating misconduct. I think it's pretty clear to most objective people this is not the ordinary course of business, nor should it be a standard for those of us in public service.

We wouldn't tolerate this from a city council member or an alderman. It falls short of ethical standards we expect of any public servant in America. And yet the Supreme Court won't even acknowledge it's a problem. The Chief Justice's letter doesn't mention it. Meanwhile, the rest of the Federal judiciary, and the executive and legislative branches have codes of conduct designed to prevent even the appearance of fraud, abuse, or corruption.

[Poster is displayed.]

Chair DURBIN. As this chart tells us, the Supreme Court is an outlier on the basics.

This is untenable. Ethics cannot simply be left to the discretion of the Nation's highest court. The Court should have a code of conduct with clear and enforceable rules so both Justices and the American people know when conduct crosses the line. The highest court in the land should not have the lowest ethical standards. That reality is driving a crisis in public confidence in the Supreme Court. The status quo must change.

For those who might suggest that my concern is driven by judicial activism against the current Court's conservative philosophy, I and other Members of this Committee wrote the Chief Justice 11 years ago and urged the Court to adopt a code of conduct. I'm going to put the copy of that letter from February 13, 2012, into the record.

[The information appears as a submission for the record.]

The Supreme Court should step up and fix this themselves. For years they've refused. And because the Court will not act, Congress must. Today we'll hear from a panel of expert witnesses about the kinds of reforms that are needed. And let's be clear, Congress not only has the authority to legislate in this area, but the responsibility.

Taxpayers' dollars pay for our Federal judiciary, including the Supreme Court. And Congress passes many laws that shape the High Court, from the annual spending bills that pay the Justice's salaries, to the Federal statute that establishes the words of the oath of office the Justices take.

I appreciate the Chief Justice responding to my letters, and responding to questions from my Democratic colleagues that I sent about the Statement of Principles, but the answers we received further highlight the need for meaningful Supreme Court ethics reform. We have the right and rationale to enact such reform, and that's what we will pursue.

I want to say that this hearing is being held jointly with the Full Committee and the Subcommittee on Courts, chaired by Senator Whitehouse, who, joined with Senator Kennedy, I believe, in making opening statements. At this time though, I turn it over to the Ranking Member, Senator Graham.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. I, too, have expressed a desire for the Court to be more transparent. To have rules that the public can relate to. I think we've been talking about that for quite a while. I have never suggested that the Congress should take over the Court's ability to regulate itself. I do not believe that is wise.

And the letter that was received by the Committee was not just signed by Justice Roberts. It was signed by all of the Judges. All of them have the same concern. Not just one. So where do we go and what are we trying to do?

I think here's what you're trying to do on the Democratic side. Remember when Senator Schumer went to the Court and started yelling at everybody in the Court? Not everybody, just pretty much our folks.

[Poster is displayed.]

Senator GRAHAM. "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."

Awful decisions, we all have been in the boat of getting an outcome from the Supreme Court we wouldn't like.

But the Majority Leader of the United States Senate went before the Court, literally out in front of it, and threatened two Judges. And Maxine Waters says, "You ain't seen nothing yet." So we can talk about ethics, and that's great. But we're also going to talk about today of a concentrated effort by the left to delegitimize this Court and to cherry-pick examples to make a point.

The New York Times wrote an article a couple of days ago suggesting that George Mason Law School was up to an effort to take

over the Court by lavishing them with trips and influencing their decision-making process by sponsoring trips overseas while they were on break.

The New York Times did not tell us about Justice Sotomayor's travel to Florence, Italy. They did not tell us about efforts. Justice Kennedy took a 3-week multi-trip to Salzburg, Austria; San Francisco; Aspen, Colorado—paid for by the Aspen Institute and University of the Pacific. Justice Sotomayor and Justice Ginsburg traveled to Florence, Italy, on the dime of the New York University.

Justice Jackson was reimbursed by the University of California, Berkeley, in 2016 and 2014 for traveling to the Aspen Institute. Chief Justice Roberts was reimbursed for travel to London to teach a class on the history of the Supreme Court to students of the New England School of Law. So universities throughout this country have been paying for trips of judges.

But if you read The New York Times, you wouldn't know that, would you?

[Poster is displayed.]

Senator GRAHAM. I can't say I read The New Republic, but this is a headline: "The Democrats Need to Destroy Clarence Thomas's Reputation." That's sort of what we're here about. Well, it's not going to work. This assault on Justice Thomas is well beyond ethics. It is about trying to delegitimize a conservative Court that was appointed through the traditional process.

Your response has been to pack the Court. Virtually every Member of the Democratic Caucus, except maybe one or two, are for expanding the number of Judges to dilute the conservative majority that exists today. So, Mr. Chairman, from our point of view, this is not going to work. You can write all the articles you want to write, you can take all the shots at the conservative Justices you want to take, you can picket before their houses, and it's not going to stop people from doing their job.

This is an unseemly effort by the Democratic left to destroy the legitimacy of the Roberts Court. It's put people at risk. It's put their personal safety at risk. And if you want to talk about making the Court a better institution, I'll be glad to work within that regard. If you want to talk about destroying the Court, count me out.

And about conflicts of interest, Justice Kagan, who's a fine person, was the dean of Harvard Law School. She's raised a half a billion dollars for the law school when she was dean. That's sort of her job. After she left, she's been trying to raise money for Harvard Law School. There's a case involving Harvard before the Court. She's not going to recuse herself. And I'm not saying she should. I'm just saying there's a very selective outrage here.

And from our point of view on this side of the aisle, we're going to push back as hard as we can and tell the American people the truth about what's going on here. This is not about making the Court better. This is about destroying a conservative Court. It will not work.

Chair DURBIN. Thank you, Senator Graham. I might note that the letter that I sent 11 years ago to the Court was certainly not any indication of current feelings about Court opinions. Another person who's been on this subject for many years is the Chairman

of the Courts Subcommittee, Sheldon Whitehouse of Rhode Island. I recognize him now.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Chairman. We are here today because the Supreme Court is playing out of bounds of the ethics rules for Federal judges. Justices read the ethics rules in unique and eccentric ways, and when they're caught out of bounds, they refuse to allow any investigation of the facts.

The personal hospitality problems I've been pursuing began with Justice Scalia, who took more than seven dozen undisclosed hunting vacations. Most people know of two. The one where he was on the Air Force Two manifest with Dick Cheney, and the one where he died. There were 70-plus more.

It was systematized. Some intermediary would ask the owner of an expensive resort, often a commercial property, to extend to Scalia a personal invitation to the resort, even where the owner was someone he'd never met. Scalia treated as personal hospitality because of the personal invitation and failed to disclose the vacations. Gun industry advocates, fossil fuel folks, and Republican political figures often tagged along. No reasonable reading of the term personal hospitality would cover this. But the Supreme Court let this go on for years.

When I challenged the Court about this practice, Exhibit 1, I got a blow-off letter, Exhibit 2, basically, "Nothing to see here," so then I asked the circuit courts what they thought about this conduct. I went 0 for 13 on answers—oh, that would be Exhibit 3. I went 0 for 13 on answers so I then sent another letter saying I hope their silence didn't indicate some kind of coordinated obstruction, Exhibit 4.

I also scheduled a Subcommittee hearing. Presto, I was told the Financial Disclosure Committee would examine how the exemption was interpreted, that's Exhibit 5. Almost a year later, 2 weeks before the recent news about Justice Thomas broke, the Judicial Conference updated its guidance to clarify that this sort of nondisclosure violates the law, Exhibit 6.

I have no evidence that any Federal judge outside the Supreme Court ever used the personal invitation trick. And the Judicial Conference, made up of other judges, firmly shut it down. Regular judges would be loath to use that trick because a complaint about it would go into a proper process and would be investigated and measured against the law and the ethics code. And a conclusion would be reached. And that conclusion could be embarrassing.

Only Supreme Court Justices refuse to allow their conduct to be investigated or reviewed. My bill would fix that. Here's an example of the no investigations problem. The key fact to determine whether Justice Thomas was bound by law to recuse himself from the first January 6 Committee case, was what he knew about his wife's insurrection activities and when he knew it.

On that fact, the lawfulness of his initial recusal decision turns. Yet Thomas has never been officially asked that question. It's a cover-up in plain view. The Supreme Court alone among Federal courts is okay with that. My bill would fix that.

Which brings us to Justice Thomas' recent nondisclosure of supposed personal hospitality from a right-wing billionaire and its problems. First problem, private jet travel is not in the personal hospitality exemption, which is limited to food, lodging, and entertainment, Exhibit 7—some textualist, by the way.

[Poster is displayed.]

Senator WHITEHOUSE. Second problem, Thomas said it was okay because he'd asked colleagues. But that Financial Disclosure Committee, it's there to ask about financial disclosure. Setting aside that its name should give a clue, Thomas knew the Committee existed because concerns about his yacht and jet travel gifts from this billionaire were referred there in 2011, after some of these gifts were first revealed in this New York Times story, Exhibit 9.

[Poster is displayed.]

Senator WHITEHOUSE. Third problem, there's no legal way not to disclose the property acquisition in Georgia.

[Poster is displayed.]

Senator WHITEHOUSE. Fourth problem, some of this personal hospitality involve people dedicated to turning the Court into a tool for right-wing billionaires, namely Leonard Leo. This guy doesn't have business before the Court, his business is the Court. This disclosure mess has again been referred to the Financial Disclosure Committee, which raises the question of the previous referral to that same Committee of the same billionaire's gifts to Thomas of yacht and jet travel.

The rules seem to require the Committee to report its findings to the Judicial Conference. The records of the Judicial Conference are public, and the records of the Judicial Conference contain no mention of any such report. So what became of the 2011 referral? Did anyone intervene? Is the Committee still considering the 2011 referral more than a decade later? There is much yet to learn. Which is why last week, I sent a letter to the courts asking for further answers, Exhibit 10.

Three things are needed to fix all this—better enforcement, better recusal rules, and better disclosures. My bill would do all three. I thank Chairman Durbin for this joint hearing and look forward to getting to the bottom of this mess. Until there is an honest ethics process at the Supreme Court, these messes will continue. The Court has conclusively proven that it cannot police itself. *Nemo iudex in sua causa*. I ask unanimous consent that my exhibits be made part of the record.

[The information appears as submissions for the record.]

Chair DURBIN. Without objection. We now will hear from Ranking Member of the Courts Subcommittee, Senator Kennedy of Louisiana.

**OPENING STATEMENT OF HON. JOHN KENNEDY,
A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator KENNEDY. Thank you, Mr. Chairman. Americans may be poorer under the Biden administration, but they are not stupid. They know what's going on here. I remember the Democratic Leader's words of March 4th, 2020, on the steps of the United States Supreme Court like they were yesterday, "I want to tell you, Gorsuch," he said—not Justice Gorsuch—Gorsuch. "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." Wow. Just, wow.

I think Matthew 12:36 is correct, "For by thy words you shall be justified, and by thy words you shall be condemned." Now, the sad truth is that some, not all, some of my Democratic colleagues have been on a crusade to undermine the United States Supreme Court's legitimacy and the credibility of the Federal judiciary for years.

Today's hearing is just the next chapter in their Federal power grab, and they've invited cameras. It's worth remembering the very real persecution that some Democrats have levied on very good people. It started with the savage destruction of Professor and Judge Robert Bork, which even *The Washington Post*, for God's sakes, *The Washington Post*, said was a case of sentencing first, verdict afterwards. In other words, they gave him a fair and impartial firing squad.

Then we saw the high-tech lynching of Justice Clarence Thomas. Then, for the first time in history, they weaponized the filibuster to kill Mr. Miguel Estrada's nomination and they also demonized Justice Janice Rogers Brown, a very fine person.

When the United States Senate confirmed three new Supreme Court Justices, which the loon wing of the Democratic Party loathed, the campaign of threats ratcheted up. You remember the shouts, "Let's pack the Court," they said, "Let's pack the Court."

And the political threats of some of the highest officials in our Government fueled physical threats against the Justices. And we know that. "You have released the whirlwind," the Democratic Leader said. Incensed protesters took to the streets, not outside Congress, not outside the Court, but outside the homes—the homes of Justice Roberts, Justice Kavanaugh, Justice Thomas, and Justice Barrett.

Federal law prohibits this intimidation, but the Biden Justice Department allowed it. "You will pay the price," the Democratic Leader said. In that spirit, angry protesters publicized the location of the school that Justice Barrett's children attend. "You won't know what hit you," the Democratic Leader said. A man with a gun, ammunition, knife, pepper spray, and zip ties went to a Justice's home to assassinate him. Actually, his stated goal was to murder three Justices. Not so suddenly, the ends justified the means for activists, even inside the Court itself.

The *Dobbs* decision was not leaked by a left-wing blogger. Why? That's worth asking? You don't need to be Einstein's cousin to figure it out. They aren't getting their way. They aren't getting their way, so they want to change the rules. But the Constitution isn't a game, folks. And now some Democrats want Congress to override the Supreme Court of the United States and apply rules to its Justices.

The constitutional separation of powers means that no branch of the Federal Government can dictate how another should govern itself. That's blackletter law. Now, why? This is to protect the people from abuse. The Framers insulated the Federal judiciary from political control to ensure that the Justices would decide cases impartially. Impartially. Without fear of the kind of retaliation that

fills the pages of some, not all, but some left-of-Lenin Democrats' playbook.

Do my colleagues want the United States Supreme Court to tell Congress how to police itself? Even if Congress wrote a code of ethics for the Supreme Court, the Court could rightly rule that code is unconstitutional. None of the laws we make here trump the United States Constitution. What's more, some Democrats want to use the lower courts as a cudgel against the highest court in the land by giving circuit judges the power to rule on whether Justices should recuse themselves.

Consider the conflicts of interest and the confusion that that would breed. Unless you peaked in high school, you must know they will be breathtaking. Now, the absence of an ethics code written by Congress in statute doesn't mean that Justices lack guidance or accountability. Justices and judges routinely consult the existing code of conduct, and Federal law already requires recusal in certain circumstances like bias or financial interest.

We all know that. The Justices are also subject to strict financial disclosure rules just like my colleagues here. Not only is this Democratic proposal unconstitutional, it is unnecessary. The attacks on conservative Justices are targeted. They're exaggerated. The alarmism is affected. The danger isn't that rogue Justices are operating without ethics. It's that Democrats aren't winning every fight, and they find that reality intolerable.

I've been disappointed by Supreme Court opinions too, but my Democratic colleagues should fill out a hurt feelings report and move on for the sake of the Constitution. Look, the agenda-driven story here is that Justice Thomas has a rich friend who had no business before the United States Supreme Court.

For context, let's recall that history is littered with examples of public officials failing to disclose their every transaction. We can acknowledge it's required by law. It is. We can acknowledge it's the right thing to do. It is. But we can do that without maligning each Justice's motives and the entire institution's credibility, for God's sakes.

You know who else amended their disclosures because of inadvertent admissions? Justice Ruth Bader Ginsburg, Justice Stephen Breyer. Two good people. Justice Jackson made multiple amendments 3 days—3 days after President Biden nominated her. Not one Senator brought that up during her confirmation hearings. Not one of my colleagues here walked into her hearings with the buckets of mud that they've thrown against Justice Thomas. Not one. Nor should we have.

In the last month, some, not all, but some Democrats and their media allies have hyped up attempted hit pieces on every Republican-appointed Supreme Court Justice except for one: They've tried going after Justice Kavanaugh for buying baseball tickets; Justice Alito for having dinner with people who gossip; the wife of Chief Justice Roberts for hiring good lawyers; Justice Gorsuch for selling land in an LLC which he properly disclosed to a major donor to the Democratic Party, for God's sakes, who he's never even met; and Justice Thomas for having a rich friend. Justice Barrett, if you're listening, I hope you don't have library books overdue. If recent history is any indicator, you're next.

Today's hearing is an excuse to sling more mud at an institution that some, not all, some Democrats don't like because they can't control it 100 percent of the time and that's a fact, and everybody in this hearing room knows that. Until they get the outcome they want in every case, I fear they are going to continue to slander it in an effort to take control of it. And I pray to God I am wrong. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Kennedy. I will repeat what I've said before because I think it bears repeating. Violence against any public official, right or left, Democrat, Republican, or Independent is unacceptable. We have tried in this Committee to pass legislation to make that point clear and enforceable under the law. When it comes to the Supreme Court Justices and others, we have an obligation to protect them. And it was Attorney General Merrick Garland who has provided round-the-clock security for Supreme Court Justices from the U.S. Marshals at their home, which I think is entirely proper. So there's no question about the bipartisan commitment to their safety.

At this point, we'll introduce the three Majority witnesses and turn it over to Senator Graham to introduce the Minority witnesses.

The Honorable Jeremy Fogel served as U.S. District Judge for the Northern District of California from 1998 until 2018. From 2011 to 2018, served as Director of the Federal Judicial Center, the research and education agency of the judicial branch. It supports the efficient, effective administration of justice. Judge Fogel served from 2004 to 2011 on the Judicial Conference Committee on Financial Disclosure. Before his confirmation to the Federal bench, he was a State court judge in California.

Kedric Payne is the vice president, general counsel, and senior director of ethics at Campaign Legal Center. Previously advised in executive branch ethics law as deputy general counsel at the U.S. Department of Energy; enforced legislative branch ethics laws and standards of conduct as a deputy chief counsel at the Office of Congressional Ethics; clerked on the Southern District of New York, practiced law at Cravath, Swaine; and I want to congratulate you on your brand-new baby. Two-weeks-old. I can imagine how difficult it is to pull yourself away from the family. We appreciate the fact that you're here.

Professor Amanda Frost is the John Ewald Professor of Law at the University of Virginia School of Law. She writes and teaches in the fields of constitutional law, judicial ethics, and immigration. She authors the Academic Round-up column for the SCOTUSblog. Prior to entering academia, served on the U.S. Court of Appeals for the D.C. Circuit, and worked as a litigator for Public Citizen. Now, I'll turn to Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

We have former Attorney General Michael Mukasey. Judge Mukasey served as Attorney General of the United States from November 2007 to January 2009, where he oversaw the Department of Justice and advised on critical issues of domestic and international law. Following his time as Attorney General, Judge Mukasey returned to private practice in New York, focused primarily on internal investigations, independent board reviews, and

corporate grievance. From 1988 to 2006, Judge Mukasey served as a district judge of the United States District Court for the Southern District of New York, becoming chief judge in 2000. From 1972 to 1976, he served as assistant U.S. attorney for the Southern District of New York, and as chief of the Offices of Corruption Unit from 1975 to 1976. He received his law degree from Yale in 1967, and his B.A. from Columbia College in 1963.

Mr. Thomas Dupree is a partner at Gibson, Dunn & Crutcher. Thomas Dupree is a partner, and co-chairs the firm's nationwide appellate and constitutional law practice group. He's a seasoned litigator who has argued in all 13 circuits as well as the U.S. Supreme Court. He's previously served at the Justice Department during the Bush administration. He served as Deputy Assistant Attorney General for the Civil Division, and later became the Principal Deputy Assistant Attorney General. He was responsible for managing the Government's most significant cases involving constitutional matters, virtually, all of Federal agencies, The White House, and senior Federal officials. He has testified for Congress on constitutional matters numerous times. He has graduated from the Williams College and the University of Chicago Law School, where he served as editor at the University of Chicago Law Review. He clerked for Judge Jerry Smith at the U.S. Court of Appeals for the Fifth Circuit. Thank you.

Chair DURBIN. Thanks, Senator Graham. After the witnesses are sworn in, they'll each have 5 minutes to make a presentation. Then Members will have 5 minutes to ask, and I ask the witnesses to please stand and raise your right hand.

[Witnesses are sworn in.]

So let the record reflect that all five witnesses have answered in the affirmative. The witnesses will be called in the order they're seated, and first will be Honorable Jeremy Fogel. Judge Fogel. Make sure your—

Judge FOGEL. Yes. Thank you.

Chair DURBIN [continuing]. Mic is on?

Judge FOGEL. Got it.

**STATEMENT OF HON. JEREMY FOGEL, EXECUTIVE DIRECTOR,
BERKELEY JUDICIAL INSTITUTE AND FORMER U.S. DISTRICT
JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA,
UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL,
WASHINGTON, DC**

Judge FOGEL. Thank you, Chair Durbin, Ranking Member Graham, Members of the Committee, it's an honor to be here. Thank you for inviting me. I also want to acknowledge and say how honored I am to be here with my fellow witnesses. I think we all have something to contribute to this conversation.

As Chair Durbin said, my name is Jeremy Fogel. I am a retired judge of the United States District Court for the Northern District of California. I served as a Federal judge for 20 years, and for 7 years as Director of the Federal Judicial Center.

And relevant to what we'll be discussing today, I worked very closely with the Judicial Conference and its committees when I was FJC Director. My primary responsibilities were overseeing policy-related research and educational curriculum for the judicial

branch, including judicial education about ethical standards and financial reporting requirements.

The Chief Justice chaired our governing board. I had regular contact with him and with the circuit and district courts' leadership. And I'm very pleased to say I have collegial relationships with judges all over the country of all judicial philosophies. It's something that's very meaningful to me.

Before being appointed as Director of the Federal Judicial Center, I was a member of the Judicial Conference Committee on Financial Disclosure for 7 years. I acquired substantial knowledge of the Ethics and Government Act and its application to judicial officers, including the redaction authority that's used to protect filers and their families.

So the principal point of my testimony is that I think the Court does need greater transparency in the way it engages with judicial ethics, and in this, I agree with Senator Graham. I want to be clear about why I'm here today. I am not here to question or criticize the conduct of any Justice, and it's not my purpose to take sides in a political debate which is an odd thing to say when one is in Congress, but it's truly where I'm coming from.

I spent 40 years of my professional life avoiding partisanship. I treasure my relationships with judges across a broad range of political persuasions, and I have great respect for the Court as an institution, and for the Justices with whom I've had the privilege of interacting in the course of my career.

I'm particularly grateful to Chief Justice Roberts for his wise counsel and steady support during my time at the FJC. From a personal standpoint, given those relationships, and given the respect I have for the judges and Justices, I know it's awkward for me to be here. And I do not doubt the sincerity of the submissions that the Chief and the Justices of the Court have made to this Committee. I think they are given in great sincerity.

I think I'm here because I think more is needed. Over the decades, the Court has been our most trusted Government institution, far outpacing the legislative and executive branches in polls measuring public confidence. And that status has eroded significantly. Only a decade ago, two-thirds of Americans said they had confidence in the Court, and now it's exactly opposite. About two-thirds say that they have little or no confidence in the Court. And some of that erosion has had to do with controversy surrounding decisions. I think one would be naive not to say that.

But there are also other factors at work. There's a persistently hyperpartisan political environment, an increasingly contentious confirmation process, the near disappearance of civics curriculum from our schools and the pervasiveness of social media as a source of misinformation and disinformation about the law, the judicial process, and the judges and Justices to whom that process is entrusted. In this fraud environment, I believe that the absence of a formal structure for defining and validating the ethical rules governing the Supreme Court Justices is untenable.

Too many Americans already think that the Justices decide cases based on their political preferences and alliances rather than the law. Lack of clarity about the Justices' ethical obligations only feeds that perception. Every other judicial officer in our country,

whether State or Federal, and regardless of the type of court on which they serve, is guided by explicit ethical standards and is subject to at least some degree of oversight to assure their compliance. The same is true for virtually all officials in the legislative and executive branches.

While people familiar with the inner workings of the Federal judiciary can read the Court's submission of this Committee and admire, as I do, the care and nuance with which it has been crafted, I fear that for everyone else, the processes and considerations that that submission details are a black box.

How and when do the Justices consult the sources described? What weight do those sources receive? Who, if anyone, not affiliated with the Court is directly available to offer detached and independent judgment and advice? And most importantly, what procedures have been placed to assure an appropriate degree of transparency that's consistent with the principles of decisional independence and judicial security?

In his year-end report in 2011 and in his recent submission, the Chief Justice has explained how the Supreme Court differs from other Federal courts, and why it would be inappropriate for it simply to adopt the identical code of conduct applicable to all other Federal judges. I agree with him about these points, but that doesn't mean that the Court should have no formal code at all. That it couldn't adopt a modified code that accounts for these differences.

For example, given the significantly greater impact of recusals on a Court with only nine members and no ability to draw upon potential replacements, the potential provisions of a modified code might identify and weigh factors for and against recusal differently.

Because of its unique position in the judicial branch, and the need to avoid a review procedure that might compromise its decisional independence or the security of its members, the Court could designate a panel of retired judges with deep experience and unquestioned integrity to provide it with confidential advice as to whether an act, omission, or relationship raises an issue under the code.

The point is that a formal code of conduct would provide clearly stated, visible rules and procedures to which the Justices are expressly committed. Adoption of such a framework wouldn't make the controversies about the Court or its decisions disappear, but it would be a statement to the American people that their faith in the Court's adherence to core ethical principles matters. It also would reflect a recognition that given the outsized importance of their role, the Justices should—in the words of former judge and noted conservative Michael Luttig—be bound by higher standards than other Justices.

Having seen firsthand the impressive ability of the Court in the Judicial Conference to develop rules of procedure that have made our Federal courts a model for other legal systems both here and abroad, I have every confidence that such an effort would produce a carefully balanced framework of high quality and would represent a significant step forward. Thank you very much for the honor of appearing before this Committee.

[The prepared statement of Judge Fogel appears as a submission for the record.]

Chair DURBIN. Thanks, Judge Fogel. General, Judge Mukasey, welcome back to the Senate Judiciary Committee. Please proceed.

STATEMENT OF HON. MICHAEL B. MUKASEY, FORMER UNITED STATES ATTORNEY GENERAL AND FORMER U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, NEW YORK, NEW YORK

Judge MUKASEY. Thank you, Mr. Chairman. Chairman Durbin, Ranking Member Graham, Members of the Committee, I thank you for inviting me to testify today, and to share my thoughts on issues surrounding Supreme Court Justices' ethics rules, and their financial disclosures.

I am a retired partner and of counsel at the law firm of Debevoise & Plimpton. The views I express today are my own. They do not represent the views of the firm. I served as Attorney General under President George W. Bush from 2007 to 2009, and as a U.S. District Judge for the Southern District of New York from 1988 to 2006.

I would like to deal today with two topics. One is policy principles relating to Supreme Court governance. The second relates to particular issues that have become current insofar as it's possible to determine the facts from publicly available information.

As to policy, I believe that basic principles of the separation of powers mean that the Court, as a separate branch of Government and the only Court specifically provided for in the Constitution, is solely responsible for its financial disclosure and ethics rules. Just as Congress establishes the rules that govern the conduct of its Members, and just as conflict-of-interest statutes that apply generally to Government employees do not apply to the President or the Vice President. It's basic to the structure of our Government that the executive, legislative, and judicial branches remain separate.

It is the Supreme Court and not the Congress that has the constitutional prerogative to decide whether to adopt a formal code of conduct governing the individual Justices. It should go without saying that if Congress cannot compel the Court to adopt a formal code of conduct governing the individual Justices, neither may Congress prescribe such a code itself.

A law compelling the Court to adopt such a code or purporting to impose one legislatively, would violate the principle of separation of powers, and would also be unworkable inasmuch as there is no authority other than the Justices themselves to apply such a code.

I am told of proposals to delegate issues of recusal of individual Justices to a Court employee, or to a panel of retired judges. Here, my own experience as a judge may be instructive. Recusal decisions are fundamentally judicial decisions, and a judge is as much obligated not to recuse when recusal is not warranted as to recuse when recusal is warranted. This is especially compelling at the Supreme Court level because Justices cannot be replaced by other judges as if the Court were a professional baseball team calling up minor league players to fill gaps in the roster.

That's not to say that there are no principles and practices that in reality, in life truth, govern the conduct of the Justices. As Chief Justice Roberts wrote to the Chair of this Committee on April 25, there is a Statement of Ethics Principles and Practices to which every single one of the current Justices have subscribed. And indeed, he attached that statement to his letter. That statement itself covers the sources judges use when analyzing ethical issues in general, and discusses a variety of topics including financial disclosure and recusal in particular.

The statement is more than two single-space pages in length, and I would not burden the Committee with a recitation of its terms or purport to summarize it. However, the statement notes that since 1991, Supreme Court Justices have followed the substance of the Judicial Conference Committee on Financial Disclosure Regulations that govern lower court judges, and file the same annual financial disclosure reports as other Federal judges. And by recent legislation signed by the President, those reports are public.

The statement itself notes that the Judicial Conference Committee reviews information in these reports and requests additional information when appropriate. It also provides ongoing guidance. And in March, it provided additional clarification on the scope of, quote, "personal hospitality exemption" to the disclosure rules. That clarification provides an easy transition to particular issues that relate to Justice Thomas, and I base my discussion of those issues on information generally available to the public.

Justice Thomas has said that he and Harlan Crow have been close friends for many years, over 25 years. That Mr. Crow is in the construction business, does not have matters before the Court. There's one trivial exemption to the last point, which I mention only because it shows how far some critics have gone. It appears that in one case, a business with which Mr. Crow is affiliated opposed an application by its adversary for a writ of certiorari. And the writ was denied.

Such applications are reviewed and summarized by a panel of clerks, not by the Justices themselves. It takes four votes to grant certiorari. So that if Justice Thomas had recused himself in that case, the result would have been identical. Denial of certiorari.

Justice Thomas has said that when accepting travel and vacation invitations from Mr. Crow, he consulted others, including colleagues, on whether applicable rules—rules applicable at the time—would prescribe including those in his financial disclosure forms. He was advised that the personal hospitality exemption applied and that such accommodations need not be included.

As the Chief Justice noted, the Judicial Conference Committee recently provided a clarification of that exemption that appears to confirm that the advice that Justice Thomas followed earlier was correct. And Justice Thomas has said that he will be guided by the new clarification and will include such travel and vacation accommodations in all future reports.

In addition, Mr. Crow bought from Justice Thomas and his family three parcels of property in Savannah, Georgia. The Savannah parcels had included two rental properties, but those were torn down. Justice Thomas' mother, who was at least in her mid-80s at the time of the transaction, lives in the remaining house which has

been improved over the years, and which did not have to be reported as a rental property because it was the Justice's mother's home. She holds a lifetime occupancy right and lives in the property to this day.

Mr. Crow has said that he purchased the childhood home of Justice Thomas with the intention to convert it into a museum of sorts to tell the story of Justice Thomas' life. The total for the parcels was \$133,600, of which a third was Justice Thomas' share. That represented a capital loss to Justice Thomas.

However, because the transcript was for more than \$1,000, Justice Thomas was obligated to report it on his financial disclosure form, but did not do so because he mistakenly believed that he did not have to report a transaction in which he suffered a loss. He has said he intends to amend the financial disclosure form for the relevant period.

It bears mention that Justice Thomas will not be the first Justice to amend his financial disclosure forms. Justices Breyer and Ginsburg are among those who have done so without so much as the batting of an eye and no doubt will not be the last.

Recent criticism of Justice Gorsuch are also meritless. He sold an interest in a vacation home to a lawyer he had never met, who is a large contributor to Democrats, whose firm has litigated a dozen cases before the Court, winning eight and losing four. The merits of these cases have not been discussed by these critics, nor have they indicated whether Justice Gorsuch wrote an opinion in any of them, cast a deciding vote, and if so, with what result. The lawyer in question says he did not know that Justice Gorsuch was the seller until an offer had been made. That's the story. Period.

Criticism has progressed, if that's the word, from meritless as to Justices Thomas and Gorsuch, to ludicrous as to Justice Alito and others with the claim that the academy is exerting an improper conservative influence on the Court by hosting conservative Justices to teach or lecture.

Apart from the history of similar invitations to liberal Justices, anyone even slightly familiar with the current political climate at law schools such that even Scalia Law School at George Mason University had to host Justice Alito by Zoom rather than in person due to security concerns. Anyone familiar with that history knows this claim is ridiculous on its face.

The dark and intense criticism directed at Justices over these transactions, the acceptance of trips and vacations from a wealthy, close friend with no business before the Court pursuant to a since amended personal hospitality exception to the Federal disclosure rules, and a property sale to the same friend at a loss, the arm's length sale of a vacation home is impossible for me to square with the professed concern for the integrity of the Court by those making the criticism.

That integrity rests on the dedication of each judge, each Justice to fulfill his or her oath by deciding cases on their merits as the Justices see those merits, even when they see them differently from one another. That integrity remains intact. If the public has a mistaken impression that the integrity of the Court has been damaged, the fault for that lies for those who continue to level unfair criticism at the Court and its Justices.

It's impossible to escape the conclusion that the public is being asked to hallucinate misconduct so as to undermine the authority of Justices who issue rulings with which the critics disagree, and thus to undermine the authority of the rulings themselves. Thank you very much.

[The prepared statement of Judge Mukasey appears as a submission for the record.]

Chair DURBIN. Thanks, Judge. Mr. Payne.

STATEMENT OF KEDRIC PAYNE, VICE PRESIDENT, GENERAL COUNSEL AND SENIOR DIRECTOR OF ETHICS, CAMPAIGN LEGAL CENTER, WASHINGTON, DC

Mr. PAYNE. Thank you. Thank you for the opportunity to appear before you today. The purpose of my testimony is to explain how the ethical standards of the Supreme Court compare to the ethical standards of the executive and legislative branches of Government.

This matters because one way to understand where the ethical standards of the Supreme Court should be reformed is to first understand the ethical standards that already apply to other public officials across Federal Government. In particular, there are four basic ethics provisions that exist in the executive and legislative branches that do not exist in the Supreme Court. As a result, the Supreme Court has the lowest ethical standards in Government.

First, the Supreme Court does not have an internal ethics enforcement body. Without an internal ethics enforcement body, the Court does not have one source responsible for providing ethics advice and for conducting ethics investigations. Justices rely on ethics advice from random and anonymous sources instead of in-house ethics experts. This leads to incorrect and inconsistent interpretations of the law.

Also, investigations of misconduct are extremely rare, and when they do occur, they are conducted by Court staff who do not have expertise in investigations or expertise in ethics. This leads to inadequate reviews of high-profile ethics matters.

In contrast, the executive and legislative branches have ethics officials with sole responsibility of providing counsel and advice to officials, and investigating misconduct. In Congress, both Chambers have Ethics Committees that provide training to Members and have the authority to investigate potential violations. In the executive branch, the Office of Government Ethics and designated ethics officials at each agency are able to provide training, counsel, and advice, while the Inspector General can investigate potential violations.

Second, the Supreme Court does not have a binding code of conduct. Instead of a binding code of conduct, the Supreme Court has stated that it voluntarily follows the regulations of the Judicial Conference while emphasizing that the Judicial Conference does not have supervisory authority over the Court. As a result, the Court does not demonstrate a willingness to hold itself accountable for conflicts of interest or other ethics issues that are not currently codified in law.

On the other hand, the executive and legislative branches have adopted codes of conduct and extensive rules that support public trust in Government.

Third, the Supreme Court does not have meaningful disclosure of privately sponsored travel. Because of the limited information that is disclosed with privately sponsored travel for Justices, there's public criticism of potential conflicts of interest especially based on the frequency of these trips and the recreational nature of these trips. Therefore, all privately sponsored travel by Justices can fall under a cloud of suspicion even when it's legitimate.

In comparison, the other branches have strong rules to address this issue. The executive branch heavily restricts officials from accepting such travel. And in Congress, there are extensive disclosure requirements required before and after Members take trips with privately sponsored entities. This includes the cost of the trips, other attendees of the trips, and the agenda. This information allows the public to determine whether there are any potential conflicts of interest.

And finally, the Supreme Court does not have a compliance procedure for its recusal requirements. The concern is that the Court is without a procedure for informing the public the way a Justice decides to recuse or decides not to recuse from a matter. As a result, the public is in the dark as to whether the Justice is ignoring a conflict of interest or has a legitimate explanation for why no conflict of interest exists.

In contrast, again, the executive branch procedure for determining whether recusals are required includes public disclosure of detailed ethics agreements between the ethics lawyers and the senior official to clarify what are the potential conflicts of interest, and to have a path forward to eliminate such conflicts.

In conclusion, there may be room to debate specific pieces of legislation that can reform the Supreme Court effectively, but there is no room to debate that the Supreme Court has the weakest ethics rules in Federal Government. Ethics rules in the executive and legislative branches can serve as models to improve Supreme Court ethical standards and increase public trust in the judiciary. Thank you for the opportunity to appear before you, and I look forward to your questions.

[The prepared statement of Mr. Payne appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Payne. Mr. Dupree.

STATEMENT OF THOMAS H. DUPREE, JR., PARTNER AND CO-CHAIR, APPELLATE AND CONSTITUTIONAL LAW PRACTICE GROUP, GIBSON, DUNN & CRUTCHER, WASHINGTON, DC

Mr. DUPREE. Chairman Durbin, Ranking Member Graham, thank you for inviting me to testify today, and to share my thoughts on the topics of Supreme Court ethics and disclosure requirements. I'm a partner at Gibson, Dunn, & Crutcher, and co-chair the firm's appellate and constitutional law practice group. I previously served as Principal Deputy Assistant Attorney General at the United States Department of Justice. The views I share today are my own.

There are several bills under consideration that would impose a code of conduct on the United States Supreme Court. Today, I will focus on Senate Bill 359, the Supreme Court Ethics, Recusal, and

Transparency Act of 2023. But I will address the salient features of other bills as necessary.

Senate Bill 359 would impose a host of new requirements on the Supreme Court, as well as on the parties who appear in the Court and on the lawyers who argue before the Court. Section 2 of the bill orders the Supreme Court to issue a code of conduct governing the Justices, and to establish procedures for disciplinary investigations of Justices. Sections 4 and 5 impose on Justices new recusal and disqualification requirements, and Sections 6 and 7 impose new disclosure requirements on party and amicus briefs filed in the Supreme Court or the courts of appeals.

Let me start with the imposition of a code of conduct. This is an extraordinary mandate that infringes on the separation of powers, a bedrock principle that underpins our constitutional democracy. Our Founders well understood the importance of separating the legislative branch from the judicial branch.

As the Supreme Court has explained, the Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers which had been prevalent in the colonies long before the Revolution and which, after the Revolution, had produced factional strife and partisan oppression.

The lesson of this shared experience is reflected in the words of James Madison, who wrote in *Federalist 47* that the preservation of liberty requires that the three great departments of power should be separate and distinct. Ordering the Justices to adopt the code of conduct offends the separation of powers.

The bill intrudes upon the core function of a coordinate and co-equal branch of Government. It is the Supreme Court, not the Congress that has the prerogative under our constitutional structure to decide whether to adopt a code of conduct that governs themselves. As Chief Justice Roberts has written, courts require ample institutional independence. And the judiciary's power to manage its internal affairs insulates courts from inappropriate political influence, and is crucial to preserving public trust in its work as a separate and co-equal branch of Government.

This bill, and in particular, its provision directing the Justices to draft a code of conduct, put it out for public notice and comment, and then adopt it, seems to be animated by an assumption that the Supreme Court of the United States is no different than the Department of Agriculture or any Federal agency that can be commanded by Congress to engage in rulemaking.

Suffice to say, that is not how the Framers drew it up. The relationship the Constitution establishes between the Article I Congress and the Article III Supreme Court is one of co-equals. The judiciary is not an inferior branch.

The bill offends the separation of power in other ways. It would compel speech by the Justices by requiring them to post ethics-related information on the Supreme Court website. It would require them to publicly disclose internal rules and guidance from the counselor to the Chief Justice of the United States. And perhaps most ominously, the bill would require the Court to establish procedures under which individuals may file complaints alleging that a Justice of the Supreme Court has violated the code of conduct or any provision of Federal law.

They could also file complaints alleging that a Justice has engaged in conduct on or off the Bench, and apparently at any point in their lifetime that the complainant believes may have, quote, unquote, “undermined the integrity of the Supreme Court of the United States.” The complaints would then be referred to what the bill calls judicial investigation panels composed of circuit court judges who would then sit in judgment of the accused Justice.

If one were to try to design a scheme that would undermine Americans’ faith in the legitimacy and integrity of the Supreme Court, these judicial investigation panels would be an excellent start.

Another bill, Senate Bill 325, entitled the Supreme Court Ethics Act, charts a similar troubling course. It would task the Judicial Conference of the United States with issuing a code of conduct governing Supreme Court Justices. When he testified before Congress, Justice Kennedy described that very proposal as legally problematic and structurally unprecedented because it would empower the Judicial Conference, a group composed of district and circuit court judges, to make rules that Supreme Court Justices have to follow.

The bill would also create what it calls an ethics investigations council charged with investigating Supreme Court Justices not just for violations of the code of conduct, but for any conduct alleged to be prejudicial to the ethical, effective, and expeditious administration of the business of the Supreme Court of the United States.

Another bill, entitled the Supreme Court Code of Conduct Act, would similarly create a designated ethics officer who would process complaints that a Supreme Court Justice has violated the code of conduct or Federal law, or has done something that the complainant believes to have been prejudicial to the administration of justice. The designated officer would then be required to publish the complaints against Justices on the Supreme Court’s website.

Just as with judicial investigation panels, these proposals for an ethics investigations council or a designated ethics officer would damage and debase the institution by encouraging frivolous and politically motivated attacks on the Court’s integrity.

If you don’t like the outcomes of particular cases, well, attack the ethics of the Justice with whom you disagree and force them to post your accusations on their website.

Finally, let me close by noting the provisions in the bill, Senate Bill 359, concerning the recusal and disqualification procedures for Supreme Court Justices. Adopting these measures would open the door to a tidal wave of disqualification motions in virtually every important case.

Round one in all the big-ticket constitutional cases would be litigation over which Justices are even eligible to hear the case. Here, too, it is hard to imagine anything more corrosive to public faith in the Supreme Court than what would become routine volleys of motions alleging that various Justices are ethically compromised and must recuse because they accepted a meal from someone distantly connected to a case.

Allow me to close by saying that the provisions of the bill I have discussed today seem to be animated by a dark and distorted perception of our judicial branch. A perception that is fundamentally

at odds with what I have seen in more than 20 years of practice in the Supreme Court and the Federal courts of appeals.

In my experience, speaking as someone who has argued in front of hundreds of Federal judges throughout the country, the men and women on our Federal bench are of the highest integrity. Even when I disagree with the outcome in a particular case, I have never doubted for a moment that these are judges who are striving to do their absolute God-given best to faithfully interpret the laws and the Constitution of our great Nation. Thank you.

[The prepared statement of Mr. Dupree appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Dupree. Professor Frost.

STATEMENT OF AMANDA FROST, JOHN A. EWALD, JR., RESEARCH PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Professor FROST. Chairman Durbin, Ranking Member Graham, and Members of the Committee. Thank you for inviting me to testify today. I am a professor of law at the University of Virginia, and I specialize in constitutional law, judicial ethics, and the Federal court system. My testimony today will focus on Congress' constitutional authority to regulate the ethical obligations of Supreme Court Justices.

But I will begin by making a point on which I know we all agree. As a constitutional matter, the Supreme Court must retain decisional independence, meaning that the Justices can never be penalized for their votes in the cases before them.

But the Court's decisional independence is not the subject of today's hearing. The subject of today's hearing is the Justices failure to comply with ethics legislation enacted by Congress, which explicitly applies to them, as well as Congress' constitutional authority and power to protect the integrity of the Federal judiciary through such legislation.

So whenever we have a constitutional question, we look to three sources. Typically, the text of the Constitution, its structure, and long-standing historical practice. And all three confirm that Congress has the constitutional authority to enact legislation regulating judicial ethics.

The text of Article III of the Constitution requires the creation of the Supreme Court, but it is otherwise silent as to the structure and operation of that Court. And, in fact, that is importantly different from the way the Constitution treats this branch of Government. Article I, Section 5, gives this branch authority over its own rules and procedures.

So the Constitution is silent as to how the Supreme Court shall be structured and delegated that task to this branch of Government under the Necessary and Proper Clause in Article I. So, back in 1789, that very first Congress quickly enacted legislation to bring the Court into existence and to establish its operations. And it did so in the Judiciary Act of 1789, which has special constitutional significance because it reflects the original understanding of the Framers and their contemporaries.

So that act regulated every aspect of the Court's operation. It set the size of the Court at six, a quorum for the Court at four. It pro-

vided the Court with a budget and authorized it to hire personnel. It even assigned the Justices to serve on lower courts and ride circuit around the country to do so.

And finally, and most relevant today to our conversation, they required the Justices to take an oath of office. And it's almost identical to the oath that the nine today have taken. Which is that they must treat rich and poor alike, and they must adjudicate cases faithfully and impartially. And just a few years after that Act went into effect in 1792, Congress established the first recusal statute, which for 75 years has also applied to the Justices.

In other words, as this history lesson teaches, for over 230 years, and for as long as the Supreme Court has existed, Congress has regulated vital aspects of its operation, including its ethical obligations. That remains true today when this Congress controls the size of the Court, the quorum, when and where it meets, etc.

But most important to today's conversation, this Congress has enacted laws that regulate the Supreme Court's ethical obligations. The recusal statute, the Ethics and Government Act of 1978, and the Ethics Reform Act of 1989. All of these laws were enacted by Members of Congress who also take an oath to uphold the Constitution. For hundreds of years, dozens of Congresses have thought such legislation is constitutionally proper. To claim that Congress lacks that authority is to ignore the Constitution's text and structure, as well as this long-standing practice.

Nonetheless, the view of some seems to be that the Supreme Court Justices should be accountable to no one. They cite as support for this remarkable proposition this vague principle of separation of powers. So the Constitution was carefully designed to ensure that no branch of Government is entirely separate and independent from each other.

That is the equally familiar constitutional principle of checks and balances. In fact, in *The Federalist Papers*, James Madison, in the same *Federalist Paper* cited by Mr. Dupree, goes on to say that each branch of Government must have partial control over the others. And that is because, quote, "ambition must be made to counteract ambition," end quote.

Some Justices today are repeatedly violating the ethics laws that Congress applied directly to them. This misconduct requires congressional action to protect the Court from itself. For all the reasons I have given, Congress has the constitutional authority to enact such legislation. I look forward to your questions.

[The prepared statement of Professor Frost appears as a submission for the record.]

Chair DURBIN. Thank you, Professor Frost. Each Member will have 5 minutes to ask, and I'd like to start with you, Professor Frost. It's been stated, and I'll say as a preface, that the reason for this hearing is that so many of us are unhappy with the decisions of the Supreme Court.

I might state again for the record that my concern about ethical standards at the Court predate this hearing by many years. In fact, 11 years. The first letter that I authored which was signed by several colleagues on the subject to the Supreme Court, was mailed on February 13th, 2012. The President at the time, Barack Obama. So

I wasn't waiting for this situation or any Court decision to be interested in this issue. I think it was timely then and still is today.

The second thing was the argument that we're out to get certain Justices because they don't rule as we wish. I would have to say, during the course of the public inquiry involving Justice Thomas and others, I've heard virtually every Justice named with some question as to their conduct and activity. Now, some will say they were harmless activities and no one should be punished for them, and they certainly wouldn't meet any high ethical standards.

But I would just add that those of us who are in public service and bound by ethical standards and codes of ethics are certainly used to this experience. Every year when we file our financial disclosure forms, in my case, my income tax returns, I'm bound to have questions from the press. And I hope most of them are considered innocent, but legitimate inquiries of a person in public service.

Professor Frost, a man who submitted a letter for the record today, Judge Luttig, said of the issues that are before us, I quote him, "in complete agreement on Congress' indisputable constitutional power to legislate ethical standards of conduct that would be binding as to the nonjudicial conduct and activities of the Supreme Court."

You've heard arguments otherwise. I think page 12 of your testimony which goes into one of the first Acts of Congress, the Judiciary Act, belies this argument that somehow the Supreme Court is at a level where Congress can't address it. Would you comment on that?

Professor FROST. Yes. And I'll also just note that I have been called to testify on this issue since 2006, and have been writing about it since 2005. So similarly to your point, this is not a new issue in response to recent decisions.

So the separation of powers argument, I find, confuses me. Because, of course, I think we all know from civics classes separation of powers is, of course, a constitutional principle which means that the branches should have some separate spheres of conduct and some separate roles in our Constitution.

But checks and balances is equally important. And the role of the Congress is to establish the Supreme Court. It's not just permitted, it's required. The Supreme Court of the United States is constitutionally mandated under Article III, but there is no detail about how it is to operate because that was left to the Congress of the United States under Article I, Section 8, the Necessary and Proper Clause. And immediately Congress agreed to do that in the Judiciary Act of 1789, as it was required to do.

The Congress sets the size of the Supreme Court, that is not in the hands of Chief Justice Roberts and his colleagues. Congress establishes the quorum requirement, that is not in the hands of Chief Justice Roberts and his colleagues.

When this Congress passes a law that says that they must recuse themselves, the judges and Justices of our Federal judiciary when there are certain conflicts of interest, the Justices are not free to say that law doesn't apply to me, I'm going to sit on that case anyway.

And so what is troubling is, there is an implication in the recent statement of ethics policies, as well as some previous statements by

the Court that it doesn't think these laws bind it. And I find that very confusing in light of the text structure and long history of congressional administration of the courts.

Chair DURBIN. Thank you. Judge Mukasey, I'd like for you to address one issue. It appears to me that in the early days of our Republic, an oath had a different meaning than it does today. In this respect, it is in the swearing in of Members of Congress, for example, kind of a pro forma exercise.

It would seem the words of an oath in the early days of the Republic were taken much more seriously. So that when the Congress set out the oath for members of the Supreme Court, every judge and Justice, quote, "solemnly swear or affirm I will administer justice without respect to persons and do equal right of the poor and to the rich, and I will faithfully and impartially discharge and perform all the duties incumbent on me."

Those words were written not by the Court, but by the Congress, enacted by the Congress. Don't you think that raises a question as to whether or not there is clear authority for Congress to put together laws that are as specific as this oath of office?

Judge MUKASEY. Respectfully, no, I don't. Prescribing the oath—which I recall taking when I became a district judge—is one thing. Prescribing the way in which the Court administers its business and the way in which a court applies rules internally is something else.

Part of the problem here is that no rule determines its own application. It always takes somebody to apply it. And the way the Court functions internally is a matter to be left to the Court. In particular, on recusal issues. The law that applies to recusal issues across the board for Federal courts applies to Supreme Court Justices as well.

When their impartiality might reasonably be called into question, they're obligated to recuse themselves. That applies to district judges, it applies to circuit judges, it applies to Supreme Court Justices. That is a law of general application throughout the judiciary. But when we're talking about internal administration in dealing with their practices, and the way they administer their cases, I think that's an entirely different thing.

So I recall taking the oath, but I don't think it means that Congress has the power to direct that the internal business of the Supreme Court be conducted in a particular way.

Chair DURBIN. Thank you.

Senator GRAHAM.

Senator GRAHAM. Thank you, Mr. Chairman. Are all the witnesses aware of the fact that when Justice Roberts declined the invitation of Chairman Durbin, that his letter was signed by the entire Court? Are all of you aware of that? Mr. Fogel, do you think that was a wise decision?

Judge FOGEL. Thank you, Senator. I think—I said in my statement that I respect it. I think it was sincere. I think the problem, and I think it's significant, and I will grant that, that it was signed by all nine of the Justices. That's the significance.

Senator GRAHAM. That's my point.

Judge FOGEL. Yes. But may I—

Senator GRAHAM. I just want people to understand that the Court as a whole has a problem with this, whether right or wrong.

Judge FOGEL. I'm sorry, Senator, I just wanted to say one other thing, if it's all right.

Senator GRAHAM. Sure.

Judge FOGEL. I think it's significant that they all signed it. I think it doesn't suggest that that's all that all of them would do. It's a point about which they all reached.

Senator GRAHAM. You and Mr. Payne mentioned something that sort of struck a nerve with me. You know, I'm not into micromanaging the Court, Judge Mukasey, but when you look at what other branches do versus the Court, Mr. Payne, you say, is pretty obvious, they have a sort of a lower threshold. Right?

Mr. PAYNE. That's correct.

Senator GRAHAM. Okay. So what I would urge the Court to do is take this moment to instill more public confidence. I'm not going to vote for any of these bills, but I think we'd all be better off if they did that. And here's what I want to kind of explain to people. In 1998, Justice Ginsburg donated a signed copy of her decision in the VMI case, where you had to admit women to a State school, and it was auctioned off at a fundraiser supporting the National Organization for Women's Legal Defense Fund. Now, I didn't know that until this moment.

Do you all agree that if Judge Alito signed the *Dobbs* decision, and gave it to the Susan B. Anthony Pro-Life organization to raise money, all hell would break loose in this country? Do you agree with that, Ms. Frost?

Professor FROST. So would I agree that if there was a sale of a—

Senator GRAHAM. If Judge Alito signed the *Dobbs* decision, autographed it, gave it to the SBA group to raise money, all hell would break loose?

Professor FROST. Yes. And I certainly would agree that would be a problem. And in fact, I think that's one of the reasons that Congress needs to play an active role today.

Senator GRAHAM. Why didn't all hell break loose in 1998?

Professor FROST. I'm not sure what the reaction was.

Senator GRAHAM. Well, when Justice Ginsburg signed a copy of the VMI decision for the National Organization for Women's Legal Defense Fund, why I think we all know the answer to that. Justice Ginsburg, one of the greatest people to serve on the Court, received an award from the National Democratic Women's Club. Can you imagine what would happen if Justice Roberts received the award from a Republican women's club? I think we may read more about it.

Justice Ginsburg was given a million-dollar award by the Berggruen Institute—in its annual philosophy and culture award for major achievements in advancing ideas that shape the world. Now, she didn't get the money personally, but they gave her a million dollars to give to other people. Does anybody have a problem with that? Does everybody have a problem with that?

Well, I'm going to assume silence means yes. The point we're trying to make here, I think, is that this effort to come after Justice Thomas is, I think, organized by the left. I think this moment

where we could find common ground is being hijacked. I take Senator Durbin at his word. He's been concerned about this for a very, very long time. But the point is, the game has been played differently. And now we're in a moment where this Court is under siege in multiple ways. And that is the problem I think most of us have. What are the lines to be drawn and who's the referee?

Does anybody know anything about the organization Demand Justice? Negative response for all Members. Do you know where their money comes from? Negative response by all Members. Are you aware that they spent over a million dollars in ads pressuring Justice Breyer to resign? Nobody knew that, right?

So if you're worried about dark money—I think that's a legitimate thing to be worried about—let's worry about it across the board. And I guess my point, Mr. Chairman, is that the efforts by Senator Schumer to go to the Court and threaten the Court with its very existence, the efforts by people to intimidate Justices decide cases before the Court can't be ignored.

And here's what I worry about the most. This is not about trying to upgrade the ability of the Court to be more transparent. It's about an effort to destroy the legitimacy of this conservative Court. So to the panel, if you have any ideas or recommendations about how the Court could be more transparent, count me in. That makes perfect sense to me.

But when you look at the history of the way things have happened with the Court, when a liberal Justice does something, the reaction in the American media is completely different. The New York Times article about George Mason admitted a lot of other schools who did the exact same thing. And I would say to Justice Alito, don't sign a copy of the *Dobbs* decision and give it to the SBA to raise money. You would not receive the same treatment if you did what Justice Ginsburg did.

Chair DURBIN. Thank you, Senator Graham. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Professor Frost, you distinguish between the adjudicative and the administrative function within the judicial branch that has constitutional relevance to our ability to legislate.

Professor FROST. Yes. I think that's a very important distinction.

Senator WHITEHOUSE. Because we have no business interfering in the Court's decision-making on matters before it. But as to the administration of justice, we do have the authority to pass laws. Correct?

Professor FROST. Yes. The Constitution intended Congress to play that role over judicial administration and not—

Senator WHITEHOUSE. In fact, Canon 4 of the Code of Conduct encourages judges to testify in legislative bodies regarding the administration of justice. And that would not be there if it were not appropriate for Congress to legislate regarding the administration of justice. Would it?

Professor FROST. Agreed.

Senator WHITEHOUSE. Moreover, you mentioned the Ethics and Government Act, the Ethics Reform Act, and the recusal statute. Those are all laws passed by Congress?

Professor FROST. Yes.

Senator WHITEHOUSE. And they all apply to the Court?

Professor FROST. Yes.

Senator WHITEHOUSE. Indeed, in some cases, using the word Justices specifically, which is the term that applies to Supreme Court Justices only. Correct?

Professor FROST. Yes.

Senator WHITEHOUSE. And has the application of those statutes to the Supreme Court ever been challenged by the Court itself in the years in which they've been in place, to your knowledge?

Professor FROST. Not to my knowledge.

Senator WHITEHOUSE. Judge Fogel, you were at the Judicial Conference for many years. You've had to have had the role that Judicial Conference was given by statute, by Congress, to administer these laws in the context of administering these laws, particularly, under the supervision of the Chief Justice. Were you ever told that these laws were unconstitutional, or that the Judicial Conference, or the Financial Disclosure Committee should not enforce them?

Judge FOGEL. No, Senator. The Justices complied, as did all of the other Federal Justices with the disclosure requirements. Or at least they made an effort to.

Senator WHITEHOUSE. And in fact, one of the rules—part of the law is that if there is a financial disclosure violation, then the determination as to whether that violation was willful and is subject to civil penalties, actually gets referred to the Attorney General for determination.

Judge FOGEL. That's correct. What the committee does is it looks at the nondisclosure or the incomplete disclosure. It determines whether it's something that could be remedied. Usually, the way the committee functions is remedially. They try to get the filer to comply with the disclosure requirements. But if there's a willful failure, then the committee has the authority to make that referral.

Senator WHITEHOUSE. And it does so based on a determination that there's reasonable cause for someone to believe that this might have been a willful violation?

Judge FOGEL. That's correct.

Senator WHITEHOUSE. Then the willfulness determination gets made by the Attorney General.

Judge FOGEL. That is correct. But I have to say—

Senator WHITEHOUSE. And there are civil fines that are potentially imposed if—

Judge FOGEL. Yes, sir.

Senator WHITEHOUSE. Okay, just go ahead. Finish what you wanted to say.

Judge FOGEL. Well, what I was going to say was that the committee tries very hard with the filer to make sure that every effort is made to get a proper filing, so.

Senator WHITEHOUSE. In fact, it's okay for a judge—in fact, it's even encouraged for judges and Justices to bring concerns about financial disclosure to the committee for a confidential opinion saying here's what you got to do.

Judge FOGEL. That's correct.

Senator WHITEHOUSE. And Justice Thomas did not do that with respect to these filings.

Judge FOGEL. I don't want to comment on Justice Thomas, but normally the committee is there to assist with questions like that.

Senator WHITEHOUSE. So has the Judicial Conference, again, under the supervision of the Chief Justice of the United States, ever suggested that it was unconstitutional for Congress to require that these forms be filled out? That if there are omissions in the forms that be referred to the Attorney General, and that a civil fine could be imposed on a Justice for failure to file? Has that ever been raised in your conversations?

Judge FOGEL. Not to my knowledge, sir. No.

Senator WHITEHOUSE. Well, that's, I think, a little bit telling. I appreciate that. Mr. Payne, are you familiar with the concept of regulatory capture?

Mr. PAYNE. Yes.

Senator WHITEHOUSE. Sometimes called agency capture?

Mr. PAYNE. Yes.

Senator WHITEHOUSE. Fairly considerable literature about it in administrative law and economics.

Mr. PAYNE. Yes.

Senator WHITEHOUSE. So I'll ask you a hypothetical. Let's just say, hypothetically, that there were an organized effort to capture—in the meaning of regulatory and agency capture—to capture the Court in such a way that it was beholden to and ruled in favor of big special interests. That's the hypothetical.

Here's the question. If that hypothetical were true, would any ethics concerns be raised by Justices consorting with individuals or associating with groups involved in that capture scheme?

Mr. PAYNE. Yes. In that hypothetical, there could be potential conflicts of interest if someone was engaged in trying to influence the Court and members of the Court were engaging in activities with them.

Senator WHITEHOUSE. Thank you. My time has expired.

Chair DURBIN. Thanks, Senator Whitehouse. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. Thanks to the witnesses before us. The Framers of the Constitution carefully crafted a system of checks and balances. While the Constitution purposefully insulated the Federal judiciary from political control, it's important that Congress exercise constitutional duty of oversight. Judges are expected to comply with high standards of ethics and integrity, and it does appear there needs to be better oversight.

I've been a longtime advocate for transparency and accountability because I believe the public's business should be public. I've been a strong proponent of Government oversight and the duty of Congress to be good stewards of the taxpayers' dollars. I've endeavored to improve our Government and promote greater responsibility at all levels. I've worked on bills to root out waste, fraud, and abuse, and to foster integrity and accountability, including in the Federal judiciary.

Unfortunately, Democrats and their left-wing dark money interest groups, as well as their allies in the liberal media, have engaged in a crusade to threaten, pack, and smear the courts. They've targeted specific judges and Justices who aren't implementing a liberal agenda that they can't ram through Congress.

The goal of these efforts is to cast doubts on certain judges and Justices all because the left is opposed to recent Court rulings. That's what this hearing is all about, undermining the American people's trust in our judicial branch of Government. Today's hearing is just one political theater to delegitimize our judicial system, particularly the Supreme Court.

Judicial decision-making must be based on law and sound jurisprudence. It must not be subject to the whims of public opinion and clamor. It must not result in threats and intimidation, as this relentless political battering of certain members of the judiciary who are doing the bidding of the liberal grand plan is coming at a tremendous cost.

Our judges and Justices face harassment and public intimidation in their private life despite Federal law which prohibits picketing or parading at a judge's residence. Our Justices and their families often endure organized protests outside their homes. Judges and Justices and their families face real threats to their safety and security.

Unfortunately, the whirlwind that Democrats threatened at the steps of the U.S. Supreme Court really has been released against our judiciary.

So I'm going to ask Mr. Dupree and Judge Mukasey two separate questions. The first one is for Mr. Dupree. Federal judges are required by law and the Judicial Conference to comply with these disclosures and ethical guidelines. Can you please give us a brief overview of the constitutional framework in which these rules and guidance operates?

And then for Judge Mukasey, this question. How is the Supreme Court different than the lower courts with respect to complying with these rules? Mr. Dupree.

Mr. DUPREE. Sure. Well, thank you for the question, Senator Grassley. There are, of course, a number of statutes that affect the information that Supreme Court Justices must disclose, and also governs things such as recusal and disqualification.

In some circumstances, the statutes act directly upon the Justices themselves. I think in those cases, they would concern what, I think, all of us would consider noncore Article III duties. And that's why, as a constitutional matter, it would be permissible for Congress to directly regulate the judiciary in that respect. There are other statutes where what Congress has done is created the Judicial Conference, which sets, effectively, regulations for the majority of the Federal judiciary, but is not directly controlling upon the Supreme Court.

Nonetheless, the Supreme Court, really as an exercise of discretion, has agreed to follow and respect and comply with those types of guidelines.

So I think that, constitutionally speaking, the Supreme Court would be regulated in two ways. One is through direct regulation when it concerns a noncore Article III activity. And the other would be an indirect regulation where Congress directly regulates the lower courts, but the Supreme Court Justices voluntarily agree to abide by and comply with those requirements.

Senator GRASSLEY. Judge Mukasey.

Judge MUKASEY. I agree with Mr. Dupree's portrayal of the way the system works. As to the mechanics, I think that the rules of general application that apply to all courts are applied to judges and Justices.

And as was pointed out before, it's sort of an iterative process. You file your report, you file your form, and they get back to you—those who review the form and ask for greater detail when necessary. And generally, it's provided. I think the one feature that was alluded to before about the Attorney General making a determination of willfulness, I don't know that that's ever been litigated. And if it were ever litigated as to a Supreme Court Justice, I believe it would be found to be unconstitutional. That is not anything that, I believe, has ever been tested. Certainly, not on the Supreme Court level.

Chair DURBIN. Thanks, Senator Grassley. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I guess I'll start with you, Mr. Fogel. The Judicial Conference, I think, did the right thing by strengthening the disclosure requirements that apply to judicial officers, including the Supreme Court, recently. But the Supreme Court Justices are still not bound to the code of conduct, as we've been discussing, for United States judges unlike all other Federal judges.

The code requires that a judge uphold the integrity and independence of the judiciary, and avoid impropriety, and the appearance of impropriety. How is a formal, enforceable code of conduct help to ensure that the rules are consistently applied for every other judge in the Federal system?

Judge FOGEL. As someone who was bound to that for 37 years, both as a State court judge and a Federal judge, it really is your North Star. It's what you look at in terms of the values you want to uphold as a judge, and it's something that guides your conduct. And it also is something that the public can look to and say this is what we expect of our judges.

Senator KLOBUCHAR. Do you agree with Judge Luttig, who was just quoted by Senator Durbin, who wrote the Committee to say if the Supreme Court does not subject itself to the highest possible professional and ethical standards, it can depreciate its power?

Judge FOGEL. Senator, I agree with that. I think that the Supreme Court—my hope is—the reason I came here today, really, is I hope that the Court will adopt a formal code of conduct. I think it needs to be modified in some respects because the Supreme Court is different in a number of ways, but I think the absence of a formal code is an issue that I hope that they will address.

Senator KLOBUCHAR. I appreciate that and your thoughtfulness. Ms. Frost, thank you. You mentioned the Judiciary Act of 1789, you mentioned the Ethics Reform Act of 1989, you mentioned the Ethics and Government Act of 1978, as reasons that, in fact, Congress has passed laws in the past based on the Constitution about the operations of the Court. Is that right?

Professor FROST. Yes, that's correct.

Senator KLOBUCHAR. Okay. So I go over here to you, Mr. Dupree. I really wasn't planning on asking you questions until you dissed the Department of Agriculture because you said, their accord is not just like the Department of Agriculture. And I was looking up—it

was set up by Abraham Lincoln in 1862—being a big Ag State that we are, 100,000 employees, serves the people of this country, yet that Department, which basically has jurisdiction over what our farmers do for ranching, and farming, and countercyclical payments, I mean, they've got ethical laws in place.

So I actually see the opposite when I think about the power of this Court, and I think about what Ms. Frost said. I think there is every reason that this Court should have ethical rules like the fine Department of Agriculture, and that we don't look at that as a bad thing. We look at it as a good thing.

Mr. DUPREE. Certainly, to be clear on the record, Senator. No disrespect to the Department of Agriculture.

Senator KLOBUCHAR. You did it.

Mr. DUPREE [continuing]. Which is a hallowed—

Senator KLOBUCHAR. You did it, sir.

Mr. DUPREE [continuing]. Department and agency.

Senator KLOBUCHAR. You decided that was the Department you were going to mention. And I think a lot of people in the middle of the country noticed it, but go ahead.

Mr. DUPREE. Understood. Again, no disrespect. My point with regard to the Department of Agriculture was simply that the provision of the bill and several bills have similar types of provisions where they basically order the Supreme Court to engage in essentially a rulemaking function. In other words, to promulgate for public notice and comment a code of conduct. Again, analogous to what this Congress would say with regard to either the Department of Agriculture, Department of Defense, Department of Homeland Security, you name it.

And my point was simply that as a matter of our constitutional structure, the Supreme Court is differently situated in a profound and fundamental way from Article II executive branch agencies which can be vested with rulemaking power under the Constitution.

Senator KLOBUCHAR. Thank you.

Mr. DUPREE. Article III can't.

Senator KLOBUCHAR. Ms. Frost, do you want to reply? Because this gets to the core of this question of us actually being able to pass a law and do anything.

Professor FROST. Yes. I mean, this is the point about Article III of the Constitution. It's very short. It requires that there be a U.S. Supreme Court as a few other provisions. But it leaves to Congress that essential role of administering the Court, and Congress has always done so. So to question that authority today is to question 230 years of consistent practice where Congress has legislated regarding the Court.

To be clear, not to control its decisions. That is clearly off limits. But every other aspect of the Court is controlled by Congress, from its size to when it meets.

Senator KLOBUCHAR. Agree. Mr. Payne, why is it important that the Supreme Court also have an ethics office separate from the individual Justices to provide them with advice on how to comply with the ethical obligations, and to ensure that this office has the authority to conduct independent fact finding?

Mr. PAYNE. The only way that any current ethics rules or future ethics rules will work is if there's a way to enforce these rules, and a way for the Supreme Court Justices to understand how they apply. So, therefore, you need an internal body that can provide the ethics expert advice, and also gather facts in the circumstances where there are potential violations that need to be resolved.

Senator KLOBUCHAR. Ms. Frost, what do you think on that?

Professor FROST. Yes. I would agree with Mr. Payne's analysis there and I think that one of the problems we've been having today is that so many of these issues get dug up by investigative journalists and splashed across the news in ways that does damage to the Court. If they had a more systematic method of adopting or approaching these problems, we could avoid this.

Senator KLOBUCHAR. And, Mr. Fogel, how would you handle that? Because you've been, you know, trying to thread the needle here.

Judge FOGEL. No, I am trying to thread the needle. I think the Court's independence is very important. I agree with other witnesses who've said that. I think there are ways they could do better at getting independent and impartial advice about ethical questions. They don't really have—it's kind of a black box. As I said in my written testimony, they have a lot of sources and rules that they follow, but no one really knows what they are.

And I think if they had an internal resource—I suggested and I'm not alone in suggesting that, that they get a group of very experienced retired judges whose integrity is unquestioned. And I stress retired judges because then they're not subject to the problem that a circuit judge would have or a district judge would have.

To just say, "Look, I have a question here, I'd like your advice, I mean, what do you think?" Somebody who's independent, who doesn't have any skin in the game, and can just say, "Yes, I think this is okay," or, "I don't think that's okay." I think that's a modest step that the Court could take.

Senator KLOBUCHAR. Okay, well, thank you. And, Mr. Mukasey, I'm sure we can talk about this in the future as my colleagues await. But you and I have worked together well, including when you were Attorney General. So thank you.

Judge MUKASEY. We have. Thank you very much.

Senator WHITEHOUSE [presiding]. Senator Cornyn.

Senator CORNYN. I'd like to go to the video, please.

[Video is shown.]

Senator WHITEHOUSE. Senator Cornyn—

Senator CORNYN. That was 32 years ago and I'm reminded as I get older that not everybody's had the same experience or memories that I have. That was one of the searing memories that I've had about Supreme Court confirmation hearings, and I think provides an important context for today's hearing.

The truth is that, as Senator Kennedy said, starting perhaps with the Bork nomination, that members of the United States Supreme Court when they've been nominated for the job, have been subjected to relentless campaigns of harassment and intimidation. Which, as Justice Alito recently pointed out, can lead not just to intemperate attacks like the Senate Majority Leader made against Judge Gorsuch and Judge Kavanaugh by name back in 2020, it

could lead unstable individuals to decide that they are going to conduct an assassination of these members of the Supreme Court. So things have gotten terribly out of hand.

Judge MUKASEY, you and Mr. Dupree both talked about the separation of powers. I looked back at the rules of the United States Senate, our ethics rules by which we are governed. And they are rules that are set by the Senate itself. How do you think the Senate would react if the United States Supreme Court said we don't like the ethics code of Senators or Members of the House of Representatives? Would the same principle of separation of powers and co-equal branches of Government apply in that circumstance?

Judge MUKASEY. Yes. Of course, it would, Senator. This body sets the rules for its conduct the same way that the Court sets the rules for its conduct and the executive—the person of the President and the Vice President set the rules for theirs. That's not to say that laws of general application don't apply. Of course, they apply. But when you're talking about the particular rules relating to a particular branch of Government, those are set by that branch of Government.

Senator CORNYN. Mr. Dupree.

Mr. DUPREE. I agree with Judge Mukasey. And I would add, Senator, in response to your question about the importance of the separation of powers, I think it's important to underscore that the separation of powers is not some sort of academic concept that was invented by law professors. This is a concept that is structurally baked into our Constitution, and the Framers viewed as absolutely crucial to preserving not just the independence of each branch and ensuring that the judiciary could act independently, but also to preserve freedom and individual liberty.

And so the things we're discussing today obviously have, you know, practical consequence in terms of granular information about data and disclosure and the like. But at the end of the day, what's really on the table is a concept that is absolutely fundamental to our constitutional structure and must be preserved.

Senator CORNYN. I think Justice Scalia pointed out, among others, that—

Senator WHITEHOUSE. The Senator's time has expired minutes ago.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman. And thanks to each of you for being here. As we heard quoted moments ago, when Justice Thomas was in this room in front of this Committee nearly 32 years ago, he had some observations about his confirmation proceedings and he described those proceedings as, quote, "high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas." He then described the consequences for doing those things, quote, "you'll be lynched, destroyed, caricatured by a Committee of the U.S. Senate rather than hung from a tree."

Now, more than three decades later, that observation remains tragically relevant. Today's hearing and the radical left's continued attacks on Justice Thomas and his wife Jenny over the last 31½ years, are part of a sustained hateful attempt to discredit an honest man and a principled jurist.

The left, you see, can't tolerate, it cannot accept the fact that one of our greatest American success stories—that of a humble citizen who rose from poverty in the segregated South to become not only one of the Supreme Court's longest serving Justices, but also one of the most influential jurists our country has ever known—is the story of a Black man who happens to be conservative.

Now, those leading the charge against Justice Thomas would have us believe that he simply couldn't think for himself. That he can't think for himself. And so his wife and his white friends must tell him what to think. And the truth is the left simply disagrees with his decisions, and with the decisions of our current Supreme Court. And they obviously can't persuade the American people to adopt their radical policies through legislation so they're attempting to destroy the Court's credibility and intimidate the Republican-appointed Justices and their families starting with Justice Thomas.

They're making clear that Justices who disagree with them will pay a price. And it's a price that the radical left is determined to ensure is very high. This is all just a thuggish shakedown. Nice Supreme Court you've got there, America. Sure would be a shame if something happened to it.

And don't just take my word for it. Remember what Senator Chuck Schumer did in 2020—went on to the steps of the Supreme Court, called out specific Supreme Court Justices by name, referring to Justices Gorsuch and Kavanaugh by name, telling them, "You've released the whirlwind and you will pay the price. You won't know what hit you if you move forward with these awful decisions."

Then, in August of 2019, five Democratic Senators, including four Members of this Committee, submitted an amicus brief to the Supreme Court of the United States, an amicus brief in which it leveled a threat saying change according to what we demand or else the Court is going to have to be, quote, "restructured in order to reduce the influence of politics."

Since the leak of the *Dobbs* draft opinion 1 year ago today, the Justices and their families have endured constant protests at their homes, their churches, even their children's schools. There was even an assassination attempt against Justice Kavanaugh. Of course, when I say the Justices in this context, I don't mean all of them. I mean the *Dobbs* majority Justices, as only the dissenters in that case have been spared the rage machines, bullying, threats, and intimidation tactics.

As Justice Alito recently observed in his comments to The Wall Street Journal, it was the *Dobbs* leak that made Justice Alito, and those of his colleagues who joined in his opinion, likely targets of assassination. As Justice Alito explained, quote, "it was rational for people to believe that they might be able to stop the decision in *Dobbs* by killing one of us."

Astoundingly, with that conversation fresh in our minds, Democratic Senators are now threatening to defund the Supreme Court's requested police protection of the Justices and their families unless they adopt specific measures that those Senators demand. All these tactics, of course, are meant to harass and intimidate the Court, specifically, the Justices appointed to the Court by Republican

Presidents and force them to impose the left's radical policy agenda on the American people. Not through the legislative process, but by judicial fiat.

The left has carefully coordinated these attacks with an increasingly compliant left-wing media. If you read articles from sources like The New York Times, Politico, and outlets like ProPublica, you'd think that the Supreme Court Justices appointed by Republican Presidents are universally reckless and corrupt, and those nominated by Democrats, universally conscientious and virtuous.

That bias becomes apparent both in what receives coverage and in what doesn't. One Justice appointed by a Democratic President failed to recuse when her husband's law firm had cases before the Court. One failed to disclose the sources of her spouse's income. One traveled for free with wealthy friends, including stays at the homes of prominent attorneys whose firms have cases before the Supreme Court.

You wouldn't hear any of that from the biased media or Congressional Democrats who conveniently point only to Republican-appointed Justices when demanding their reforms to the Court.

Now, I raise these examples not to accuse the Court of being systematically corrupt or broken in any way. No, it's neither of those things—let me just finish my statement, if I could. I raise these things only to point out that Senate Democrats, left-wing advocates and activists, and their publicity outposts in America's mainstream media establishment never tell the complete story about this. And by telling only half the story, they reveal their true purpose, which is not to tell the truth, but to punish their political enemies. We cannot afford to delegitimize and denigrate the Court in this way. It must stop. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Lee. We passed the Daniel Aderl Judicial Security and Privacy Act in the last Congress after the murder of Judge Esther Salas' son at their home. That bill was held up on the Senate floor for nearly a year by a Member of the other party.

Senator Coons.

Senator COONS. Thank you, Chairman Durbin. The American people need to have confidence that Government officials in all three branches are serving the public interest, not their personal interests. And the Supreme Court, as I think this hearing has demonstrated, suffers today from a lack of transparency and accountability when it comes to ethics practices.

This is true for Justices appointed by Presidents of both parties. This is not a Democrat or Republican issue. This is an issue of transparency, accountability, and confidence. Last year, I led the successful passage of the Courthouse Ethics and Transparency Act, joined by Senator Cornyn, many Republicans. It was actually adopted unanimously.

It's simple. It requires Federal judges, including on the Supreme Court, to promptly report when they sell securities so the public is made aware of any potential conflict due to a financial interest. Members of Congress have had to comply with the same requirements so we made sure that Federal judges, all Federal judges, should have to play by similar rules.

Still, the Supreme Court is today subject to weaker ethical obligations than other branches of our Government. I want to explore some of those differences briefly. Now, Mr. Payne, if I might, one obvious difference between Congress and the Supreme Court is the Court has no formal mechanism to provide guidance, investigate allegations, or enforce ethical constraints on the Justices.

I'm the chair of the Senate Ethics Committee and have seen firsthand the value of similar structures. Why has the Court failed to create a similar ethics body, and could it do so at any moment if it chose to?

Mr. PAYNE. It is unclear why the Court has decided not to establish such an internal body. It is just a basic principle with any rules to have an enforcement or compliance mechanism internally. And they could create this immediately. All they need is to establish an office within the Supreme Court that has ethics experts who are professionals, who can provide advice on the existing rules, and can handle any new rules that are enacted.

Senator COONS. If one were seeking ethics guidance, as a member of the executive branch, legislative branch, judicial branch, and you simply turned to your colleagues rather than a professional office that was responsible for providing uniform and impartial advice, would you be practicing at the highest level in terms of your compliance with ethics rules—

Mr. PAYNE. No.

Senator COONS [continuing]. And regulations?

Mr. PAYNE. No. If you rely on colleagues or anyone who is not providing guidance across the board, the advice will not be consistent and won't necessarily be correct.

Senator COONS. In his response to this Committee to the letter from the Chairman, Chief Justice Roberts noted, the Supreme Court adopted a resolution in 1991 to comply with the Judicial Conference's Financial Disclosure Regulations.

But the Court has declined to adopt a similar resolution that would bind the Justices to the Judicial Conference's Code of Conduct. Why has the Court agreed to comply with the Conference's disclosure rules, but not its broader ethics rules? And could the Justices easily bind themselves to the Code of Conduct if they so chose?

Mr. PAYNE. Again, it's unclear why the Justices decided to only bind themselves with the regulations. However, I point out that the Ethics and Government Act applies to the Justices. So they really don't have the option to opt out, but they could easily establish a code of conduct for themselves to have rules that are applicable to them and can be enforced.

Senator COONS. And is there any significant distinction among the other members of the Article III Federal judiciary in terms of their report requirements, their disclosure, and their ability to have their conduct reviewed by an independent and impartial enforcement body? Is there any variation among the rest of the Article III judiciary?

Mr. PAYNE. Yes. Unlike the Supreme Court, all of the lower court judges are bound by the same financial disclosure requirements. But they do have the Judicial Conference that can provide ethics advice that is available online, even in advisory opinions, such that

it is clear what the rules are, how they apply, and what happens if there's noncompliance.

Senator COONS. Last question, if I might, Professor Frost. Chief Justice Roberts has said it would be inappropriate for the Judicial Conference to supervise the Supreme Court. At the same time, he suggested he believes the Court can't be constrained by Congress. That concept has been raised here today as well. In that view, only the Court itself would be able to enforce its own ethics requirements. Do I understand that correctly?

Professor FROST. Yes, that seems to be the position.

Senator COONS. And it seems to me that's the equivalent of saying that they alone should be able to grade their own homework. I think Congress can legislate here if necessary. It may not be the most desirable outcome, but it is possible. In fact, I think we passed the Courthouse Ethics and Transparency Act by voice vote last year. Colleagues on both sides of the aisle co-sponsored this bill. Can you explain how we can reconcile this kind of legislation with the key principle of separation of powers?

Professor FROST. Yes. That's because we are not talking about interfering with the Court's decisional independence. We're not talking about penalizing Justices for their votes in any cases. We're talking about the checks and balances that exist for all three branches where Congress plays a role in establishing the administration of the courts. The Constitution requires that, and its part and parcel of that establishes ethical guidelines.

Senator COONS. In fact, I'd argue, Mr. Chairman, in closing, that if the most senior members of the executive branch, and the legislative branch, and the judicial branch are all subject to disclosure, and reporting, and compliance, and enforcement obligations, for just one court of nine Justices to exempt themselves puts us at real risk of the highest court having the lowest ethical standards of the entire senior members of all three branches. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Coons.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. And thanks to all of our witnesses who have joined us today. Mr. Payne, let me start with you, sir. You are kind of in the middle here. You work for the Campaign Legal Center. Is that right?

Mr. PAYNE. That's correct.

Senator KENNEDY. Is your website campaignlegal.org?

Mr. PAYNE. Correct.

Senator KENNEDY. Okay. Does not the front page of your website say, I'm going to quote here, I want to get it right. "The current U.S. Supreme Court is a threat to our democracy." "The current U.S. Supreme Court is a threat to our democracy." Did I read that right?

Mr. PAYNE. What I can say is that our organization—

Senator KENNEDY. But is that on your website?

Mr. PAYNE. I am not certain exactly what's on the website.

Senator KENNEDY. Here it is right here, as big as Dallas.

Mr. PAYNE. What that refers to is the voting rights legislation— I mean, voting rights cases of the Supreme Court. Our organization

is a voting rights organization that fights for all Americans that have the ability to vote.

Senator KENNEDY. Yes. But you've got to click a bunch of times to find that explanation. I just want to make sure I read that correctly. A few months ago, Mr. Payne, you retweeted the following statement: "Some Justices are politicians in robes who thrive in a system where access and influence are for sale." "Some Justices are politicians in robes who thrive in a system where access and influence are for sale." Now, that's a pretty bold statement.

Mr. PAYNE. I'm sorry, Senator, is that a news article?

Senator KENNEDY. No, sir. That's a retweet here. You tweeted this out. Tell me which Justices are for sale?

Mr. PAYNE. I don't recall that tweet, but—

Senator KENNEDY. Here it is, November 21, 2022. Can you tell me which Justices are for sale?

Mr. PAYNE. No.

Senator KENNEDY. Are any of them for sale?

Mr. PAYNE. No. The problem is that the American public has a perception that some Justices—

Senator KENNEDY. Yes, but I'm going—

Mr. PAYNE [continuing]. May be—

Senator KENNEDY [continuing]. To establish the point first. You tweeted this out. Do you believe that some Justices are for sale, and if so, which ones?

Mr. PAYNE. No, Senator, I do not believe that Justices are for sale.

Senator KENNEDY. Then why did you tweet this out?

Mr. PAYNE. Can you provide more context of what that is?

Senator KENNEDY. Sure. I'll get you a copy, but here it is. I checked it and triple checked it. You also said less than a month ago that John Roberts—you retweeted this out: "John Roberts is a disgrace."

Mr. PAYNE. No, I actually—

Senator KENNEDY. "I disagree with Justice Roberts." Well, you didn't call him Chief Justice Roberts. You called him John Roberts. You retweeted this.

Mr. PAYNE. No, Senator, I did not retweet that.

Senator KENNEDY. Yes, sir, you did. Right here, it's as big as Dallas.

Mr. PAYNE. I will need to see. Can you provide a copy to me now?—

Senator KENNEDY. Sure.

Mr. PAYNE. But I did not retweet that.

Senator KENNEDY. Can you tell me why you think Chief Justice Roberts is a disgrace?

Mr. PAYNE. I did not say that. Did not retweet that.

Senator KENNEDY. Okay. Maybe Twitter got it wrong.

Mr. PAYNE. Someone got it wrong.

Senator KENNEDY. Let me ask you this, because the unstated premise of all this—sometimes it's stated—but the unstated premise of all this is that some Justices have been bribed. Let's just cut to the chase. Okay? Now, let me stay with you, Mr. Payne. Let me go to Mr. Fogel. I don't want to just pick on you, Mr. Payne. You can be looking up on Twitter where you said those things.

On April 4th, 2019, the American Civil Liberties Union paid for Justice Sotomayor's trip to San Juan, Puerto Rico. You ever been to San Juan, Mr. Fogel? Is it expensive?

Judge FOGEL. I have been, Senator. Well, it depends on when you go.

Senator KENNEDY. Yes. How much do you think it costs to go down there?

Judge FOGEL. Depends whether you fly first class or economy.

Senator KENNEDY. What if you fly first class?

Judge FOGEL. Oh, probably a couple of thousand dollars.

Senator KENNEDY. Okay. The ACLU, do they have cases in front of the Supreme Court?

Judge FOGEL. All the time.

Senator KENNEDY. They do all the time?

Judge FOGEL. Yes, sir.

Senator KENNEDY. Do you think the ACLU was trying to bribe Justice Sotomayor?

Judge FOGEL. No, sir, I don't.

Senator KENNEDY. I don't either. I don't either. But that's the unstated premise of all this.

Judge FOGEL. Well, Senator, if I may—

Senator KENNEDY. All these articles about Justice Clarence Thomas, and the Chief Justice of the United States, and Justice Gorsuch who sold an interest in an LLC to a Democratic donor who he had never met, that they bought him. Isn't it?

Judge FOGEL. May I say something in response, Senator? I think there are two things going on here today. I think there is a political conflict, which is, as I said earlier, it's very intense. It's hyperpartisan. Both sides have things to say. And then, I think there's an ethical issue.

Senator KENNEDY. When you accuse people of being bribed—

Judge FOGEL. No, no, no. I'm not accusing—

Senator KENNEDY [continuing]. It kind of gets their attention.

Judge FOGEL. Sir, hold on a second. I'm not accusing anybody of being bribed. I'm not.

Senator KENNEDY. But some people are.

Judge FOGEL. Some people are. The reason I'm here is I think that there is an ethical issue that, as Senator Graham said earlier, it would be good for the Court to think about in terms of being more transparent. That is what I care about. That's the only thing I care about. There's a lot of political back and forth. It's very interesting. I'm interested in it as a citizen of the United States. But I think the most useful thing that this or any other Committee could do is think about how do we make our institution—

Senator KENNEDY. Well, how are you going to do that in the context, though, of one of our Leaders—for whom I have great respect—going on the steps of the United States Supreme Court, telling two Justices if they vote in a way he doesn't like, they will pay the price and reap the whirlwind.

And you have another one of your witnesses here tweeting out stuff saying, quote, "some Justices are politicians in robes who thrive in a system where access and influence are for sale." He said they were bought like a sack of potatoes.

Judge FOGEL. Okay. I'm not—

Mr. PAYNE. Not true.

Judge FOGEL [continuing]. Going to comment on that, Senator. That's not anything I had anything to do with, so.

Senator KENNEDY. Did I hear the gavel?

Chair DURBIN. No. Thank you, Senator Kennedy. Senator, Hirono—I'm sorry, I got it wrong. Senator Blumenthal.

Senator BLUMENTHAL. Thank you.

Chair DURBIN. Can I say a word before you start? Members are coming and going. We have two roll call votes on the floor. So please understand. It's not disrespectful. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Chairman Durbin, and thank you to the witnesses for being with us today. You know, as I listen to this exchange, the fact of the matter is the American public want action. The American public is disgusted. They're disgusted with what they see in public life as the degrading of standards and conduct that would never be tolerated in their own workplaces and in their own private lives. And they want us to provide that action.

The public confidence in the United States Supreme Court has plummeted. We can go back and forth as to what the cause is, but a lot of the American public are increasingly seeing the Justices as politicians in robes. And now, after the revelations about Justice Thomas, as corrupt politicians in robes. They want an investigation. They want the truth.

And the ones who are victims here are not only the American public, they're the judges themselves at the lower courts. Year in and year out, Federal district court judges, appellate court judges are filling out those forms rigorously, accurately. And now the Nation's highest court is seeming to put itself higher than the law. And that is unfair to the other judges who are playing by the rules. And in fact, it is tarring the entire judiciary, undermining that branch of Government that has no armies, no police. All it has is its legitimacy.

If you undermine that legitimacy, confidence, and trust the American people, there's nothing left of our judiciary. And the greatest democracy in the history of the world, protected by judges who are supposed to be independent, impartial, is going to suffer irreparably.

That's why I think we need a proper investigation. It should be done by the Department of Justice because there are allegations of criminal wrongdoing here, violations by Justice Thomas of the disclosure laws, incomplete, inaccurate reporting as well as nondisclosure. And in the absence of an investigation by the Department of Justice, we have a role to play in Congress.

But the judges have a role to play, too, in protecting themselves. And what Chief Justice Roberts has done in refusing to come before this Committee is judicial malpractice. It is a disservice to the courts, to his colleagues who sit there every day, sometimes endangered physically, and always under the microscope of public scrutiny. So I think judges ought to be angry about this crisis of legitimacy that is developing in the Supreme Court because it affects our entire judiciary.

And I want to ask Judge Fogel, in your experience, although you're a retired judge, my view is judges should be angry and fearful. Do you agree?

Judge FOGEL. Let me answer your question this way, Senator. First of all, I said earlier, and it's true, I have a lot of respect for Chief Justice Roberts. He certainly was a great guy to work with for the 7 years I worked with him. And I think his intentions are good.

I think that the rank-and-file judges to whom you alluded earlier have often felt that they would like the Court to be a little bit more robust in asserting itself in this area of ethics and transparency. That it has been not forthcoming in some ways that I think it could be.

I'm not saying that there's anything wrong. I'm not here to be partisan. I'm not going to get into that debate. But I think that it would be good for public confidence. It would be very good for public confidence and for the confidence of the judicial rank and file that you were talking about if the Court were more assertive in standing for ethical compliance.

And I think this is on the Court. I think the Court can do it. I think they got some really smart people. I think there are ways that they can do it that don't compromise their decisional independence or their institutional independence.

And I think some judges are frustrated that that hasn't happened.

Senator BLUMENTHAL. I agree. I've talked to a number of judges who are more than frustrated. They are livid. And I believe their views reflect a growing feeling among the judiciary. All I can say is I urge those judges to stand up and speak out because they can help protect the judiciary as an institution. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blumenthal. Senator Cruz.

Senator CRUZ. In 1991, Justice Clarence Thomas appeared before this Committee in one of the most disgraceful performances by the Senate Judiciary Committee in our Nation's history. Justice Thomas rightly described the treatment he got from then-Chairman Joe Biden and Senate Democrats as a, quote, "high-tech lynching."

It is sad to see 30 years later, this Committee is again engaged in the same despicable tactics. Senate Democrats and their lap dogs in the media are engaged in a twofold political campaign.

Number one, to delegitimize the Supreme Court of the United States because they are angry that there are a majority of constitutionalists on the Court. But number two, very directly, this is a political campaign designed to smear Justice Clarence Thomas and the reason is simple. The left despises Clarence Thomas, and they do not despise him because he's a conservative. The left despises Clarence Thomas because he is a conservative African American.

Here's what Clarence Thomas said at that confirmation hearing. He said, if you are a freethinking African American, quote, "you will be lynched, destroyed, and caricatured by a Committee of the U.S. Senate." Well, in three decades, that hasn't changed, and it's gotten worse.

And to be clear, here's the left's view.

[Poster is displayed.]

Senator CRUZ. I point to one article just 3 weeks ago. "The Democrats need to destroy Clarence Thomas' reputation. They'll never successfully impeach him, but so what? Make him a metaphor for

every insidious thing the far right has done to this country.” That’s what the left is trying to do.

And I will tell you, if you look at the next poster board.

[Poster is displayed.]

Senator CRUZ. The left has repeatedly attacked Clarence Thomas with a racism. This is a magazine cover that showed Justice Scalia every bit as conservative as Clarence Thomas, but he’s portrayed as the master and Clarence Thomas, in a bigoted attack, is portrayed as shining his shoes.

I’ll show you another one to give you a sense of the racist vitriol from the left.

[Poster is displayed.]

Senator CRUZ. Here’s a racist caricature of Clarence Thomas, lawn jockey for the far right. This is the bigoted contempt the left has. I’ll show you another magazine cover.

[Poster is displayed.]

Senator CRUZ. Offensively, this is how the left views Clarence Thomas.

Now, it’s important for people at home to understand this is not about judicial ethics—you can take those down. This is not about judicial ethics. This is not about rules that should apply to judges across the board. We could have a reasonable discussion about that. This is about applying a double standard to Clarence Thomas, and only Clarence Thomas.

The attack that my Democrat colleagues breathlessly repeat is that Clarence Thomas stayed at the vacation home of a very close friend of his, a successful Texas businessman, flew on his plane, and went on his yacht. Well, if that’s the standard, going and traveling, and being paid for by others, then guess what? Just about every Supreme Court Justice has done so, and done so in much greater numbers.

Justice Thomas was appointed in 1991. In the time since then, he’s taken 109 reported trips, 5 international trips. Justice Ruth Bader Ginsburg was appointed in 1993 two years later. In the time she was on the Court, she took 157 trips, including 28 international trips. Mr. Payne, yes or no, do you think Ruth Bader Ginsburg was corrupt?

Mr. PAYNE. No.

Senator CRUZ. Nor do I. Ruth Bader Ginsburg was not alone. Justice Stephen Breyer, appointed the year later, in 1994, took 233 reported trips, including 63 international trips. Again, yes or no, Mr. Payne. Do you think Stephen Breyer was corrupt?

Mr. PAYNE. No.

Senator CRUZ. Nor do I. I would point out Justice Kagan has done the same thing. Justice Sotomayor has done the same thing. And yet none of my Democrat colleagues care because this is a political attack directed at a Justice they hate.

And by the way, let’s spend a moment focusing on Justice Stephen Breyer. A delightful human being. Someone I know personally. Someone who served decades on the Court. Justice Stephen Breyer repeatedly traveled on the penny of a prominent Democratic billionaire, the Pritzker family. Now, J.B. Pritzker is the Democrat Governor of the State of Illinois from which our Chairman hails.

I would be shocked if the Chairman of this Committee has not had multiple meals with the Pritzker family.

Justice Breyer was a longtime member of the board that awarded the Pritzker Architecture Prize. Now, what did that mean? That meant Justice Breyer traveled on the dime of these Democrat billionaires. In 2019, Justice Breyer traveled to New York City, to Vancouver, and Paris.

In 2018, Justice Breyer traveled to Ireland, and Spain. In 2016, he traveled to New York, Spain, and France. In 2013, he traveled to Norway, Sweden, Denmark. In 2012, he traveled to Beijing, and to London. All of this paid for by the Pritzker Foundation.

Now, none of my Democrat colleagues are mad about this. And let me be clear, I'm not suggesting Justice Breyer is corrupt. What I'm suggesting is this Committee is corrupt because this is a kangaroo circuit—circus, and I will note, we had 15 Senate Democrats, including 6 Members of this Committee, send a letter to the Appropriations Committee threatening to cut off the funding for security at the Supreme Court. The left is willing to threaten the lives of the Justices.

Justice Samuel Alito this weekend in *The Wall Street Journal* said that the attacks directed at the Justices are making them targets of assassination. This is disgraceful. Every Senator who signed this letter should be embarrassed. Mr. Chairman, I ask unanimous consent that this letter be admitted into the record, and also that the interview with Justice Alito from this weekend be entered into the record.

[The information appears as submissions for the record.]

Democrats can have disagreements based on law, but this attempt to delegitimize the Court, this attempt to personally smear Clarence Thomas, is dishonest and everyone in the media echoing it is participating in a shameful reprise of 1991's high-tech lynching.

Chair DURBIN. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. We have heard that every other Federal judge, Members of Congress, and legislative, and executive branch employees are all bound by strict ethical rules. But this extends beyond Government into the private sector, where employees from the CEO to the sales floor are subject to strict codes of conduct.

[Poster is displayed.]

Senator HIRONO. For example, Home Depot tells all its employees that a conflict occurs when their private interests even appear to interfere with the company's interests, and that the perception of a conflict by others can be just as damaging. Home Depot makes clear that gifts of personal travel for an associate or an associate's family member are never allowed.

[Poster is displayed.]

Senator HIRONO. Ally Bank explains that even gifts from personal friends can appear to be improper if the friendship resulted from a business relationship involving the bank or the perceived purpose relates to business involving the bank. The bank tells its employees to ask themselves the following questions in evaluating gifts: Does the person or entity frequently provide or offer gifts to me? Is the gift extravagant or otherwise not reasonable and cus-

tomary? Would I be embarrassed for everyone to know about the gift?

[Poster is displayed.]

Senator HIRONO. Similarly, AutoZone tells all its employees, we don't give or accept gifts, meals, entertainment, favors, or anything else of value that may inappropriately influence or appear to influence our judgment. So as we've seen today, the Supreme Court's ethics rules fall far short of the clear, binding rules of the executive and legislative branches and those of the private sector.

Judge Fogel, these companies have their rules posted online for the world to see. Wouldn't it help restore faith in the Supreme Court if it, too, had a set of explicit, binding ethical rules available for the world to see?

Judge FOGEL. Yes. I completely agree, Senator. I think it would. You know, the Code of Conduct for United States Judges, which all the other Federal judges follow, is online. You can find it anytime you want. All of the State courts have something similar and it's available online. And I think it's potentially very reassuring to the public particularly given all of the political back and forth. So, yes, I think the answer is yes.

Senator HIRONO. Thank you. Professor Frost, the Supreme Court has a huge impact on the daily lives of every single American. For example, the ruling in *Dobbs* that overturned *Roe* has led to chaos in our country over reproductive care. The decision gutting the Voting Rights Act have resulted in over a dozen States enacting laws making it harder and harder to vote. Supreme Court decisions have also sanctioned unlimited corporate spending in elections and diminished the quality of the air we breathe. Professor Frost, shouldn't a group of individuals with such immense power be held to at least the same ethical rules as all other judges?

Professor FROST. Yes, I agree.

Senator HIRONO. I want to get to the personal hospitality. That was a huge, I'd say, exception to the disclosure requirements before the Judicial Conference, at Senator Whitehouse's prompting, clarified the personal hospitality exception. The judiciary's rules were anemic at best.

If there is even an argument, however unconvincing, that trips valued at hundreds of thousands of dollars might be allowed, it shows how far we are from a strong binding code of ethics. And that is what the Supreme Court needs and if the Court will not adopt one on its own, we must impose one on them.

And basically, for all of our panelists, the highest court in our land should hold itself to the highest ethical standards and it is so clear that that is not what is happening today. What is so hard for our Supreme Court to adopt a code of ethics? It could have done so 11 years ago, 10 years ago, when our Chairman first brought up the subject. So what is so hard for them to adopt the code that every other court has to abide by?

That's what we are facing today and frankly, I can see why the public has severe questions about the confidence that they have in our Supreme Court, which seems to hold itself above any other court, and any of the rest of us in terms of their ethical behavior. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Hirono. Senator Booker.

Senator BOOKER. Thank you, Mr. Chairman. Professor Frost, Mr. Dupree, I really enjoyed both of your testimonies. And I thought they were speaking to the importance of trying to find balance. The Supreme Court is probably one of the most important parts of our Government, and its independence to rule is critical.

And I appreciated Mr. Dupree injecting some skepticism about how anything that we do. If it can be exploited by this very political institution called Congress, is somewhat problematic and something that I would tread on very lightly. And I enjoyed both of your testimonies for that reason.

Professor Frost, can I just ask you there are some legitimate concerns, I think, that Mr. Dupree brought up. And I wonder if you could just talk to me. This balance between separation of powers, and checks and balances, which you spoke to so eloquently is really what I'm looking at myself.

There's been unsurprisingly a lot of political talk today in this hearing. But at the end of the day, I think America wants their Supreme Court—something I learned at Yale Law School, if I learned anything there, was this idea of there being the appearance of impropriety, and how problematic that is for a lawyer, not to mention the highest court in the land.

And as was said in some of the early writings, is that, you know, the Supreme Court has no army. It vests its power in the consent of the governed, and these are very fundamental ideals. And I'm just wondering if you could help me with that balance.

Professor FROST. Yes. And thank you for the question. So I hear Mr. Dupree's concern that we would not want ethics rules to be used as some way in which to penalize Justices for their decisions. And in fact, I started my testimony by saying decisional independence is vital.

But I actually think it's the absence of ethics rules that is harming the Court and leading to the problems we see today in terms of public perception. If ethics laws were strengthened or passed by this Congress, they would apply to all the Justices. If there was more transparency in the Court and its process for dealing with ethical problems, then we wouldn't have certain reporters publicizing certain Justices' problems. We'd have transparency about each and every Justice, whether they were abiding by the rules and what should happen next.

So I think it's the absence of laws that is leading to the problem of political tax on Justices. If we had better legislation, we'd see less of that.

Senator BOOKER. And what about concerns you would have when we enter into this space? That is not something we regularly do in writing this legislation. What are some of the reasonable concerns that you would have about how that legislation is narrowly tailored to the end that we are looking for?

Professor FROST. Well, so first, and I think this is in the proposed legislation, it would be best for the Supreme Court itself to draft a code of conduct for itself. I agree with others on this panel who have said that the code of conduct for the lower courts—which the Supreme Court says it follows or uses as guidance—it maybe needs to be tweaked or changed in various ways to deal with the unique nature of the Supreme Court.

So the Supreme Court itself should come up with a code that it drafts for itself. But legislation could tell the Court, you must do this now because we've been waiting since Elena Kagan testified that in 2019 they were seriously considering doing it, and they have yet to take action.

Senator BOOKER. It's almost stunning that they haven't to me. I don't want to ask you to speculate as to why not. Clearly, America's faith in their Court, on both sides, people identify as Independent, Republican, or Democrat, they're losing their faith in this institution and something that is—you know, I'm an X Generation guy, and maybe like many of my generation, we took for granted the rock-solid nature of our democratic ideals and principles until we started seeing them—very unprecedented things happening, including the Capitol being overrun for the second time in American history—not happening before since the War of 1812 and 1814.

And so could you maybe, at least, explain this idea that the Supreme Court—maybe what the Founders had in mind in terms of its urgency to self-govern? To do things that would protect itself from that kind of loss of confidence.

Professor FROST. Yes. I mean, I think the Framers of the Constitution realized how important it was to have a judiciary that was insulated. That its decisions were insulated from political pressure. But equally, the Framers realized that they would want Congress to play a role in the establishment of the courts, the lower courts, which are the Congress' choice to create them, and the Supreme Court, which must exist, but does not control most aspects of its administration, like its size, like the quorum requirements, like when it meets.

Even significant aspects of its jurisdiction are controlled by Congress as the Framers intended. And what they intended to do was have Congress ensure that the courts run effectively to serve the Nation's interests. And that's what this legislation will do.

Senator BOOKER. So the last point I want to make, which is something that, again, in all my studies of the founding of our country, this worry about concentrations of power, this worry about the corruptibility of officials, should they not have checks and balances? We have seen that writ large in our society, in the other branches of Government, how corruption happens.

Because you get elected to the Supreme Court, you are not beyond the corrupting influences of our society which are often revolving around enormous influences of wealth. And so could you just give me one more point on if we are going to hand on a democracy stronger than we inherited or at least as secure, is there some wisdom to glean from the understanding the Founders had about the fallibility of the people that hold these sacred offices?

Professor FROST. Yes. The Framers were very clear that there would be partial control of each branch over the other because no one should be unaccountable. And, "ambition must counteract ambition," as James Madison put it.

Senator BOOKER. Thank you very much.

Chair DURBIN. Thanks, Senator Booker. Senator Hawley.

Senator HAWLEY. Thank you very much, Mr. Chairman. Thanks to all of the witnesses for being here. I want to talk about this let-

ter that I think 11 Democrat Senators signed dated March 31st, 2023—it's to Members of the Appropriations Committee.

I'm just looking here at the signatories. It includes quite a number of Members of this Committee, as well as others. This is a very interesting letter to me. And I just want to look a little bit at some of the language, and what these Senators are asking for.

[Poster is displayed.]

Senator HAWLEY. They say that, "Congress ought to impose a code on the Supreme Court." They say, "Congress has broad authority to compel the Supreme Court to institute reforms." Compel. And then, they go on and say, "Congress' appropriations power is one tool for achieving these changes." Compel. Now, we're going to compel the Court, we're going to use the appropriations power. How to do it? Well, they're very specific. Congress should, "withhold appropriations." Withhold appropriations.

And then they go on to say, "nothing stops Congress from treating the judiciary any differently than any other entity of Government when faced with judicial recalcitrance." So here we have judicial recalcitrants. These darn judges won't do what we tell them to do. So we're going to compel them to do what we want, and we're going to use the appropriations power.

All right, what appropriations? Well they ask for \$10 million to be withheld. That's an interesting number to me. \$10 million. \$10 million. Why \$10 million? Well, let's have a look at the Supreme Court's 2024 budget request.

[Poster is displayed.]

Senator HAWLEY. What do we see? Well, we see \$4 million of request for security funding from the CHIPS Act. \$4 million.

Then we see an additional \$6 million of more security funding that the Court is asking for. This is their 2024 budget request. The Supreme Court, it's asking for \$4 million in security funding from one source, and another \$6 million over and above: 4 plus 6 equals 10; \$10 million of security funding that the Court is specifically asking for this year in their budget request. And that just happens to be, magically, the exact same number that my Democrat colleagues want to deny the Supreme Court unless they stop their judicial recalcitrance and submit to the compulsion of this body.

So in other words, the threat is, we will deny you security unless you do what we want. Let me say it again. We will deny you security unless you do what we want. We had an assassin come to the home of Justice Kavanaugh and try to murder him. We have had credible threats on the lives of other Justices. And now Members of this body say we will deny you security for you, your families, your children, unless you do what we want. Extraordinary. Extraordinary.

Judge MUKASEY, can I just ask you, longtime distinguished jurist, former Attorney General of this country, do you think it's appropriate to threaten the security of Justices of the United States and their families in order to get them to comply with the wishes of this body?

Judge MUKASEY. No.

Senator HAWLEY. Have you heard of something like this being done before?

Judge MUKASEY. I have not.

Senator HAWLEY. I haven't either. And I have to say, at a time when we have had three different credible assassination attempts or threats against Justices, we still have people illegally going to the Justices' home to attempt to influence their decisions in cases. No one has been prosecuted for those violations.

We have constant threats and danger to their children. We had radicals post publicly the school location of one of the Justices' children. And in that context, to say that we will deny them millions of dollars in security funding unless they do what this body wants, I think is the height of irresponsibility. And frankly, I can't believe that I'm seeing it.

I guess it's just of a piece with what we've seen from the Majority Leader who said that—what was it? Schumer, he said, Kavanaugh and Gorsuch, that, “you will reap the whirlwind.” Well, I guess we're reaping the whirlwind now. That they're just on their own unless this judicial recalcitrance stops. I hope that we don't have to see another assassination attempt. I hope we don't have to have a Justice actually killed before this body will take judicial security seriously and stop its attempts to coerce an independent branch of Government. Thank you, Mr. Chairman.

Chair DURBIN. Since the assertion has been stated and repeated here, I want to make it clear that it was the Democrats who led the charge to pass the Daniel Anderl Judicial Security and Privacy Act last Congress after the taking of the life of Judge Esther Salas' son at their home. That bill was held up on the Senate floor for nearly 1 year by a Republican Senator, unfortunately. The cause of security for our members of the judiciary is bipartisan.

Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. You know, I continue this important and timely dialogue. As the Supreme Court itself stated in *Buckley v. Valeo*, quote, “of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption,” end quote.

While this case dealt with financial contributions to elected government officials, the same logic applies to appointed judges. There's very serious concern of actual corruption in the absence of strictly enforced, rigorous ethical standards for our judges.

But as the *Buckley* opinion made clear, there's also a serious concern that public trust in our highest court is damaged even by the appearance of impropriety, weakening the faith in our judicial institutions as a whole. Now, what's more, as a former Federal judge and advisor to Vice President Mike Pence—speaking of Mike Luttig here, he said in a statement to this Committee—not some far left or whatever tagline some of my Republican colleagues would assign to Mr. Luttig. He said, quote, “this is emphatically not a partisan political issue and must not become one,” end quote. And I agree.

This is an issue of importance to all Americans. My first question is this, and I'll address it to Professor Frost. Can you explain the effect of when judges take actions that call into question their own ethical standards, and how that impacts public faith in the courts?

Professor FROST. Yes. It does so in two ways. First, when the law is binding on the Justice and the Justice does not follow it, I think it both undermines the integrity of the court system and also raises the question of whether the Justice is following the law in all the

other cases because, of course, the Justice is responsible for administering the law.

And second, you made the point about the appearance of impropriety. So I think it's very important for judges and Justices to be aware that even if they are doing nothing personally wrong, they're not trying to be bribed if they create the appearance of that to others, that is a problem for the legitimacy of the judiciary.

Senator PADILLA. So even the appearance of impropriety can be just as damaging as actual impropriety when it comes to the public trust in our court system?

Professor FROST. Yes. And in fact, the code of conduct that applies only to the lower courts, in which the Supreme Court does not have to follow, specifically states that: that the appearance of impropriety is as much of a problem as actual impropriety.

Senator PADILLA. So, speaking of, according to Federal statute, all judges are required to recuse themselves when they either have a financial interest in the outcome of a case or where there's otherwise a strong possibility that their decision could be biased.

The Chief Justice, along with some of today's witnesses, argue that the Supreme Court cannot be subject to sensible, robust recusal rules because the Constitution demands that all nine sit and recusal would invite gamesmanship over which Justices might hear a case. That's the argument, anyway. I'll address this question to Mr. Payne. Is it accurate that nine Justices always make decisions together?

Mr. PAYNE. No. Sometimes Justices recuse, and all nine are not active on a case. But I also will point out the important point, that recusal does not necessarily mean that the judge has to get off of the case if you have a procedure where the recusal disclosure, that is, the rationale for not recusing is made public, or the decision to recuse is made public. That also can provide what the public is looking for with transparency.

Senator PADILLA. So I want to bring together the earlier topic in question of actual impropriety versus perceived impropriety, and now the dynamic of recusal. Back to Professor Frost.

Bloomberg recently reported that Harlan Crow, the billionaire Republican donor that gave Justice Thomas hundreds of thousands of dollars' worth of gifts and travel over two decades, had a financial interest in a case appealed to the Supreme Court in 2005. And that there's no indication that Justice Thomas recused himself from that matter.

In your opinion, how does a situation such as this, with the absence of recusal, impact the public's faith and trust in the Court system?

Professor FROST. Yes. Again, it's two problems. One, there's the possibility, or certainly the public would be reasonable to think that there might be bias when there's a financial interest by a Justice in a case that that Justice is hearing.

And second, there's the broader point of it's just disturbing to see any Justice not follow a law that applies to them. They're responsible for administering the laws, and they should follow the laws that apply to them.

Senator PADILLA. Thank you very much. Thank you, Mr. Chair.
Chair DURBIN. Senator Welch.

Senator WELCH. Thank you, Mr. Chairman. We have two competing narratives here. We have 5 witnesses and two opinions. Three witnesses believe that it's within the power of Congress to act. Two witnesses believe it's a violation of separation of powers. We have a dispute here and disagreement among, basically, Republicans and Democrats about what the motivation is of an ethical investigation, whether it's just a proxy for the competing views about what the outcome of the decisions were.

I happen to strongly believe that the Court—or pardon me, the Congress does have authority, and I won't rehash that. But I would ask this. Wouldn't it simply be wise for the Chief Justice, who is the steward of the public reputation of the Court, on his own volition, to adopt a strong code of conduct that the Court would adhere to? Attorney General Mukasey.

Judge MUKASEY. One-word answer, no. Because the strong code of conduct that you hypothesize would then have to be enforced with a mechanism that would involve the questioning of individual Justices. He has in his letter to this Committee, he has outlined the procedures that are used in cases of recusal.

Senator WELCH. So let me ask this—

Judge MUKASEY. He's outlined the fact that they file the same disclosure reports that—

Senator WELCH. So if he had—

Judge MUKASEY [continuing]. Other judges file.

Senator WELCH [continuing]. A code of conduct that included a Supreme Court Justice cannot take a bribe. Something that they can't do. You would say that would be improper because they would be subject to enforcement outside of the Court?

Judge MUKASEY. No. I would say that would be redundant because—

Senator WELCH. Mr. Payne—

Judge MUKASEY [continuing]. They are subject to the same laws of general application that apply to—

Senator WELCH. Okay. Thank you.

Judge MUKASEY [continuing]. Federal employees. They could be prosecuted—

Senator WELCH. Thank you. Mr. Payne.

Judge MUKASEY [continuing]. And they could be impeached. That's not the same question.

Senator WELCH. Thank you. Do you have a view as to whether it would be prudent for the Chief Justice of the Supreme Court as the steward of its reputation to promulgate—or pardon me, I'll ask you, Mr. Dupree—a code of conduct that would apply to all?

Mr. DUPREE. I think the Chief Justice, at least, Justice Kagan when she testified before the House several years ago, she said that the Supreme Court was actually considering doing that. They obviously haven't—

Senator WELCH. No, I'm just—

Mr. DUPREE [continuing]. Done that.

Senator WELCH [continuing]. Asking, you know, as a citizen, you know, we have different points of view, but what is the problem with the Supreme Court Justice saying, "Let's have a code of conduct that applies to all of us"?

Mr. DUPREE. I think the problem, at least the potential problem, would be the one that Judge Mukasey identified. Which is to say, what is the enforcement mechanism? Is there going to be some superior tribunal to the Supreme Court—

Senator WELCH. I think that—

Mr. DUPREE [continuing]. That is going to disqualify Justices.

Senator WELCH [continuing]. Puzzles the average Vermonter. But I want to go on to another issue. There's been discussion that there is an agenda here because many on our side disagree with some of the Court decisions. Let me just admit, I am one of those who disagrees with a lot of the Court decisions.

We've talked here about separation of powers. Which I agree with. But we've also talked about checks and balances. And my view is that the erosion of support for the Court has less to do with the ethical issues and more to do with the public sense that it has completely disregarded the rights of the majority through their elected representatives to pass laws to protect the public interest.

Now, I'll ask you again, Attorney General. The Supreme Court has done this before, in my view. The *Dred Scott* decision. They said African Americans couldn't be citizens, they said Congress could not legislate against slavery in the territories. Historically, do you agree with that decision?

Judge MUKASEY. With *Dred Scott*?

Senator WELCH. Yes.

Judge MUKASEY. Hell no.

Senator WELCH. Good. But that was the Court interfering with the authority of Congress to legislate on what was a majority point of view to start pushing back on slavery.

Judge MUKASEY. That was the Court making a disastrous—

Senator WELCH. That's correct.

Judge MUKASEY [continuing]. Error.

Senator WELCH. And in the *Bruen* decision, which was where the New York legislature was attempting to protect its own citizens from the violence of rampant gun violence, the Supreme Court said they didn't have authority to do that. And that is completely divorced from what the majority of American citizens want about gun safety. What say you about that?

Judge MUKASEY. What I say about that is that the *Bruen* decision stands on its own rationale. And it does not have to do with denying anybody's rights, or denying anybody's—

Senator WELCH. It denied—

Judge MUKASEY [continuing]. Protection.

Senator WELCH [continuing]. The legislature the right to protect the citizens who elected them. What about—

Judge MUKASEY. What it says—

Senator WELCH [continuing]. The *Lochner* decision. No, let me ask about the *Lochner* decision.

Judge MUKASEY. Which has been overruled.

Senator WELCH. At the beginning of the Progressive Era—yes, it was overruled, thank goodness.

Judge MUKASEY. By the Supreme Court.

Senator WELCH. At the beginning of the Progressive Era, the Court, according to Holmes—who I happen to think was a pretty good Justice, and he was a dissenter—said that what was the ra-

tionale of the Court's decision prohibiting the New York legislature from protecting the workers from working 60 hours a week, that that was based on the Court's adherence to not a legal principle, but to an economic doctrine of laissez faire. Do you agree with that decision?

Judge MUKASEY. With the dissent or with *Lochner*?

Senator WELCH. With the basis of the decision where the Court essentially interfered with the legislative capacity to pass laws in this case to protect against abuse of wage and hour regulations imposed by the employer?

Judge MUKASEY. I don't agree with it. And more to the point, the Supreme Court didn't agree with it because they reversed *Lochner*.

Senator WELCH. But here's the point that I would want to make, and I appreciate your pushback here. The checks and balances component of the Constitution is being disregarded. The Congress is not autonomous. We are all elected, and we reflect different points of view. But this Congress, as in the *Lochner* Congress, as in the *Dred Scott* Congress, has the authority and the responsibility to act on behalf of the citizens who elected them, and not have that impeded by a Supreme Court unless there's something unconstitutional. The decision-making authority of the Court, we're not contesting. I yield back. And I apologize for going over my time.

Chair DURBIN. Senator Tillis.

Senator TILLIS. Mr. Chair, I think it's the only day where Senator Welch shouldn't have to apologize. It's his birthday. Happy birthday.

Senator WELCH. Thank you.

Senator TILLIS. Thank you all for being here. I actually came with some prepared comments to talk about what I thought was covered very well by Senator Graham and Senator Kennedy. So I'm not going to talk about the current state of affairs. But I think that our behaviors, and the behaviors of some people in this country have created a really toxic and very dangerous environment for the Supreme Court and the judiciary down the line.

And that's what we need to be aware of. We have to stop this here because it won't end here. We'll have protests at district judges' houses. We will have circuit court judges stalked. I mean, we've got a serious challenge here, and I think it's in large part on Congress to de-escalate the situation.

But, Mr. Dupree and Professor Frost, in y'all's opening statements, you looked like you were preparing your opening remarks for a debate on the constitutionality of what we're considering here. And so I'm going to create an ad hoc debate between the two of you and maybe allow others, if you want to raise your hand and opine.

But you laid out in 5 or 6 minutes a very strong case for saying that any actions we would take here could arguably be unconstitutional. I do think stipulating to what Professor Frost said in her opening comments, there is clearly a role for Congress to play, and we have in the past with creating the structure for the Article III branch that was mandated under the Constitution.

But I'm kind of curious about Professor Frost's idea of where the line goes because I could have read your comments to say that all of the proposals that are before us in the Senate and the House would pass constitutional muster.

I think the one that I found most interesting that I'd like your opinion on is the proposal—I don't recall the bill number—that really created the structure where circuit and district courts were really going to be empowered to govern the proceedings of the Supreme Court. Maybe if you're aware of this particular bill, we can go right to your rebuttal. But that seems to be far afield from anything that the Founding Fathers would have conceived congressional action being appropriate. Would you elaborate that on that for 30 seconds?

Mr. DUPREE. Absolutely, Senator, and thank you for the question. The first point is yes, I mean, I think it just is self-evident that you can't constitutionally have a system in which the Congress vests inferior tribunals in our Federal judiciary with supervisory authority over the United States Supreme Court.

As you know, and as this Committee knows, you know, the opening of Article III of our Constitution vests the judicial power in one Supreme Court, and such lower courts as the Congress may from time to time ordain and establish.

And so I think the Framers necessarily understood that we have a pyramid. We have one court at the top, we have inferior tribunals below it. And it stands to reason that you cannot vest those inferior tribunals with supervisory authority, including the power to disqualify from a case the Supreme Court Justices.

Senator TILLIS. Okay. Professor Frost.

Professor FROST. Yes. So if the legislation you're referring to says that the judges on the lower courts will be reviewing the ethical conduct of the Justices, that is maybe their financial reporting and not their recusal decisions, I don't see a constitutional problem. The same way there's not a constitutional problem with a Justice being prosecuted if they commit a crime like any other judge.

So, no, the lower courts couldn't review the Supreme Court's decisions for the reasons that Mr. Dupree just gave, but they certainly could review their ethical conduct off the Bench as a constitutional mandate.

Senator TILLIS. What do you think about the—you know, we are the political body. We were envisioned to be that. And right now, they seem to be all doing very well. But it would just seem to me that you'd be creating a framework to where the outside could game it and divide the courts.

I mean, suddenly you'd have a group of district court judges who would have one agenda that they would be advancing. You would have others, another agenda, and probably some of the middle, not unlike what we have here on any policy matter. But it just seems ripe for really seeding the field with the politicization of the Court. Starts with ethics, but where does it go from there?

Mr. DUPREE. Well, I think that's a very serious concern, Senator, I would say in two respects. One is that there's a serious concern that litigants could try to game the system to determine the Justices who would be hearing their case. In other words, some of the proposals before the Congress right now would allow third parties to challenge the ability of a Justice to participate in a decision.

And if that provision were to become law, I promise you, someone who litigates regularly in the United States Supreme Court round

one of any litigation, would be trying to knock out the Justices who you think might be opposed to you. That's untenable.

Number two, the problem is if you create a system where individuals are incentivized and encouraged to file ethical complaints, I worry that long term, that ultimately—

Senator TILLIS. It'll be a cottage—

Mr. DUPREE [continuing]. Will corrode—

Senator TILLIS [continuing]. Industry. We already have it in other branches of Government. It will be a cottage industry. It will be politicized. We will diminish, I think, the integrity of the Article III branch as a result. You know, for my part, I think the exchange of information here may be helpful. What I think is more important is that I think that the Supreme Court and clerks are watching this right now. We have heard examples of instances of behavior at either end of the ideological spectrum that was unacceptable behavior.

I, for one, hope that this does nothing more than turn into an oversight hearing, not something that lays the groundwork for congressional action. And that the Supreme Court who rightfully declined with the concurrence of all Justices not to come before the Committee. That would be a political circus, and almost unprecedented in terms of American history to have a hearing of that nature with the Chief Justice.

So I just hope—what I care about most is not your confidence in the judicial system, not necessarily the confidence of any one Member here, but the confidence of the American people. And I do hope that this process has been instructive to an Article III branch who should independently, in the same way that I have an office code of conduct that all my staff had to read and affirm every year.

I don't know how many Senate offices have that. Probably not many. But I think that they could update, refresh, and address the concerns without requiring any congressional action. And if they act in the near term, maybe this Committee could be instructive. Thank you for your time.

Chair DURBIN. Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman. And thank you to our panelists for joining the Committee today. Judge Fogel, the Judicial Conference has issued a code of conduct which applies to the district and circuit courts. Correct?

Judge FOGEL. Yes.

Senator OSSOFF. And as I understand it, one of the tenets of that code is that judges should avoid any conduct that can lead even to the appearance of a conflict of interest. Correct?

Judge FOGEL. That's correct.

Senator OSSOFF. And why is that important?

Judge FOGEL. Because if there's an appearance of a conflict of interest or an appearance of impropriety, then the people who are affected by the decisions that that judge or judges make rightly lack confidence in it. They suspect that it's not a fair decision. That there are improper influences.

Senator OSSOFF. The appearance of a conflict of interest—

Judge FOGEL. That's correct.

Senator OSSOFF [continuing]. Can undermine public confidence in the integrity of the judiciary. Correct?

Judge FOGEL. That's correct.

Senator OSSOFF. Judge Mukasey, putting aside the question of how such a code of conduct might be applied to the Supreme Court, and I recognize and acknowledge that there are separation of powers and constitutional concerns that need to be carefully weighed in considering the design of such a system. Do you agree with Judge Fogel that the appearance of a conflict of interest can reasonably undermine public confidence in the impartiality of a judiciary, whether it's a district, or a circuit, or the Supreme Court?

Judge MUKASEY. Of course. So long as you articulate what it is that appears. People often say the appearance of conflict and feel that that's just kind of a nice, vague term that they can use to cover a concern about something else. I think if you allege, in particular, as to a particular Supreme Court Justice that there is an appearance of a conflict, or an appearance of impropriety, you have some obligation to articulate what it is that appears. Otherwise—

Senator OSSOFF. Would you agree, Judge—forgive me, you agree, Judge Mukasey, with the principle—

Judge MUKASEY. Yes.

Senator OSSOFF [continuing]. That, as for district and circuit court judges, where they are advised and governed in part by a judicial code of conduct through the Judicial Conference that they should avoid any appearance of conflict of interest or impropriety because it can reasonably undermine public confidence in the impartiality of a judiciary, that the public could also reasonably, depending upon the facts, lose confidence in the integrity of the Supreme Court depending upon the conduct of Justices?

Judge MUKASEY. Right. And it has to be reasonable. I recall writing on that subject when I was asked to recuse myself because I am a Jew and a Zionist from judging a case involving some terrorists. I refused. And I wrote rather long and elaborately on that topic.

Senator OSSOFF. That's right. But you did not, Judge Mukasey—and I ask this rhetorically, and I know the answer is no. You did not, as a judge, or do not as a judge accept foreign travel and hundreds of thousands of dollars from politically active parties. Correct?

Judge MUKASEY. No, I did not.

Senator OSSOFF. And I think reasonably you might have been concerned that such conduct would have created some public concern about your impartiality and probably would have avoided that conduct even if it weren't strictly illegal for that reason. Correct?

Judge MUKASEY. I was never offered that conduct because I don't know people who—

Senator OSSOFF. But that wasn't my question. My question is, as a judge you quite reasonably and properly would avoid accepting such lavish gifts because of the concern that it could create public doubt in the impartiality of your judgment. Is that right?

Judge MUKASEY. The only time that I accepted travel and accommodations was from a seminar in economics that I found enormously valuable that was then obliterated because it was said that that created the appearance of conflict.

Senator OSSOFF. And Judge Mukasey, I'm not in any way questioning or even seeking to interrogate your personal conduct. What I'm asking you is that as a judge, is it fair to say that you most likely would have declined an offer of foreign travel worth hundreds of thousands of dollars because quite reasonably, you would have had the concern that public disclosure of such travel could have undermined public confidence in the impartiality of your judgment?

Judge MUKASEY. Simply because it amounted to—I mean, if somebody took me—I mean, if I were a district judge and somebody wanted to fly me on his private plane on a vacation with his family, and I were friendly with that person. Would I have refused and endangered the friendship? I'm not sure that I would have.

Senator OSSOFF. I think the American public sees that kind of conduct and quite reasonably asks the question whether it's appropriate. And my impression is that most judges at the district and circuit level considering the guidance in the judicial code of conduct—but, Judge Fogel, I don't know if you agree with me—would refrain from such acceptance for that very reason.

Judge FOGEL. Well, I think it's interesting, Senator. The California Code of Conduct which is very similar to the Federal one, there actually is guidance. That when you receive social hospitality, you receive a gift like we're talking about here, that you should consider the size of the gift. That's one of the factors you should consider. So that it's one thing if somebody takes you out to dinner. It's another thing if somebody flies you on a private jet to some far-away place.

That actually is not in the Federal code of conduct. I think it is one of the hard ethical questions here, is—you know, you can focus on whether one's accepting a gift like that should be disclosed, which is something that's under the Ethics and Government Act.

And then there's the question of whether the sheer size of the gift creates an appearance. And I think there are different opinions about that. But I think when you're talking about the appearance of impropriety, you need to look at the entire context. And I agree with Judge Mukasey that what is a reasonable question about whether the gift or the hospitality or whatever it is, is so large that it raises issues of undue influence. I think it's a holistic type of inquiry.

Senator OSSOFF. Thank you, Judge Fogel.

Chair DURBIN. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. Before I begin my questions, I know that a lot of my colleagues have addressed what they see as the hypocrisy of this hearing, and the continued effort by our colleagues across the aisle to politicize, or smear, or delegitimize the Supreme Court. And I find that disappointing, especially when you look at what has transpired in the past year with our Justices and the threats, the assassination attempts, the protest outside of their home, simply because people disagree with the decisions that they have reached. And I find it just completely inappropriate.

General Mukasey, I want to come to you and talk for a moment about the safety of the Justices. And Section 1507, which some of my colleagues have raised today, that section makes it illegal to

protest outside of a judge's residence if the intent is to influence that judge's decision-making.

And we've heard what the protesters outside of the Justices' homes were saying post the *Dobbs* decision. Things like, and I'm quoting some of those, "If you take away our choices, we will riot." And another one they would chant was, "No privacy for us, no peace for you."

In other words, if the Justices were not going to vote their way on *Roe* and *Casey*, then the protesters were going to keep the harassment up. And as we have heard, they have done that as they have protested *Roe v. Wade*, as they have protested the *Dobbs* decision.

And despite all of this, the Biden DOJ has refused to enforce Section 1507. And that's why I introduced the Protecting Our Supreme Court Justices Act, which increases the jail time for anyone who tries to influence a judge's decision-making in this manner.

And I would just like to ask you what more can we do to send this message that what they're doing is wrong—to allow these protesters outside of these Justices' homes. And you've got Justices that I know fear for not only their safety, but the safety of their families. And we've talked about that today. And I do see increasing that jail time from a year to 5 years as one step that we can take. And we should pass that and protect our Justices.

Judge MUKASEY. Well, increasing the penalty may very well be appropriate, but I think that the key here is there have been no arrests in those cases. None. Zero. Nada. And to say that that's within the control of the marshals who provide the safety, I think really doesn't pass the laugh test. And to suggest that somehow these people are exercising First Amendment rights when First Amendment rights are subject to place, time, and manner restrictions, is really disingenuous. If you had arrests, I'm not entirely sure that increasing the penalty would be necessary. But in any event, it starts with that.

Senator BLACKBURN. It would be nice to see some people held to account for what they are doing. Does anyone else on the panel have a thought on what ought to be done? Would arrest send the proper message that what they're doing is inappropriate?

Mr. DUPREE. I think both branches, frankly, have an important role to play in protecting, you know, the brethren, so to speak, on Article III, the Supreme Court. I think that the executive, as Judge Mukasey said, can play a much more aggressive role in law enforcement, both in protecting the Justices, particularly when they're in their homes, particularly when threats are directed at the children of the Justices. They can make arrests, and they can just basically take those law enforcement responsibilities seriously.

I mean, I think we all can recognize that peaceful protest has an honored role in our society. And, you know, you want to protest on the steps of the Supreme Court, that's one thing. But if you're targeting the Justices in their home and their children, I mean, that goes well beyond the line of any—

Senator BLACKBURN. Let me ask you this then. What about Senator Schumer's threat when you heard it? Of course, we've talked about that some today. Do you see that as an ethical breach of conduct of one branch of Government to another?

Mr. DUPREE. Well, I think if you have a United States Senator, you know, on the steps of the Supreme Court saying what, I think, most reasonable people interpreted as a threat to individual Justices by name, if they don't vote a particular way and vote the way that the Senator prefers, that they will, you know, inherit the whirlwind, or reap the whirlwind, or whatever he said, that's obviously not appropriate. I mean, you can't have a system that functions when you have Members of the Senate standing on the steps of the Supreme Court threatening the Justices in particular cases.

Senator BLACKBURN. That's right. Three co-equal branches. And that's part of the point, I think, that is so important to make, Mr. Chairman. That we recognize that. Thank you all.

Chair DURBIN. Thanks, Senator. Mr. Payne, you've asked for a chance to respond, if I understand it, to—

Mr. PAYNE. Yes.

Chair DURBIN [continuing]. Questions raised earlier.

Mr. PAYNE. Yes. Just simply clarifying that when Senator Kennedy asked me about tweets that I made, I didn't make the tweets myself. It wasn't my words. But it was pointed out to me that I did retweet a news article that did have additional commentary with that retweet. So I just want to clarify that for the record.

Chair DURBIN. Thank you. I also want to clarify that when I had sent the letter of invitation to Chief Justice Roberts, he responded directly to me. The other Justices signed on to his ethics statement that was accompanying that response. So they did not technically decline an invitation. It never was offered to them. I said to Senate, in my invitation to the Chief Justice, he could come join us, or any member of the Court could as well. So point of clarification.

I'm going to close this by saying, thank you, and allowing Senator Whitehouse, if he has anything he wants to add at this point.

Senator WHITEHOUSE. Thank you. I think what we have here is a situation in which very clear policies and procedures exist in the judicial branch of Government and are generally administered through the circuit courts of appeal. And they include very basic things like having a place where a complaint about a judge's ethics can be lodged. The Supreme Court doesn't have that.

They include very basic things like having staff people assigned to review any complaints that come in, sort out what makes sense and what doesn't. Do the usual filtering that people have to do of complaints that come in. I think every circuit court does that. The Supreme Court does not.

Beyond that, once you've done the filtration, if it looks like a complaint has merit, a staff attorney's work with regard to the other Federal judges is to take a look at the complaint and to do a little bit of a factual investigation so there's a record to decide what's true and what isn't. And that can include asking a question of the judge about what their recollection is of the situation or what their justification is so their factual record gets made. Again, the Supreme Court doesn't do that.

I think there's plenty of room well within even the more extreme views here to see this as to—forgive me, Mr. Dupree, but I consider these to be noncore duties of the Court—to comply with these statutes that are permissible to regulate. The Court has already agreed

to follow, and respect, and comply with the Judicial Conference rules and procedures.

It doesn't seem much to have them also ask, not just comply, but ask what does it take to comply and get an answer in advance so they know whether it's complied or not. In fact, that's what Judge Fogel's Financial Disclosure Committee was set up to do.

And to take it another step further, to make the advice that they get—which could perfectly easily be from other judges, it's just advice—public so that there's a clear contrast between what every other judge has to live by for rules and what the Justices arrogate to themselves is the rules that they have to live by.

And I'll close by reminding everyone of Ben Franklin's Poor Richard's Almanac, which advised that the best way to show that a crooked stick is crooked is to put a straight stick down next to it. And I think the circuit courts of appeal and the way they behave right now, overseeing the ethical conduct of Federal judges, presents that straight stick. Thank you very much, Chairman, for the hearing.

Chair DURBIN. Thanks, Senator Whitehouse. I'm going to close with a personal note. It was my good fortune as a college student to be an intern in the office of the United States Senator named Paul Douglas from Illinois. And he inspired me to aspire to this life. He was, I think, the penultimate leader when it came to questions of ethics and took it to a level that many in elected office in the 1960s wouldn't consider.

He never accepted a gift worth more than \$2.50. \$2.50. And he made an annual disclosure in detail of his net worth and his income tax returns. Very few, if any, others did it. One person did, his disciple, Paul Simon, whom I also worked with for many years.

I picked up that tradition of making a complete detailed income disclosure, net worth disclosure every single year. I don't know that anybody even notices. My wife did for a few years when we had no money. But no one else really notices that. My goal is to try to make enough disclosures so the questions of my own ethical judgment would at least have to consider that disclosure.

I don't know what it takes to restore people's faith in our Government or our courts. But this was a good-faith hearing on an issue that I raised 11 years ago. It had nothing to do with President Trump. He wasn't the President at the time. It had nothing to do with the agenda of the Court today. That was long before that ever happened. I still think this is a valid point.

What I hear from the Committee today is it's a partisan point. This is now a Democratic cause. I don't think Judge Luttig, or Judge Fogel, or others, Mr. Tribe, came to this on a political basis. They are looking for a matter of principle and I still think it's valid.

I made my first entree on this issue after the Justice Thomas disclosures with a personal letter. First with a phone call, then with a personal letter to the Chief Justice. I respect him. I really think this is his Court and he can make of it what he wishes. And he had a chance to use us if he wanted to. He didn't choose to. Or some other means to restore the confidence of the American people, at least partially, in the Court.

So I hope that regardless of what comes of this matter and these pending matters of legislation, that the Court will in fact heal itself

by the Justices' leader—the Chief Justice as leader of the effort. We're going to have a number of statements in the record that will be added with the unanimous consent.

[The information appears as submissions for the record.]

And there may be some questions coming your way. It's rare, but it happens. And if you receive them, I hope you'll respond quickly. Thanks very much for your patience today. The hearing stands adjourned.

[Whereupon, at 1:19 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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STATEMENT OF THOMAS H. DUPREE JR.

Before the United States Senate Judiciary Committee

May 2, 2023

Thank you for inviting me to testify today and to share my thoughts on the topics of Supreme Court ethics and disclosure requirements.

I am a partner at Gibson, Dunn & Crutcher and co-chair the firm's Appellate and Constitutional Law Practice group. The views I share today are my own. I served as Principal Deputy Assistant Attorney General under President George W. Bush and Attorney General Michael Mukasey. Between my work at the Justice Department and at Gibson Dunn, I have argued more than 100 appeals in the federal courts, including in all thirteen federal circuit courts of appeals, as well as the United States Supreme Court.

There are several bills under consideration that would impose a Code of Conduct on the Supreme Court. Today I will focus on Senate Bill 359—the Supreme Court Ethics, Recusal, and Transparency Act of 2023—but I will address the salient features of the other bills as necessary.

Senate Bill 359 would impose a host of new requirements on the Supreme Court, as well as on the parties who appear in the Court and on the lawyers who practice before the Court. Section 2 of the bill orders the Supreme Court to issue a

Code of Conduct governing the Justices and to establish procedures for disciplinary investigations of Justices; Sections 4 and 5 impose on Justices new recusal and disqualification requirements; and Sections 6 and 7 impose new disclosure requirements on party and amicus briefs filed in the Supreme Court or the courts of appeals.

Let me start with the imposition of a Code of Conduct. This is an extraordinary mandate that infringes on the separation of powers—a bedrock principle that underpins our constitutional democracy. Our founders well understood the importance of separating the legislative branch from the judicial branch. As the Supreme Court has explained, “The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression.” [*Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)] The lesson of this shared experience is reflected in the words of James Madison, who wrote in Federalist 47 that “the preservation of liberty requires that the three great departments of power should be separate and distinct.”

Ordering the Justices to adopt a Code of Conduct offends the separation of powers. The bill intrudes upon the core function of a coordinate and co-equal

branch of government. It is the Supreme Court, not the Congress, that has the prerogative under our constitutional structure to decide whether to adopt a Code of Conduct that governs themselves. As Chief Justice Roberts has written, courts “require ample institutional independence” and “[t]he Judiciary’s power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government.”

This bill—and in particular its provision directing the Justices to draft a Code of Conduct, put it out for public notice-and-comment, and then adopt it—seems to be animated by an assumption that the Supreme Court of the United States is no different than the Department of Agriculture, or any federal agency that can be commanded by Congress to engage in rulemaking. Suffice to say that is not how the Framers drew it up. The relationship the Constitution establishes between the Article I Congress and the Article III Supreme Court is one of co-equals; the judiciary is not an inferior branch.

The bill offends the separation of powers in other ways. It would compel speech by the Justices by requiring them to post ethics-related information on the Supreme Court website. It would require them to publicly disclose internal rules and guidance from the Counselor to the Chief Justice of the United States. And

perhaps most ominously, the bill would require the Court to establish procedures under which individuals may file complaints alleging that a Justice of the Supreme Court has violated the Code of Conduct—or any provision of federal law. They can also file complaints alleging that a Justice has engaged in conduct—on or off the bench, and apparently at any point in their lifetime—that the complainant believes may have “undermined the integrity of the Supreme Court of the United States.” The complaints would then be referred to what the bill calls “judicial investigation panels,” composed of circuit court judges, who would then sit in judgment of the accused Justice. If one were to try to design a scheme that would undermine Americans’ faith in the legitimacy and integrity of the Supreme Court, these “judicial investigation panels” would be an excellent start.

Another bill, Senate Bill 325, entitled “The Supreme Court Ethics Act,” charts a similar troubling course. It would task the Judicial Conference of the United States with issuing a Code of Conduct governing Supreme Court Justices. When he testified before Congress, Justice Kennedy described that very proposal as legally problematic and “structurally unprecedented” because it would empower the Judicial Confidence, a group composed of “district and circuit judges to make rules that supreme court judges have to follow.” The bill would also create what it calls an “Ethics Investigations Counsel” charged with investigating Supreme Court Justices not just for violations of the Code of Conduct, but for *any* conduct alleged

to be “prejudicial to the ethical, effective, and expeditious administration of the business of the Supreme Court of the United States.”

Another bill, entitled “The Supreme Court Code of Conduct Act,” would similarly create a designated ethics officer who would “process complaints” that a Supreme Court Justice has violated the Code of Conduct or federal law, or has done something that the complainant believes to have been “prejudicial to the administration of justice.” The designated officer would be required to publish the complaints against Justices on the Supreme Court’s website.

Just as with the “judicial investigation panels,” these proposals for an “Ethics Investigations Counsel” or a designated ethics officer would damage and debase the institution by encouraging frivolous and politically-motivated attacks on the Court’s integrity. If you don’t like the outcomes of particular cases, well then, attack the ethics of the Justices with whom you disagree and force them to post your accusations on their website.

Let me now turn back to Senate Bill 359 and focus on its provisions concerning the recusal and disqualification of Supreme Court Justices. Adopting these measures would open the door to a tidal wave of disqualification motions in virtually every important case. Round One in all the big-ticket constitutional cases would be litigation over which Justices are eligible to decide the case, and which

Justices must be disqualified. Here too, it is hard to imagine anything more corrosive to public faith in the Supreme Court than what would become routine volleys of motions alleging that various Justices are ethically compromised and must recuse because they accepted a meal from someone distantly connected to a case. As Justice Scalia once wrote in denying a request that he recuse, “While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor” [*Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 928 (2004) (Scalia, J., in chambers)]

The bill’s provisions requiring enhanced disclosures from parties and amici pose their own distinct constitutional dangers. Section 6 would impose extreme and unnecessary disclosure requirements on those who file briefs in the Supreme Court. Section 7 would impose a host of additional disclosure requirements on those who file amicus briefs in the Supreme Court or in a federal court of appeals. In cases where the amicus is an organization, the amicus would need to disclose the identity of anyone who made a substantial contribution to the organization or to an affiliate of the organization.

The purpose of an amicus brief—literally a friend-of-the-court brief—is to assist the judges. A good amicus brief does not simply echo the parties’ briefs but provides a different perspective, often one derived from the amicus’s own experience. In some cases, an amicus brief will fully align with the positions of one of the parties, but in other cases, an amicus brief will stake out a middle ground or urge an outcome that neither of the parties have proposed.

The bill’s disclosure requirements are unnecessary. The Supreme Court and the federal courts of appeals already have disclosure requirements that govern amicus briefs. If the Justices and judges on the Supreme Court and the federal courts of appeals believe that additional information would help them evaluate the arguments presented in an amicus brief, it is their prerogative to require that information.

These disclosure requirements would result in far fewer amicus briefs being filed. That in turn would result in the courts receiving far less information, and hearing from far fewer voices, when they decide cases.

Moreover, the disclosure requirements will chill and penalize constitutionally protected conduct. By requiring amici to disclose the identities of those who contribute to their organization, the bill would put a steep price on the exercise of First Amendment rights, including the right to free speech, the right to

assemble, and the right to petition the government. The bill tells those who want their voice to be heard in our federal courts, “You may speak—but only if you turn over your contributor list.”

Allow me to close by saying that the provisions of the bills I have discussed today seem to be animated by a dark and distorted perception of our judicial branch—a perception that is fundamentally at odds with what I have seen in more than 20 years of practice in the Supreme Court and the courts of appeals. In my experience, speaking as someone who has argued in front of hundreds of federal judges throughout the country, our federal bench is populated by men and women of the highest integrity. Even when I disagree with the outcome in a particular case, I have never doubted for a moment that these are judges who are striving to do their absolute God-given best to faithfully interpret the laws and the Constitution of our great nation.

Thank you very much. I welcome your questions.

WRITTEN TESTIMONY OF
HON. JEREMY FOGEL (RET.)
SENATE COMMITTEE ON THE JUDICIARY
MAY 2, 2023

Chair Durbin, Ranking Member Graham, and Honorable Committee Members:

My name is Jeremy Fogel. I am a retired judge of the United States District Court for the Northern District of California. I was a federal judge for twenty years, for the last seven of which I served as Director of the Federal Judicial Center (FJC). Prior to my federal judicial service, I was a judge in the California state court system for seventeen years. Currently, I serve as Executive Director of the Berkeley Judicial Institute at the University of California, Berkeley Law School. The Institute's mission is to build bridges between judges and academics and to promote an ethical, resilient and independent judiciary.

During my seven-year term at the FJC, I worked closely with the Judicial Conference of the United States and its committees. My primary responsibilities were overseeing the FJC's policy-related research and its educational curriculum for the judicial branch, including judicial education about ethical standards and financial reporting requirements. Our governing board was chaired by the Chief Justice of the United States. I also had frequent contact with the leadership of both circuit and district courts and built collegial relationships with hundreds of judges from all parts of the country.

Before being appointed as Director of the FJC, I served for seven years as a member of the Judicial Conference Committee on Financial Disclosure, during which time I acquired substantial knowledge about the Ethics in Government Act and its application to judicial officers, including the use of the Committee's redaction authority to protect the security of

filers and their families. I chaired the subcommittee that developed the original platform and procedures that enabled filers to submit their annual financial disclosure reports electronically and laid the groundwork for making the reports available online. As a state court judge in California, I chaired both the Judicial Ethics and the Discipline and Disability Committees of the California Judges Association and organized and led a confidential counseling program for judges facing potential disciplinary proceedings.

Before addressing the principal point of my testimony—what I see as a need for greater transparency in the way our Supreme Court engages with matters implicating judicial ethics—I want to be clear about why I am here today. I am not here to question or criticize the conduct of any Justice, nor is it my purpose to take sides in a political debate. I have spent more than forty years of my professional life avoiding partisanship, and I treasure my relationships with judges of a broad range of philosophical persuasions. I have great respect for the Court as an institution and for the Justices with whom I've had the privilege of interacting in the course of my judicial career. I'm especially grateful to Chief Justice Roberts for his wise counsel and steady support during my time at the FJC; from a personal standpoint, it is awkward being here. I have read the Chief's response to Chair Durbin's invitation to appear before this Committee and the attached statement signed by all nine members of the Court, and I do not doubt the sincerity with which the views in both of those documents have been expressed.

I am here because I believe that more is needed. For decades, the Court has been our most trusted governmental institution, far outpacing both the legislative and the executive branches in polls measuring public confidence. That status has eroded significantly; while only a decade ago more than two-thirds of Americans said that they had confidence in the Court,

almost the same number express the opposite opinion today. While some of that erosion likely has to do with controversy surrounding some of the Court's decisions, I think that there are other important factors at work, including a persistently hyper-partisan political environment, an increasingly contentious confirmation process, the near disappearance of civics curriculum from our schools, and the pervasiveness of social media as a source of misinformation and disinformation about the law, the judicial process and the judges and Justices to whom that process is entrusted.

In this fraught environment, I believe that the absence of a formal structure for defining and validating the ethical rules governing the conduct of Supreme Court justices is untenable. Too many Americans already think that the Justices decide cases based upon their political preferences and alliances rather than the law; lack of clarity about the Justices' ethical obligations only feeds that perception. Every other judicial officer in our country, whether state or federal and regardless of the type of court on which they serve, is guided by explicit ethical standards and is subject to at least some degree of oversight to assure their compliance. The same is true for virtually all officials in the legislative and executive branches.

While people familiar with the inner workings of the federal judiciary can read the Court's submission to this Committee and admire the care and nuance with which it has been crafted, I fear that for everyone else the processes and considerations that the submission details are a black box. How and when do the Justices consult the sources described, what weight do those sources receive, who if anyone not directly affiliated with the Court is available to offer detached, independent judgment and advice, and perhaps most importantly, what

procedures are in place to insure an appropriate degree of transparency, consistent with the principles of decisional independence and judicial security?

In both his recent submission and his 2011 year-end report, the Chief Justice has explained how the Supreme Court differs from other federal courts and why it would be inappropriate for it simply to adopt the identical Code of Conduct applicable to all other federal judges. I agree with him as to these points. But that doesn't mean that the Court should have no formal code at all, that it couldn't—or that it shouldn't—adopt a modified code that accounts for these differences. For example, given the significantly greater impact of recusals on a Court with only nine members and no ability to draw upon potential replacements, the relevant provisions of a modified code might identify and weigh factors for and against recusal differently. Because of its unique position in the judicial branch and the need to avoid a review procedure that might compromise its decisional independence or the security of its members, the Court could designate a panel of retired judges with deep experience and unquestioned integrity to provide it with confidential advice as to whether an act, omission or relationship raises an issue under the code.

The point is that a formal code of conduct would provide clearly stated, visible rules and procedures to which the Justices are expressly committed. Adoption of such an ethical framework wouldn't make controversies about the Court or its decisions disappear, but it would be a statement to the American people that their faith in the Court's adherence to core ethical principles matters. It also would reflect a recognition that given the outsized importance of their role, the Justices should, in the words of former judge and noted conservative Michael Luttig, be "bound by higher standards" than other judges. Having seen firsthand the impressive ability of

the Court and the Judicial Conference to develop rules of procedure that have made our federal courts a model for other legal systems both here and abroad, I have every confidence that such an effort would produce a carefully balanced framework of high quality and would represent a significant step forward.

Thank you for the honor of testifying before this Committee and for your consideration.

United States Senate
Committee on the Judiciary

“Supreme Court Ethics Reform”

May 2, 2023

Amanda Frost
John A. Ewald Jr. Research Professor of Law
University of Virginia School of Law

Introduction

Thank you for inviting me to testify regarding Congress's role in regulating the ethical obligations of U.S. Supreme Court Justices.

I am a professor of law at the University of Virginia School of Law. My areas of expertise include federal courts and judicial ethics, and I have authored academic articles on these topics. *See, e.g.,* Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEORGETOWN JOURNAL OF LEGAL ETHICS 443 (2013); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 UNIVERSITY OF KANSAS LAW REVIEW 531 (2005).

Part I of my testimony describes questions and concerns raised by the Supreme Court's April 25, 2023, Statement on Ethics Principles and Practices. The deficiencies in that Statement confirm the need for new legislation clarifying the recusal process, as well as an enforceable Code of Conduct for the U.S. Supreme Court. Part II explains that Congress has the constitutional authority to regulate the ethical standards of all members of the federal judiciary, including the Justices on the U.S. Supreme Court.

I. Questions and Concerns Raised by the Court's Statement on Ethics Principles and Practices

A. Background

In recent years, Justices have repeatedly violated laws regulating judicial ethics. For example, some Justices have repeatedly failed to recuse themselves as required by 28 U.S.C. § 455, the federal recusal statute. *See* "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest," Fix the Court, available at <https://fixthecourt.com/2023/03/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>. Others have repeatedly failed to disclose outside income and gifts as required by the Ethics in Government Act of 1978. *See* "The Justices' Financial Disclosure Omissions," Fix the Court, available at <https://fixthecourt.com/2023/04/justices-financial-disclosure-omissions-this-will-be-updated-as-additional-info-becomes-available/>;

On April 6, 2023, an article in *ProPublica* described Justice Clarence Thomas' failure to disclose his acceptance of gifts of vacations and transportation on private jets and a private yacht. *See* Joshua Kaplan, Justin Elliott, and Alex Mierjeski, "Clarence Thomas and the Billionaire," *ProPublica*, Apr. 6, 2023, available at <https://www.propublica.org/article/clarence-thomas-scotus->

[undisclosed-luxury-travel-gifts-crow](#). After *ProPublica* published its account, Justice Thomas issued a short public statement explaining that he had been advised by “colleagues and others in the judiciary” that “this sort of personal hospitality from close personal friends, who did not have business before the Court, was not reportable.” See [Statement of Justice Clarence Thomas](#), April 7, 2023. A subsequent *ProPublica* article, published on April 13, 2023, revealed that Justice Thomas also failed to disclose a real estate transaction. See Justin Elliott, Joshua Kaplan, and Alex Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn’t Disclose the Deal,” *ProPublica*, Apr. 13, 2023, available at <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

On April 20, 2023, Senator Richard Durbin, Chair of the Senate Judiciary Committee, invited Chief Justice John Roberts, or an associate Justice designated by Roberts, to testify before the Senate Judiciary Committee. Senator Durbin’s letter noted the “steady stream of revelations regarding Justices falling short of the ethical standards,” as well as the lack of communication about these problems from the Court. The letter concluded: “The time has come for a new public conversation on ways to restore confidence in the Court’s ethical standards. I invite you to join it, and I look forward to your response.” [Letter from R. Durbin to J. Roberts](#), April 20, 2023.

On April 25, 2023, Chief Justice Roberts declined Senator Durbin’s invitation to testify before the Senate Judiciary Committee, citing “separation of powers concerns and the importance of preserving judicial independence.” Accompanying the letter was a five-page “Statement on Ethics Principles and Practices” (hereinafter “Court’s Ethics Statement” or “Statement”), signed by all nine sitting Justices. The goal of this Statement was to “reaffirm and restate foundational ethics principles and practices to which [the Justices] subscribe in carrying out their responsibilities as Members of the Supreme Court of the United States.”

The Justices’ decision to publicize information regarding their ethics practices is a welcome development, particularly in the wake of Justices’ recurring ethics violations and a general lack of transparency on these issues. Unfortunately, however, the Court’s Ethics Statement raises more questions than it answers, confirming the need for congressional legislation of the Justices’ ethical obligations.

B. Questions and Concerns Raised by the Court's Ethics Statement

Listed below are questions and concerns raised by Chief Justice Roberts' letter to Senator Durbin and the Court's Ethics Statement that accompanied it.

1) Chief Justice John Roberts' Decision Not to Testify

In the first paragraph of his letter to Senator Durbin, Chief Justice Roberts declined Senator Durbin's invitation to testify before the Senate Judiciary Committee. In the second paragraph, he stated that "testimony before the Senate Judiciary Committee by the Chief Justice of the United States is exceedingly rare," and implied that testifying would jeopardize judicial independence and/or violate separation of powers.

Chief Justice Roberts' response is puzzling. Appearances by the Justices before Congress are not rare. Sitting Justices have testified before Congress at 92 hearings since 1960 on a variety of matters regarding judicial administration.¹ Senator Durbin's letter of invitation made clear that the questions would be limited to judicial ethics and, in any case, the Chief Justice could decline to answer any question he feared would undermine the Court's independence. His testimony regarding ethics policies would contribute to interbranch dialogue on this important aspect of judicial administration, and would not interfere with the Court's decisional independence. To the contrary, such testimony could benefit the Court by providing the Justices' perspective on proposed ethics legislation, thereby improving the final legislation.

¹ For example, Justice Antonin Scalia and Justice Stephen Breyer appeared before the Senate Judiciary Committee on October 5, 2011, at a hearing entitled: "Considering the Role of Judges Under the Constitution of the United States," and Justice Anthony Kennedy appeared before the Senate Judiciary Committee on February 14, 2007, at a hearing entitled "Judicial Security and Independence." Many of the hearings at which Justices appeared concerned appropriations, but Justices were asked and answered a variety of questions regarding judicial administration at those hearings. Most recently, in 2019, Justice Elena Kagan testified before a House Subcommittee that the Court was "seriously" considering adopting a code of conduct. *See* Robert Barnes and Ann Marimow, "Supreme Court Justices discussed, but did not agree on, code of conduct," *Washington Post*, Feb. 9, 2023.

2) The Justices' Failure to Comply with Federal Ethics Laws

The Court's Ethics Statement declares:

In 1991, Members of the Court voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations [implementing ethics legislation]. Since then Justices have followed the financial disclosure requirements and limitations on gifts, outside earned income, outside employment, and honoraria. They file the same annual financial disclosure reports as other federal judges.

As a threshold matter, the Court's Ethics Statement could be read to suggest that the Justices follow these federal ethics laws "voluntarily." In fact, those laws are binding on "judicial officers"—a term that includes the Justices—and so the Justices' compliance is not voluntary. 5 U.S.C. 13101(10).

Furthermore, the Court's Ethics Statement does not address some Justices' repeated failures to report income and gifts, as required by these laws. "The Justices' Financial Disclosure Omissions," Fix the Court, available at <https://fixthecourt.com/2023/04/justices-financial-disclosure-omissions-this-will-be-updated-as-additional-info-becomes-available/>. In particular, the Statement does not reference Justice Clarence Thomas' frequent errors over many years, including the recent *ProPublica* articles revealing that he failed to report tens of thousands of dollars of gifts in the form of travel on a private jet and a yacht, as well as real estate transactions. Finally, the Statement is also silent about how to ensure Justices comply with the law in the future, and the consequences for failures to follow these laws.

Justice Thomas' response to the *ProPublica* article illustrates the failure of the Court's current policies. In his response, Justice Thomas declared:

Early in my tenure at the Court, I sought guidance from my colleagues and others in the judiciary, and was advised that this sort of personal hospitality from close personal friends, who did not have business before the Court, was not reportable.

Justice Thomas was either misadvised, or misunderstood the advice given. The Ethics in Government Act of 1978 requires reporting all gifts over a few hundred dollars. Although the law makes an exception for "food, lodging, or entertainment received as personal hospitality of an individual," that exception

does not include transportation to social events or vacations. 5 U.S.C. 13103(a)(2)(A). That law also contains no exception for transportation to professional events, or for transactions involving real estate.

Justice Thomas did not identify which of his colleagues may have misadvised him, nor did he acknowledge that he was obligated to consult the *text* of the Ethics in Government Act rather than rely on word-of-mouth. These errors are part of a pattern of violations by Justice Thomas, including a multi-year failure to report income received by his wife from the Heritage Foundation and Hillsdale College, among other sources. (In 2011, Justice Thomas filed an amended financial disclosure report, with an attached note stating: “It has come to my attention that information regarding my spouse’s employment required in Part III.B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions.”). Neither Justice Thomas, nor any other Justice, has ever faced any legal consequence for violations of these laws.

Accordingly, the Court’s current policies and practices have failed to ensure compliance with ethics rules. Yet the Court’s Ethics Statement neither acknowledges the unfortunate history of Justices’ failure to comply with their legal obligations, nor suggests methods for ensuring compliance in the future.

3) Insufficient Standards for Determining Whether Conduct “Creates an Appearance of Impropriety”

The Court’s Ethics Statement declares:

[I]n deciding whether to speak before any group, a Justice should consider whether doing so would create an appearance of impropriety in the minds of reasonable members of the public. There is an appearance of impropriety when an unbiased and reasonable person who is aware of all relevant facts would doubt that the Justice could fairly discharge his or her duties.

These two sentences are confusing because they state two different standards. The first sentence quoted above relies on the “reasonable minds” standard. That is the same standard referred to in the Commentary to Canon 2 of the Code of Conduct for United States Judges, which instructs judges to avoid

activities creating the “appearance of impropriety.”² However, the second sentence adds that this “reasonable” person must be both “unbiased” and “aware of all relevant facts,” which creates confusion and undermines the purpose of the “appearance of impropriety” standard used in Canon 2 of the Code of Conduct.

The addition of the term “unbiased” requires clarification. Who decides whether a person is biased? What is the standard for determining bias? And how does being “unbiased” differ from being reasonable? This new term raises the concern that a Justice may conclude her conduct is permitted if, in the Justice’s opinion, all those who view that conduct as improper are biased against her.

In addition, the requirement that the observer be “aware of all relevant facts” directly undermines the goal of the Code of Conduct’s objective standard. The objective standard protects the reputation of the judiciary by prohibiting conduct that *appears* to be improper to the reasonable person based on facts that person could ascertain, regardless of whether it actually *is* improper. For that reason, the Commentary to Canon 2 of the Code of Conduct states: “An appearance of impropriety occurs when reasonable minds, *with knowledge of all the relevant circumstances disclosed by a reasonable inquiry*, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.” (Emphasis added). Yet under the Court’s Ethics Statement, a Justice need not share “all relevant facts” with the public—even if those facts are known only to the Justice.

The end result is that the Court’s Ethics Statement leaves to each Justice to determine whether his or her conduct would appear improper to someone who is not only “reasonable,” but also “unbiased” (in the Justice’s view) as well as aware of all the relevant facts—facts that only the Justice may know, and which he or she is not obligated to share with anyone else. This is not the standard that lower court judges follow under the Code of Conduct, and it leaves the Justices leeway to engage in conduct that, to a reasonable person, creates the appearance of impropriety.

² Although the Code of Conduct does not apply to the Justices, Chief Justice Roberts has stated that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations.” See *2011 Year-End Report on the Federal Judiciary*, at 4.

4) The Unfounded Modification of the Recusal Statute by the Addition of a “Duty to Sit”

The Court’s Ethics Statement declares that the Justices’ “application” of the recusal standards under 28 U.S.C. § 455 “can differ” from lower-court judges “due to the unique institutional setting of the Court.” The Statement explains that lower courts can substitute a different judge for the recused judge, then states that the “Supreme Court consists of nine members who always sit together.” Accordingly, the Statement declares that Justices have a “duty to sit” that must be taken into “consideration” when making a recusal determination to avoid “impairment of a full court.”

The “duty to sit” violates the plain language of the statutory standard for recusal. Nothing in 28 U.S.C. § 455 references a “duty to sit” or states that the standards for disqualification of a Justice should differ from the standards that apply to lower court judges. To the contrary, Section 455’s disqualification standards are mandatory and apply identically to all federal judges, stating: “Any justice, judge or magistrate judge of the United States shall disqualify himself” under a set of specific circumstances. 28 U.S.C. § 455(a).

Furthermore, the manufactured “duty to sit” requirement is based on the Statement’s erroneous assertion that the “Supreme Court consists of nine Members who always sit together.” Congress has the sole constitutional authority to establish the size of the Supreme Court, as well as to establish the number needed for a quorum. Today, the quorum is set at six Justices, permitting the Court to decide cases for the nation when three members are absent for any reason, including because they were required to recuse themselves under Section 455. *See* 28 U.S.C. § 1. In nearly every Term throughout its history, including this Term, the Supreme Court has decided cases with fewer than nine Justices.

Congress has the authority to incorporate a “duty to sit” into the recusal statute, but it has chosen not to do so. Instead, it enacted a mandatory recusal standard that does not change depending on its impact on the number of Justices who are available to decide a specific case. By adding the “duty to sit” requirement to the statutory recusal standard, the Supreme Court has arrogated to itself both the power to determine when to recuse and the size of the Court—matters that the Constitution assigns to Congress.

The result of the Court’s fabricated “duty to sit” requirement will be to taint decisions by enabling Justices to sit on cases in which their partiality might

reasonably be questioned. This problem is particularly acute if the vote is 5-4 and a Justice in the majority has a recusal-worthy conflict. Although 4-4 ties are not ideal, they are preferable to a 5-4 decision establishing binding precedent for the nation based on the vote of a Justice who has a financial or other conflict of interest. Indeed, that is the very result that Congress intended to prevent when enacting the federal recusal statute.

5) The Flawed Practice of Allowing the Justice with an Alleged Conflict to be the Sole Decisionmaker Regarding Recusal

The Court’s Ethics Statement declares:

Individual Justices, rather than the Court, decide recusal issues. If the full Court or any subset of the Court were to review the recusal decisions of individual Justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

The Statement does not acknowledge that the practice of allowing each Justice to decide for him or herself whether to recuse has failed. As has been well documented, Justices repeatedly hear and decide cases in which they or their spouse have a financial or other interest in the matter, in violation of 28 U.S.C. § 455. See “Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest,” Fix the Court, available at <https://fixthecourt.com/2023/03/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

Finally, even if Justices never erred when applying recusal standards to themselves, the current practice leaves the recusal decision in the hands of the decisionmaker whose partiality is questioned—the very result the recusal statute was designed to prevent. See Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures* p. 5 (June 2017) (“Allowing the judge who is the subject of the recusal motion to make a dispositive decision denying that motion flies in the face of the oft-invoked, age-old proposition that no person should be a judge in his own case.”)

The Court’s Ethics Statement declares that it would be “undesirable” to allow the full Court to “affect the outcome of a case by selecting who among its Members may participate.” But the full Court would not be “selecting” which Justices may participate at its unbridled discretion; rather, the Justices would be applying the recusal standards under 28 U.S.C. § 455 to determine whether a

Justice has a conflict that requires disqualification. Recusal decisions are made by state supreme court justices for their colleagues, as well as by federal circuit judges reviewing district court decisions not to recuse. *See, e.g., State v. Allen*, 322 Wisc.2d 372, 453-458 (2010) (describing state supreme court practices); CHARLES GARDNER GEYH, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW* (3d ed. 2010) 99-109 (describing the procedure for reviewing recusal decisions under federal law). Presumably, the Justices would carefully apply the legal standards to the facts when making a recusal determination, just as these other courts do, without regard to how that decision might affect the result of the case. Indeed, that is their constitutionally-assigned task when deciding the *merits* of every case. The Statement's implication that the Justices would apply the law in an outcome-oriented manner when deciding recusal questions is troubling, and hopefully unwarranted.

Admittedly, voting to disqualify a fellow Justice from hearing a case is a sensitive matter. But the Justices are regularly required to make decisions on sensitive matters for the nation, ranging from the death penalty to same sex marriage to abortion. They frequently disagree with each other when doing so, sometimes in strident terms, without damaging their ability to work with each other on future cases. The same professionalism can and should govern their determination of recusal questions.³

As explained above, the Court's Ethics Statement raises a number of questions and concerns. The Statement fails to address prior violations of federal ethics laws, and does not propose methods for preventing future violations. At times, it misstates legal standards, adding leeway and discretion that does not exist in the text of the ethics laws. For all these reasons, Congress should move forward with legislation on these matters. As explained below, the Constitution gives

³ In addition, the current practice regarding recusal decisions lacks transparency and consistency. A Justice often chooses to recuse (or not) without revealing relevant facts or explaining the basis for that decision, undermining public faith in the Court and preventing the development of a body of precedent to guide future recusal decisions. The predictable result is that some Justices regularly recuse themselves under circumstances in which others do not. The Court's Ethics Statement notes that "a Justice may provide a summary explanation of a recusal decision," but does not require that Justices do so, and so fails to address this problem.

Congress the authority to enact such legislation to protect the integrity of the Supreme Court.

II. Congressional Authority to Regulate Judicial Ethics

The Court's Ethics Statement suggests that the Justices' compliance with federal ethics laws is voluntary. The Statement refers to the Court's decision to "voluntarily adopt[] a resolution" to follow various ethics laws. The Statement also partially repeats Chief Justice Roberts' declaration in his *2011 Year-End Report on the Federal Judiciary* that: "As in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested." Accordingly, at least some Members of the Supreme Court appear to question whether Congress has the constitutional authority to regulate the Justices' ethical obligations.

The Justices' claim to be above the laws that govern all federal judges, as well as officials in the other two branches of the federal government, has no basis in constitutional text or history. Congress's power to regulate the ethical obligations of all federal judges is evident from the text and structure of the U.S. Constitution, and has been confirmed by centuries of historical practice. *See NLRB v. Noel Canning*, 573 U.S. 513 (2014) (noting the significance of historical practice in constitutional interpretation).

Article III of the Constitution states that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." But the Constitution left it to Congress, acting pursuant to the Necessary and Proper Clause under Article I, to enact legislation establishing the Supreme Court and the lower federal courts. As legal scholar James Pfander has explained, Article III "leaves Congress in charge of many of the details" necessary to implement federal judicial power, and "Article I confirms this perception of congressional primacy by empowering Congress to make laws necessary and proper for carrying into execution the powers vested in the judicial branch." JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES*, 2 (Oxford University Press, 2009). *See also* RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 20 (6th ed. 2009) ("The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system.").

The first Congress quickly fulfilled its constitutional obligation to establish the federal judiciary by enacting the Judiciary Act of 1789, which controlled significant aspects of judicial administration, including judicial ethics. That law

has special constitutional significance because it was enacted by a Congress composed of the Framers' contemporaries, including a number of the Framers themselves. Accordingly, the Judiciary Act of 1789 is "widely viewed as an indicator of the original understanding of Article III." See FALLON, JR., ET AL., *supra*, at 21.

The Judiciary Act of 1789 not only created the lower federal courts, it also controlled the operations of the U.S. Supreme Court. That law set the size of the Supreme Court at six Justices, established a quorum requirement of four, and provided that the Supreme Court would meet at the "seat of government" twice a year. The first Congress also authorized funds to support the federal judiciary and granted the Supreme Court authority to hire personnel, including a clerk of the Court, to assist in its administration. Finally, that same legislation mandated that the Justices do double duty as judges on the lower circuit courts. In addition to meeting in the nation's capital as the Supreme Court, each Justice was required to travel the country to hear cases in his dual capacity as circuit court judge—a dual role that the Justices served for more than a century. See *generally* An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1804) (rejecting a constitutional challenge to the law requiring the Justices to sit as judges on circuit courts).

Consistent with its constitutionally-assigned obligation to establish the federal judiciary, the first Congress enacted laws regulating the ethical conduct of all federal judges, including the Supreme Court Justices. Starting with the Judiciary Act of 1789, Congress has required every judge and justice to "solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me." An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); *see also* 28 U.S.C. § 453 (establishing the nearly identical oath used today). Congress chose these words to ensure that federal judges adjudicate cases fairly and impartially—the same goals that underlie the current ethics legislation.

Congress's long tradition of regulating the ethics of all federal judges, including the Supreme Court Justices, continues to this day. The recusal statute, 28 U.S.C. § 455, has applied to Supreme Court Justices as well as lower federal court judges for 75 years. The Ethics Reform Act of 1989 places strict limits on outside earned income and gifts for all federal officials, including all federal judges. The Ethics in Government Act of 1978 requires high-level federal officials in all three branches of the federal government to file annual reports disclosing financial information, including their outside income, the employment of their spouses and dependent children, investments, gifts, and household liabilities. All federal

judges, including Supreme Court Justices, file these annual reports, and the Judicial Conference of the United States is empowered by that Act to refer to the Attorney General any judge or Justice who fails to file that report or files a false report. *See* 5 U.S.C. app. 4, 104(b). The Supreme Court Justices must abide by all of these laws, just like officials in the other two branches of government.

Despite this long history of regulating the ethical obligations of *all* federal judges, some have argued that Congress lacks authority to mandate ethical standards for Supreme Court Justices. These critics contend that Congress is empowered to regulate the ethical conduct of the lower-court judges as part of its constitutional authority to “ordain and establish” the lower federal courts, but lacks that same authority over the U.S. Supreme Court because that Court is constitutionally mandated.

Although that distinction is important when it comes to Congress’s power to establish (or abolish) the lower courts, it is irrelevant when it comes to Congress’s role in regulating the ethical conduct of the federal judiciary. The Constitution *requires* Congress to enact laws that establish the U.S. Supreme Court as an institution and ensure that it operates effectively. The Court could not exist without legislation from Congress establishing it in the first instance, and thus the Constitution implicitly mandates that Congress do so. Federal laws fund the Supreme Court, set its size at nine members, establish the quorum requirement, and permit the hiring of law clerks and staff—all of which support the sound operation of the Court. *See* FALLON, JR., ET AL., *supra*, at 21. Ethics legislation serves the same vital purpose.

To be clear, Congress has no power to control federal judges’ decisions or penalize them for results it dislikes. The Constitution intends the judiciary to be a co-equal branch of government that decides cases independent from the influence of the other branches. For that reason, it provides all Article III judges with life tenure and protection against diminution of their salary to ensure that judicial decision-making is insulated from political influence. *See* THE FEDERALIST NO. 79, at 109 (Alexander Hamilton) (Alexander Bourne ed., 1901).

Regulating judges’ and justices’ ethical conduct does not pose a risk to the federal courts’ decisional independence, however. To the contrary, such legislation bolsters the power and prestige of the third branch of government, enabling it to fulfill its role under the U.S. Constitution as a check on the political branches. Because the Court has proven incapable of policing the ethics of its own Members, Congress should exercise its constitutional authority to ensure the sound operation of the Court.

Conclusion

The Supreme Court's Statement on Ethics Principles and Practices raises more questions than it answers. Recurring ethics violations by some Justices, combined with the Court's failure to address these problems in its Statement or elsewhere, demand a congressional response. The Constitution grants Congress the authority to legislate on matters of judicial administration and ethics, and such legislation will strengthen the judicial branch. In light of the Supreme Court's failure to take action, Congress must step in to protect the Justices from themselves.

STATEMENT OF MICHAEL B. MUKASEY

Before the United States Senate Judiciary Committee

May 2, 2023

Thank you for inviting me to testify today and to share my thoughts on issues surrounding Supreme Court Justices' ethics rules and their financial disclosures.

I am a retired partner and of counsel at Debevoise & Plimpton. The views I express today are my own, and do not represent the views of the firm. I served as Attorney General under President George W. Bush from 2007 to 2009, and as a U.S. District Judge for the Southern District of New York from 1988 to 2006.

I would like to deal today with two topics: one is policy principles relating to Supreme Court governance; the second relates to particular issues that have become current insofar as it is possible to determine the facts from publicly available information.

As to policy, I believe that basic principles of the separation of powers mean that the Court, as a separate branch of government and the only court specifically provided for in the Constitution, is solely responsible for its financial disclosure and ethics rules. Just as Congress establishes the rules that govern the conduct of its members, and just as conflict of interest statutes that apply generally to government

employees do not apply to the President or the Vice President, it is basic to the structure of our government that the executive, legislative and judicial branches remain separate. It is the Supreme Court and not the Congress that has the constitutional prerogative to decide whether to adopt a formal code of conduct governing the individual Justices. It should go without saying that if Congress cannot compel the Court to adopt a formal code of conduct governing the individual Justices, neither may Congress impose such a code itself.

A law compelling the Court to adopt such a code, or purporting to impose one legislatively, would violate the principle of separation of powers, and would also be unworkable inasmuch as there is no authority other than the Justices themselves to apply such a code.

I am told of proposals to delegate issues of recusal of individual Justices to a Court employee. Here, my own experience as a judge may be instructive. Recusal decisions are fundamentally judicial decisions, and a judge is as much obligated not to recuse when recusal is not warranted as to recuse when recusal is warranted. This is especially compelling at the Supreme Court level because Justices cannot be replaced by other judges as if the Court were a professional baseball team calling up minor league players to fill gaps in the roster.

That is not to say that there are no principles and practices that in reality govern the conduct of the Justices. As Chief Justice Roberts wrote to the Chair of

this Committee on April 25, there is a Statement of Ethics Principles and Practices to which all of the current Justices have subscribed, and indeed he attached that Statement to his letter. That Statement itself covers the sources judges use when analyzing ethical issues in general, and discusses a variety of topics, including financial disclosure and recusal in particular. The Statement is more than two single spaced pages in length, and I would not burden the Committee with a recitation of its terms, or purport to summarize it. However, the Statement notes that since 1991 Supreme Court Justices have followed the substance of the Judicial Conference Committee on Financial Disclosure regulations that govern lower court judges, and “file the same annual financial disclosure reports as other federal judges.”

The Statement itself notes that the Judicial Conference committee reviews information in these reports and requests additional information when appropriate. It also provides ongoing guidance and in March provided additional clarification on the scope of the “personal hospitality” exemption to the disclosure rules.

That clarification provides a transition to particular issues that relate to Justice Thomas. I base my discussion of these issues on information generally available to the public. Justice Thomas has said that he and Harlan Crow have been close friends for many years, that Mr. Crow is in the construction business and does not have matters before the Court. There is one trivial exception to the last point, which I mention only because it shows how far some critics have gone. It

appears that in one case a business with which Mr. Crow is affiliated opposed an application by its adversary for a writ of certiorari and the writ was denied. Such applications are reviewed and summarized by a pool of clerks, not by the Justices themselves; it takes four votes to grant certiorari, so that if Justice Thomas had recused himself in that case the result would have been identical – denial of certiorari.

Justice Thomas has said that when accepting travel and vacation invitations from Mr. Crow, he consulted others, including colleagues, on whether applicable rules would prescribe including them on his financial disclosure form. He was advised that the “personal hospitality” exemption applied and that such accommodations need not be included. As the Chief Justice noted, the Judicial Conference committee recently provided a clarification of that exemption that appears to confirm that the advice Justice Thomas followed was correct, and Justice Thomas has said he will be guided by this clarification and will include such travel and vacation accommodations in all future reports.

In addition, Mr. Crow bought from Justice Thomas and his family three parcels of property in Savannah Georgia. The Savannah parcels had included two rental properties, but those were torn down; Justice Thomas’s mother, who was at least in her mid-80’s at the time of the transaction, lives in the remaining house, which has been improved over the years, and which did not have to be reported as a

rental property because it was the Justice's mother's home. She holds a lifetime occupancy right and lives in the property to this day.

Mr. Crow has said that he purchased the childhood home of Justice Thomas with the intention to convert it into a museum of sorts to tell the story of Justice Thomas's life. The total for the parcels was \$133,600, of which a third was Justice Thomas's share; that represented a loss to Justice Thomas. However, because the transaction was for more than \$1,000, Justice Thomas was obligated to report it on his financial disclosure form, but did not do so because he mistakenly believed he did not have to report a transaction in which he sustained a loss. He has said he intends to amend the financial disclosure form for the relevant period.

It bears mention that Justice Thomas will not be the first Justice to amend his financial disclosure forms – Justices Breyer and Ginsburg are among those who have done so without so much as the batting of an eye – and no doubt will not be the last.

Recent criticisms of Justice Gorsuch are also meritless. He sold an interest in a vacation home to a lawyer he had never met and who is a large contributor to Democrats, whose firm has litigated a dozen cases before the Court, winning eight and losing four. The merits of these cases have not been discussed by these critics, nor have they indicated whether Justice Gorsuch wrote an opinion in any of them or cast a deciding vote, and if so with what result. The lawyer in question says he did

not know that Justice Gorsuch was the seller until an offer had been made. That is the story – period.

Criticism has progressed – if that is the word – from meritless as to Justices Thomas and Gorsuch, to ludicrous as to Justice Alito and others, with the claim that the academy is exerting an improper conservative influence on the Court by hosting conservative Justices to teach or lecture. Apart from the history of similar invitations to liberal Justices, anyone even slightly familiar with the current political climate at law schools – such that even Scalia Law School at George Mason University had to host Justice Alito by Zoom rather than in person due to security concerns – knows this claim is ridiculous on its face.

The dark and intense criticism directed at Justices over these transactions – the acceptance of trips and vacations from a wealthy close friend with no business before the Court pursuant to a since-amended personal hospitality exception to the financial disclosure rules and a property sale to the same friend at a loss, the arms-length sale of a vacation home – is impossible for me to square with the professed concern by those making the criticism for the integrity of the Court. That integrity rests on the dedication of each Justice to fulfill his or her oath by deciding cases on their merits as the Justices see those merits, even when they see them differently from one another. That integrity remains very much intact.

If the public has a mistaken impression that the integrity of the Court has been damaged, the fault for that lies with those who continue to level unfair criticism at the Court and its Justices. It is impossible to escape the conclusion that the public is being asked to hallucinate misconduct so as to undermine the authority of Justices who issue rulings with which these critics disagree, and thus to undermine the authority of the rulings themselves.

Statement of Kedric Payne**Vice President, General Counsel, and Senior Director of Ethics
Campaign Legal Center****U.S. Senate Committee on the Judiciary****Hearing on “Supreme Court Ethics Reform”
May 2, 2023**

Thank you for the opportunity to appear before you today to testify about the need to enhance Supreme Court ethics rules to provide more transparency, consistency, and compliance. I am the Vice President, General Counsel, and Senior Director of Ethics at Campaign Legal Center, a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. I have served in all three branches of federal government, and for nearly 20 years, I have specialized in government ethics. Today, my testimony describes how the Supreme Court’s ethics rules lag behind legislative and executive branch ethics rules, and the fundamental provisions that can improve Supreme Court ethics.

On April 25, 2023, Chief Justice Roberts confirmed that Supreme Court ethics rules are weaker than any other branch of government, in his published “Statement on Ethics Principles and Practices.” All nine Justices signed the statement, which “aims to provide new clarity to the bar and to the public on how the Justices address certain recurring issues, and seeks to dispel some common misconceptions.”¹ But instead of dispelling misconceptions, the statement proves that the Court has the least developed ethics rules of any branch of government because it does not have: 1) a formal internal ethics enforcement body to advise Justices about their legal obligations and to investigate alleged misconduct; 2) a binding code of conduct; 3) a requirement for full disclosure of privately sponsored travel; and 4) a formal recusal compliance procedure.

Specifically, the Court’s statement explains that: Justices rely on a “wide variety of authorities” for ethics advice without any specific binding authority; Justices may consult the Code of Conduct for lower courts, but it is mostly “aspirational” and the provisions are “not themselves rules”; financial disclosure violations can only be enforced by a letter of inquiry from a body that “does not supervise the Supreme Court”; Justices can decide for themselves whether “public

¹ Chief Justice John G. Roberts, Jr., *Letter to Senate Judiciary Committee Chair Richard J. Durbin* (Apr. 25, 2023), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>

disclosure of the basis for recusal would be ill-advised”; and issues “such as travel, accommodations, and disclosure” are subject to “security guidance.”²

As described in detail below, the Supreme Court can increase public trust in the judiciary by establishing specific and relevant ethics practices that have already proven effective in the other two branches of government.

Supreme Court Ethics Rules Lag Behind the Legislative and Executive Branches

Ethics laws are essential to maintaining public trust in government. Although some ethics laws apply to all branches of federal government, Supreme Court Justices have fewer fundamental ethics provisions that specifically govern their conduct than the other branches. Over the past decade, the absence of such provisions has resulted in persistent ethics concerns implicating actual or perceived conflicts of interest involving the Justices. Reform of Supreme Court ethics laws and rules would mitigate the risk of diminishing public trust and confidence in the Court.

I. The Supreme Court Lacks an Internal Ethics Enforcement Body

Both the legislative and executive branches have designated enforcement bodies, with authority to provide ethics advice and investigate allegations of non-compliance with the respective branch’s applicable ethics rules. These ethics enforcement bodies are responsible for training officials on application of the rules, which, in turn, promotes compliance. When there is evidence of misconduct, these bodies can also gather facts and make public determinations of whether the rules were followed, which further facilitates compliance.

No such body exists for the Supreme Court. As a result, lingering allegations of ethical misconduct, whether credible or not, harm individual Justices, the Court as a whole, and public confidence in the institution. Until the Supreme Court creates a formal internal enforcement body that provides consistent ethics advice to Justices and publicly reviews allegations of misconduct while disposing of meritless claims, the Court’s current ethical standards will produce little benefit and any reform will have muted impact.

A. Supreme Court Ethics Enforcement

The consequences of the Supreme Court’s lack of an internal ethics enforcement body are evident in recent unresolved controversies arising from a lack of uniformed ethics advice and inadequate investigations.

² *Id.*

Regarding ethics advice, the Court has no controlling source for guidance and Justices can rely on “a wide variety of authorities to address specific ethical issues [including] judicial opinions, treatises, scholarly articles, disciplinary decisions, and historical practice of the Court and the federal judiciary.”³ For example, allegations recently surfaced that Justice Clarence Thomas omitted gifts of travel in his financial disclosure reports.⁴ In response to the allegations, Justice Thomas admitted that he did not report the information, and stated that he “sought guidance from my colleagues and others in the judiciary, and was advised that this sort of personal hospitality from close personal friends, who did not have business before the Court, was not reportable.”⁵

Such advice from “colleagues and others in the judiciary” is legally incorrect with respect to the disclosure of free air travel, and completely inconsistent with how other Justices and officials across the federal government have complied with the exact same law for decades.⁶ This case demonstrates how the Court’s lack of a designated ethics official responsible for answering questions about disclosure and compliance results in a system of infinite interpretations and, ultimately, non-compliance.

Regarding ethics investigations, the lack of any fact-gathering body in the Court means that allegations of ethics violations are not subject to a formal review process, which can sow distrust in the institution and cause confusion about ethics compliance. For example, when the *Dobbs v. Jackson Women’s Health Organization* decision was leaked in 2022, the Court directed the Marshal of the Supreme Court to investigate the leak, even though such an investigation is not included in the Marshal’s statutory responsibilities.⁷ The Marshal essentially serves as a sergeant at arms, who shall “oversee the Supreme Court Police,” “serve and execute all process and orders issued by the Court,” “pay the expenses of printing briefs,” and

³ *Id.*

⁴ Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA, (updated Apr. 7, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

⁵ Statement from Justice Clarence Thomas, Supreme Court of the United States Public Information Office (Apr. 7, 2023), available at <https://www.documentcloud.org/documents/23745868-clarence-thomas-statement-4-7-23>.

⁶ Gifts of free transportation are required to be reported under the Ethics in Government Act. 5 U.S.C. § 13104(a)(2)(A-B). Although Justice Thomas’ response implies that the Judicial Conference’s changes to disclosure guidance in March 2023 created a new requirement to report private plane travel, this is not a new requirement. Indeed, Justice Thomas himself reported private plane travel from the same source in the past, and it is well established in all three branches that EIGA has required these disclosures for decades. See Letter to Judicial Conference Secretary, Campaign Legal Center, at 2-3 (Apr. 11, 2023) <https://campaignlegal.org/sites/default/files/2023-04/Judicial%20Conference%20Letter-FINAL.pdf>.

⁷ 28 U.S.C. § 672(b-c).

undertake other administrative tasks, none of which include investigations.⁸ As a result, the haphazard assignment to the Marshal to investigate the matter caused public criticism that the findings were fundamentally flawed.⁹

In another case, when a witness publicly alleged that Justice Alito leaked the outcome of a decision to an acquaintance, the Supreme Court's Legal Office concluded within eight days that "[t]here is nothing to suggest that Justice Alito's actions violated ethics standards."¹⁰ The Court's Legal Office apparently did not gather any facts independently, but relied on public statements in the media to close the matter. Like the Marshal of the Supreme Court, the Court's Legal Office is not statutorily responsible for conducting such an investigation.¹¹

The Court's lack of a clear fact-gathering body also means financial disclosure violations by the Justices may go unresolved. The Ethics in Government Act of 1978 ("EIGA") requires that Justices disclose the ownership, purchase, and sale of investment properties.¹² Despite this requirement, Justice Thomas failed to disclose the sale of properties for \$133,363 (three times the reported value) to the same person who provided him undisclosed vacation travel.¹³ Justice Gorsuch similarly omitted required details relating to the sale of a property he co-owned, a sale on which he made between \$250,001 and \$500,000.¹⁴ In particular, while Justice Gorsuch disclosed the sale of an LLC, he omitted listing the underlying real estate asset and the identity of the buyer: the Chair of a law firm that regularly argues before the Supreme Court.¹⁵

⁸ *Id.*

⁹ Robert Barnes, *Marshal says Supreme Court justices questioned in leak probe, not implicated*, WASH. POST (Jan. 20, 2023), <https://www.washingtonpost.com/politics/2023/01/20/supreme-court-leak-justices-questioned/>; Charlie Savage, *Supreme Court's Inquiry Into Leak Included Interviews With Justices*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/us/politics/supreme-court-leak-justices.html>; Nina Totenberg, *Supreme Court is unable to ID the leaker in Dobbs decision*, NPR (updated Jan. 19, 2023), <https://www.npr.org/2023/01/19/1150051376/supreme-court-dobbs-leak-marshall>.

¹⁰ Letter from the Legal Office of the Supreme Court of the United States to Hon. Sheldon Whitehouse and Hon. Henry C. Johnson (Nov. 28, 2022), <https://www.documentcloud.org/documents/23320603-scotus-letter-dated-11282022>.

¹¹ J. W. Winkle III, M.B. Swann, *When Justices Need Lawyers: The U.S. Supreme Court's Legal Office*, 76 JUDICATURE 244 (Feb. – Mar. 1993), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/when-justices-need-lawyers-us-supreme-courts-legal-office>.

¹² 5 U.S.C. §13104(a)(3).

¹³ Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

¹⁴ Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, POLITICO (Apr. 25, 2023), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>; *Financial Disclosure Report for Calendar Year 2017* (May 15, 2018), available at https://fixthecourt.com/wp-content/uploads/2018/06/Gorsuch-NM-J3.-SUP_R_17.pdf (financial disclosure report of Justice Neil Gorsuch).

¹⁵ Financial Disclosure Report of Justice Neil Gorsuch, *supra* note 14.

EIGA gives the Judicial Conference, the policymaking body for federal courts, the authority to enforce financial disclosure reporting requirements.¹⁶ While the Supreme Court has stated that the Judicial Conference, “which binds lower courts, does not supervise the Supreme Court,”¹⁷ that assertion does not impact the Judicial Conference’s clear authority to refer to the U.S. Attorney General a Justice’s intentional failure to file required information.¹⁸ Nonetheless, without an internal body with clear, legally binding jurisdiction over the Supreme Court to review allegations of financial disclosure violations, Justices may continue to ignore ethics laws they are required to follow without consequences.

The minimal ethics enforcement in the Supreme Court contrasts significantly with the legislative and executive branches.

B. Legislative Branch Ethics Enforcement

The Supreme Court lags behind the legislative branch by nearly 60 years in the development of formal internal ethics enforcement processes. Both the House and Senate maintain standing internal ethics committees: the U.S. House Committee on Ethics, established in 1967,¹⁹ and the U.S. Senate Select Committee on Ethics, established in 1964.²⁰ The committees serve three functions. First, the committees provide ethics advice and education to members and staff.²¹ Second, the committees investigate and adjudicate any alleged violations of ethics rules or laws.²² Third, the committees administer their chamber’s financial disclosure program.²³

The House ethics enforcement structure includes an additional office: the U.S. Office of Congressional Ethics (“OCE”). Created in 2008, OCE is an independent, nonpartisan entity whose responsibility is solely to investigate allegations of misconduct by House members and staff.²⁴ After conducting investigations, OCE provides a report to the House Ethics Committee with its

¹⁶ “The provisions of [the financial disclosure requirements of federal personnel] shall be administered by the Judicial Conference in the case of [a judicial officer or judicial employee].” 5 U.S.C. § 13102(a)(3).

¹⁷ Chief Justice Roberts, *Letter to Judiciary Committee Chair Richard J. Durbin*, *supra* note 1.

¹⁸ 5 U.S.C. § 13106(b).

¹⁹ Committee History, U.S. House of Representatives Comm. on Ethics, <https://ethics.house.gov/about/committee-history> (last visited Apr. 28, 2023).

²⁰ History, U.S. Senate Select Comm. on Ethics, <https://www.ethics.senate.gov/public/index.cfm/history> (last visited Apr. 28, 2023).

²¹ About, U.S. House of Representatives Comm. on Ethics, <https://ethics.house.gov/about> (last visited Apr. 28, 2023); About Us, U.S. Senate Select Comm. on Ethics,

<https://www.ethics.senate.gov/public/index.cfm/aboutus> (last visited Apr. 28, 2023).

²² *Id.*

²³ *Id.*

²⁴ About, Office of Congressional Ethics, <https://oce.house.gov/about> (last visited Apr. 28, 2023).

recommendations. These reports, which generally become public, include a summary of the allegations, detailed findings of fact, and citations to law.²⁵ OCE does not have any authority to provide final adjudication of investigative matters or impose penalties; those powers rest with the House Ethics Committee.

Before each chamber of Congress established their ethics committees, ethics violations were dealt with on a case-by-case basis; they were investigated either by a special or select committee created for the purpose of investigating a specific allegation, or by bringing an issue directly to the floor.²⁶ This system resulted in a patchwork, inefficient system of enforcement. In 1963, when the Secretary to the Senate Democratic Majority resigned following allegations that he misused his official position for personal gain, the Senate Rules Committee began the process of adopting a proposal to create a permanent ethics committee.²⁷ In the House, questions about misconduct and the lack of reliable and accessible ethics guidance thus led to the creation of the House Ethics Committee.²⁸

The Supreme Court is now facing similar challenges related to the appearance of improper conduct by Justices and criticism for its inability to properly investigate misconduct. In the face of these challenges, Congress developed ways to provide better accountability. If the Supreme Court does not establish a specific enforcement body to provide clarity to Justices on how ethics rules and laws apply and to investigate alleged ethics violations, it will continue to experience violations of ethics laws, rules, and norms that will go unchallenged.

C. Executive Branch Ethics Enforcement

The Supreme Court lags behind the current state of ethics in the executive branch by at least 45 years. Under EIGA, the executive branch takes a multi-layered approach to ethics enforcement. The head of each agency appoints a designated agency ethics official (“DAEO”), whose responsibilities include reviewing employee financial disclosure reports to determine whether they violate ethics laws and rules;²⁹ resolving conflicts of interest that violate such provisions;³⁰ and “[c]arrying out an effective government ethics education program.”³¹ In addition, each agency has an office of Inspector General with the authority to conduct investigations into suspected violations of ethics laws and regulations.³²

²⁵ Process, Office of Congressional Ethics, <https://oce.house.gov/learn/process> (last visited Apr. 28, 2023).

²⁶ History, Senate Select Comm. on Ethics, *supra* note 20; Committee History, House Committee on Ethics, *supra* note 19.

²⁷ History, Senate Select Comm. on Ethics, *supra* note 20.

²⁸ Committee History, House Comm. on Ethics, *supra* note 19.

²⁹ 5 C.F.R. § 2634.605; 5 C.F.R. § 2638.104(c)(8).

³⁰ 5 C.F.R. § 2638.104(c)(6).

³¹ 5 C.F.R. § 2638.104(c)(5).

³² 5 C.F.R. § 2638.106.

The Office of Government Ethics (“OGE”) oversees the executive branch ethics program. OGE’s statutory function is to ensure that the executive branch’s ethics program effectively prevents conflicts of interest and other ethics violations.³³ OGE was created in 1978 as part of the post-Watergate reforms, to restore confidence in government after the abuse of public trust, and out of a need to bring “continuity and uniformity” to ethics regulations in the executive branch.³⁴

The mechanisms the executive branch uses to ensure effective ethics enforcement can be instructive for the Supreme Court. The Court’s current scandals could be addressed adequately by an ethics office tasked with carrying out ethics education programs and conducting investigations.

D. Establishing a Supreme Court Ethics Enforcement Body

To meet the baseline standard set by the legislative and executive branches, the Supreme Court must create an ethics body with the authority to provide ethics advice to Justices and to investigate allegations of misconduct, issuing public reports of its findings. This body can be established internally, like a DAEO, office of Inspector General, or the House and Senate Ethics Committees, or externally, like OCE, OGE, or the Judicial Conference that administers the Court’s financial disclosure program.

For this body to be effective, it does not necessarily need the authority to discipline or penalize Justices for ethics violations. Enforcement mechanisms bolstered by well-resourced investigative bodies such as OCE and Inspectors General promote transparency and accountability through their ability to publish detailed public reports within reasonable timeframes. The role of such a body for the Court would be to provide guidance for those seeking to comply with the Court’s rules; investigate possible violations of the Court’s rules; and bring transparency, uniformity, clarity, and accountability to the Court’s ethics.

The scandals surrounding the Supreme Court in recent months and years have led to a significant decline in public trust in the Court.³⁵ Both the legislative branch and executive branch responded to similar public trust crises by creating ethics enforcement bodies. The Supreme Court should follow their lead, to restore confidence in the institution and increase accountability.

³³ 5 C.F.R. § 2638.101.

³⁴ Our History, U.S. Office of Government Ethics, https://www.oge.gov/web/OGEnsf/about_our_history (last visited Apr. 28, 2023); Walter M. Shaub, Jr., OGE and the Inspector General Community, U.S. Office of Government Ethics (July 17, 2015), <https://www.oge.gov/web/oge.nsf/Resources/OGEnsf+and+the+Inspector+General+Community>.

³⁵ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

II. The Supreme Court Lacks a Code of Conduct

The executive and legislative branches have adopted codes of conduct to prohibit common conflicts of interest and support public trust in government, but the Supreme Court has not. Unless the Supreme Court establishes a code of conduct to formally define and prohibit ethical misconduct, the judicial branch will remain the branch with the least developed ethical standards.

A. Supreme Court Code of Conduct

The Judicial Conference has promulgated the Code of Conduct for United States Judges, which applies to most federal judges, but not Supreme Court Justices. The Judicial Conference acknowledges that complying with the code “helps to maintain public confidence in the impartiality of the judiciary,” while “violation of this [c]ode diminishes public confidence in the judiciary and injures our system of government under law.”³⁶ Nevertheless, this Code of Conduct is considered a set of “aspirational rules” for federal judges, and not a binding code. Chief Justice Roberts has acknowledged that, while the Court “takes guidance from the Code,” it “applies by its terms only to lower court federal judges.”³⁷

This Code of Conduct tells judges to: 1) uphold the integrity and independence of the judiciary; 2) avoid not only impropriety but the appearance thereof; 3) perform the duties of their offices fairly, impartially, and diligently; 4) avoid extrajudicial activities that would be inconsistent with the obligations of judicial office; and 5) refrain from political activity.³⁸ While this code does not contain an enforcement mechanism, a judicial discipline process does exist.³⁹

Importantly, neither the code nor the judicial discipline process governs Supreme Court Justices, and the Supreme Court has not promulgated its own ethics code. Chief Justice Roberts has indicated that Justices consult the Code of Conduct for United States Judges, and other authorities, to “address specific ethical issues,” and most recently shared a “Statement on Ethics Principles and Practices” to which all the current Members of the Supreme Court subscribe.⁴⁰ But there is no specific or formal way the Supreme Court handles ethics issues that arise.⁴¹

³⁶ Code of Conduct for United States Judges, *Guide to Judiciary Policy*, United States Courts, Vol. 2, Pt. A, Ch. 2 at 3 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf.

³⁷ Chief Justice Roberts, *Letter to Judiciary Committee Chair Richard J. Durbin*, *supra* note 1.

³⁸ Code of Conduct for United States Judges, *supra* note 36, at 1.

³⁹ See 28 U.S.C. §§ 351-364.

⁴⁰ Chief Justice Roberts, *Letter to Judiciary Committee Chair Richard J. Durbin*, *supra* note 1.

⁴¹ *Chief Justice's 2011 Year-End Report on the Federal Judiciary*, Supreme Court of the United States at 5 (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

The only ethics laws that apply to the Supreme Court are: the EIGA, which requires Justices to file annual reports on their financial interest;⁴² the Ethics Reform Act of 1989, which restricts outside employment and gifts;⁴³ the 28 U.S.C. § 455 (“§ 455”) recusal rule discussed below; and most recently, the Courthouse Ethics and Transparency Act.⁴⁴ Without a binding code of conduct, Justices do not have any ethical obligations related to the numerous other potential conflicts of interest that are addressed by codes of conduct in the executive and legislative branches.

B. Codes of Conduct in Executive and Legislative Branches

Both the executive and legislative branches have clear standards of conduct that cover specific situations that could lead to ethical issues. These rules provide officials with ethics guidance and address circumstances where the public may reasonably question an official’s actions as benefitting themselves rather than the public. Beyond creating a set of rules for officials to follow, most of these codes of conduct also contain a disclosure component to increase transparency and prevent conflicts of interest.

The executive branch ethics code of conduct, “Standards of Ethical Conduct for Employee of the Executive Branch,” is codified in 5 C.F.R. Part 2635. The extensive provisions cover common ethical issues, including gifts,⁴⁵ conflicting financial interests,⁴⁶ impartiality,⁴⁷ future employment negotiations,⁴⁸ misuse of position,⁴⁹ and outside activities.⁵⁰

Similarly, each chamber of Congress has a code of conduct. Explaining the purpose and importance of the code of conduct, the House Ethics Committee noted “[t]hat ‘public office is a public trust’ has long been a guiding principle for government. To uphold this trust, Congress has bound itself to abide by certain standards of conduct. . . .”⁵¹ The House and Senate codes of conduct provide rules

⁴² Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

⁴³ Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716 (codified as amended at 5 U.S.C. app. § 502(a)).

⁴⁴ Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205.

⁴⁵ 5 C.F.R. §§ 2635.201-2635.304.

⁴⁶ 5 C.F.R. §§ 2635.401-2635.403.

⁴⁷ 5 C.F.R. §§ 2635.501-2635.503.

⁴⁸ 5 C.F.R. §§ 2635.601-2635.607.

⁴⁹ 5 C.F.R. §§ 2635.701-2635.705.

⁵⁰ 5 C.F.R. §§ 2635.801-2635.809.

⁵¹ See U.S. House of Representatives Comm. on Ethics, 117th Cong., *House Ethics Manual 2022 Print Ed.*, 2 (2022), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/2022/House-Ethics-Manual-2022-Print.pdf>.

related to gifts, travel, outside employment, financial disclosure, outside activities, and other topics.⁵²

EIGA and the Ethics Reform Act of 1989 apply to all three branches of government; yet the legislative and executive branches have opted to go above and beyond the ethics requirements of those two laws. The judiciary is the only branch that has not adopted a substantial and enforceable code of conduct to address ethical issues that fall outside those that have been prohibited by law. The conspicuous absence of a code of conduct for the Supreme Court raises questions about whether ethics are prioritized in the judicial branch.

C. Establishing a Supreme Court Code of Conduct

For the Supreme Court to raise its ethical standards closer to the executive and legislative branches, the Justices need a code of conduct. The code of conduct for the Court may not need be as extensive as those of the other branches, which encounter broader conflicts of interest due to the nature of each branch. Nevertheless, more comprehensive ethics rules for the Court are necessary to increase public confidence in the judiciary.

A Supreme Court code of conduct should provide concrete standards for what a Justice can and cannot do. This would help demonstrate to the public that the Supreme Court is willing to hold itself accountable for conflicts of interest and other ethics issues that are not currently codified in law. If the code of conduct includes a compliance procedure, Justices will be held accountable for violations and the dwindling public trust⁵³ in the institution can be restored.

III. Supreme Court Privately Sponsored Travel Lacks Transparency

All three branches of government have rules regarding officials accepting travel from private sources because of the potential for conflicts of interest associated with receipt of expensive and recreational gifts. The executive branch has the most restrictive rules, which limit senior officials from accepting privately sponsored travel in most circumstances.⁵⁴ The legislative branch established extensive disclosure requirements for its members⁵⁵ in response to corruption

⁵² See U.S. House of Representatives Comm. on Ethics, 118th Cong., *Code of Official Conduct* (2023), <https://ethics.house.gov/publications/code-official-conduct/>; U.S. Senate Select Comm. on Ethics, 117th Cong., 1st Sess., *The Senate Code of Official Conduct* (2021), https://www.ethics.senate.gov/public/_cache/files/3507e6ae-2525-40ac-9ec8-7c6dbfe35933/2021---red-book---the-senate-code-of-official-conduct.pdf.

⁵³ See, e.g., *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/>.

⁵⁴ 31 U.S.C. § 1353; 5 C.F.R. § 2635.807(a)(2)(iii); 5 C.F.R. § 2635.204.

⁵⁵ Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735 (2007).

scandals involving privately sponsored travel.⁵⁶ In contrast, Supreme Court Justices routinely attend trips paid for by private entities, but the limited information publicly disclosed about these trips has caused speculation about potential conflicts of interest. Enhanced disclosure requirements for Justices' privately sponsored travel could increase confidence in the integrity of the Court by providing the public with more information about potential conflicts of interest.

A. Disclosure of Privately Sponsored Travel for Justices

Justices can accept gifts of privately sponsored travel under certain circumstances, but it must be disclosed. The Supreme Court voluntarily agreed in 1991 to follow the Judicial Conference's gift regulations.⁵⁷ Under these rules, a judicial officer or employee "is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties."⁵⁸ However, the rules provide a broad exception for travel expenses "to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice."⁵⁹

For travel reimbursements aggregating more than \$415 in value received from a single source, Justices must report the identity of the source and a brief description of the trip, including travel locations, dates, and the nature of the expenses provided.⁶⁰ Justices are required to disclose privately sponsored travel only at the end of the year as part of the gifts and reimbursements section of their

⁵⁶ John Bresnahan, *Travel Scandal Fallout Ensnarers Both Parties*, ROLL CALL (May 4, 2005), <https://rollcall.com/2005/05/04/travel-scandal-fallout-ensnarers-both-parties/>.

⁵⁷ Comm. on Codes of Conduct of the Judicial Conference (adopted Jan. 18, 1991), memorandum of Chief Justice Rehnquist, available at https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991_Resolution.pdf.

⁵⁸ *Guide to Judiciary Policy*, United States Courts, Vol. 2, Pt. C, Ch. 6 §620.35(a), <https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf>.

⁵⁹ *Id.* at §620.35(b)(3).

⁶⁰ 5 U.S.C. § 13104(a)(2); 5 C.F.R. § 2634.304(a); *Guide to Judiciary Policy*, United States Courts, Vol. 2, Pt. D, Ch. 3 §330, <https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf>. Recent revisions to the Federal Judiciary Financial Disclosure Regulations have absolutely no impact on the EIGA requirements for the reporting of private plane and yacht travel by justices. Those revisions provide narrow clarification of the "personal hospitality" exception for the reporting of food, lodging, or entertainment. In particular, the Judicial Conference made the revisions "to provide guidance on 'whether 'personal hospitality' may encompass hospitality extended at a commercial property such as a resort' and whether hospitality for which a 'third party reimburses the hosts for the costs' would fall outside the scope of the reporting exemption." The Honorable Roslynn R. Mauskopf, *Response Letter to Sen. Sheldon Whitehouse* (Mar. 23, 2023), [https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20\(Final\).pdf](https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20(Final).pdf).

financial disclosures.⁶¹ The public is unable to adequately determine whether any permissible exception of the gift regulations applies to a trip or if there are additional potential conflicts of interest associated with privately sponsored travel because of the limited disclosure requirements. Specifically, Justices' disclosures are missing four important features: details on the purpose of the trip; attendees of the trip; the cost of the trip; and immediate reporting of the trip.

The lack of transparency surrounding privately sponsored travel has raised questions about the influence that private parties funding or attending the trips can exert on individual Justices. From 2004 to 2018, Justices reported attending more than 1,300 privately sponsored trips.⁶² Justice Antonin Scalia notably frequently traveled at third parties' expense, taking 258 privately sponsored trips over the course of 11 years;⁶³ but many other Justices traveled at the expense of private parties.

For example, in 2019, Justice Brett Kavanaugh was reimbursed for a two-week teaching trip to the United Kingdom by George Mason University.⁶⁴ In 2018, Justice Ruth Bader Ginsburg took 14 privately sponsored trips,⁶⁵ Justice Alito took 6 trips,⁶⁶ and Justice Sonia Sotomayor took 13 trips.⁶⁷ In 2014, six Justices received paid trips to Europe. That year, Justice Scalia went on 23 privately funded trips, including to Hawaii, Ireland, and Switzerland.⁶⁸ Justice Kennedy took a three-week trip paid for by the Aspen Institute and the University of the Pacific, with destinations of Salzburg, San Francisco, and Aspen.⁶⁹

⁶¹ 5 U.S.C. § 13104(a)(2).

⁶² Karl Evers-Hillstrom, *Supreme Court justices continue to rack up trips on private interest dime*, OPEN SECRETS (June 13, 2019), <https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips/>.

⁶³ Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html>.

⁶⁴ *Financial Disclosure Report for Calendar Year 2019*, at 2 (May 14, 2020), https://fixthecourt.com/wp-content/uploads/2020/06/Kavanaugh-BM-JB.-SC_SR_19.pdf (financial disclosure report of Justice Brett Kavanaugh).

⁶⁵ *Financial Disclosure Report for Calendar Year 2018*, at 2-3 (May 15, 2019), https://s3.amazonaws.com/pfds.opensecrets.org/N99999924_2018.pdf (financial disclosure report of Justice Ruth Bader Ginsburg).

⁶⁶ *Financial Disclosure Report for Calendar Year 2018*, at 2 (May 23, 2019), https://s3.amazonaws.com/pfds.opensecrets.org/N99999926_2018.pdf (financial disclosure report of Justice Samuel Alito).

⁶⁷ *Financial Disclosure Report for Calendar Year 2018*, at 2-3 (May 10, 2019), https://s3.amazonaws.com/pfds.opensecrets.org/N99999915_2018.pdf (financial disclosure report of Justice Sonia Sotomayor).

⁶⁸ *Financial Disclosure Report for Calendar Year 2014*, at 2-3 (May 15, 2014), <https://embed.documentcloud.org/documents/2157458-scalia-antonin-2014> (financial disclosure report of Justice Antonin Scalia).

⁶⁹ *Financial Disclosure Report for Calendar Year 2014*, at 2-3 (May 11, 2015), <https://embed.documentcloud.org/documents/2157457-kennedy-anthony-2014> (financial disclosure

Because only partial information was disclosed about the trips, the public cannot determine whether they fall under the gift exemption for privately sponsored travel. More importantly, the public is not aware of the cost of the trip and participants, which, if known, could trigger the recusal requirement by bringing into question the impartiality of the Justice. Without more detailed and frequent reporting of privately sponsored travel and a way to investigate failures to comply with those reporting requirements, public confidence in the integrity of the Court may continue to decrease.

B. Disclosure of Privately Sponsored Travel for the Legislative Branch

Congress has robust and detailed reporting requirements for privately sponsored travel, acknowledging that “travel may be among the most attractive and expensive gifts” in the 2008 House Ethics Manual.⁷⁰ The nature of the gift could create the appearance of a lawmaker using public office for private gain, and therefore privately sponsored travel is permitted only if it complies with the disclosure and pre-approval process. The disclosure is filed immediately following the trip and includes details about the sponsor of the trip, scheduled events, attendees, and costs.

Members of the House of Representatives, for example, are required by House Rule 25, clause 5 to disclose the receipt of travel expenses from a private source if that travel is in connection with the lawmaker’s official duties within 15 days after the travel is completed, after which the disclosures are made available for public inspection on the Clerk of the House’s website.⁷¹ This disclosure is in addition to the requirement to disclose gifts of private travel on the representative’s annual financial disclosure form.

Prior to the trip, members must submit details to the U.S. House Committee on Ethics (“House Ethics Committee”) for pre-approval to attend the trip. The extensive disclosures for pre- and post-trip reports include:

report of Justice Anthony Kennedy); Reity O’Brien and Rachel Baye, *Supreme Court justices bolstered by free travel, royalties, rental income*, CTR. FOR PUB. INTEGRITY (July 2, 2015), <https://publicintegrity.org/politics/supreme-court-justices-bolstered-by-free-travel-royalties-rental-income/>.

⁷⁰ U.S. House of Representatives Comm. on Standards of Conduct, 110th Cong., 2d Sess., *House Ethics Manual*, 87 (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

⁷¹ RULES OF THE HOUSE OF REPRESENTATIVES OF THE U.S., 118th Cong., Rule 25, cl. 5(b)(1)(A)(ii), cl. 5(b)(5); see also U.S. House of Representatives, *Gift Travel Filings*, <https://disclosures-clerk.house.gov/PublicDisclosure/GiftTravelFilings> (last visited April 28, 2023).

- *Pre-Travel Disclosure*
 - The member reports 30 days prior to the start of the trip the date and location of the travel; the sponsor paying for the travel; any family accompanying the member; justification for the trip and how it is connected to official duties; and a certification that no registered lobbyists or foreign agents were involved in organizing, requesting, or arranging the trip.⁷²
 - The private sponsor reports 30 days prior to the start of the trip the name of the primary sponsor of the trip; an attestation that the trip is not financed in any part by a registered lobbyist or foreign agent; the true source of the sponsor's funds and any additional sponsors; the sponsor's interest in the trip and reason for the trip; all House members invited on the trip; and the anticipated cost of expenses, among other details of the trip.⁷³
- *Post-Travel Disclosure*
 - The member confirms attending the trip and provides the trip itinerary.⁷⁴
 - The private sponsor provides the amount of expenses paid on behalf of, or reimbursed to, each individual traveler, as well as a list of all House members that attended the trip.⁷⁵

Willful or knowing misrepresentations on any of the preceding forms subject the signer to criminal prosecution under 18 U.S.C. §1001.

The Senate has similar travel disclosure requirements under Senate Rule 35.⁷⁶ The Senate requires 30-day advanced approval from the U.S. Senate Select Committee on Ethics ("Senate Ethics Committee") by submitting a Private Sponsor

⁷² U.S. House of Representatives, Comm. on Ethics, *Traveler Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Travel_Traveler%20Form_Interactive.pdf (last revised March 2021).

⁷³ U.S. House of Representatives, Comm. on Ethics, *Primary Trip Sponsor Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Primary_Trip_Sponsor%20Form_V2_Interactive.pdf (last revised March 2021).

⁷⁴ U.S. House of Representatives, Comm. on Ethics, *Member/Officer Post-Travel Disclosure Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Travel_Member_Officer%20Post-Travel_Disclosure_Form_Interactive.pdf (last revised March 2021).

⁷⁵ U.S. House of Representatives, Comm. on Ethics, *Sponsor Post-Travel Disclosure Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Travel_Sponsor%20Post-Travel_Disclosure%20Form_Interactive%20%28002%29.pdf (last revised March 2021).

⁷⁶ *The Senate Code of Official Conduct*, *supra* note 52, Rule 35; U.S. Senate, Select Comm. on Ethics, 118th Cong., Regulations and Guidelines for Privately Sponsored Travel (2023), https://www.ethics.senate.gov/public/_cache/files/674e33d3-9372-4ee1-9f12-e6939d4e58b7/regulations-and-guidelines-for-privately-sponsored-travel.pdf.

Travel Certification Form⁷⁷ along with the invitation for the travel and the itinerary for the travel. If the travel is approved, a post-travel disclosure package must be submitted within 30 days of completion of the privately sponsored travel. That package includes a Post-Travel Disclosure of Expenses,⁷⁸ the travel invitation, the completed and signed Private Sponsor Travel Certification Form, and any attachments. These documents are made available to the public by the Secretary of the Senate.⁷⁹

According to the 2008 House Ethics Manual, Congress established these enhanced disclosure requirements following ethics scandals involving lawmakers accepting travel from private sources without oversight or transparency.⁸⁰ The legislative branch's experience suggests that the potential of ethics scandals will continue to increase if the judicial branch continues to allow Justices to accept privately sponsored travel without at least increasing disclosure.

C. Increasing Transparency of Privately Sponsored Travel for Justices

To improve public confidence in the Supreme Court and its impartiality, Justices should disclose additional details concerning their acceptance of privately sponsored travel, including: the cost of the travel, attendees, and all scheduled events during the trip. Moreover, the disclosures should become public immediately following the trip instead of annually. The prompt disclosures will provide the public and litigants with adequate notice of any potential conflicts of interest with pending matters before the Court.

Congress' disclosure requirements for privately sponsored travel demonstrate that providing the public with clear information about the nature of a trip can decrease speculation of whether the trip is improper. Current Supreme Court ethics

⁷⁷ U.S. Senate, Select Comm. on Ethics, *Private Sponsor Travel Certification Form*,

https://www.ethics.senate.gov/public/_cache/files/e3282b35-ddee-43e5-9c59-10920eedae26/pstcf.pdf.

⁷⁸ U.S. Senate, Select Comm. on Ethics, *Senators and Officers Post-Travel Disclosure of Travel Expenses*, https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=C1735D98-6E76-4D6B-A89E-A06B47DAB8CA.

⁷⁹ U.S. Senate, Select Comm. on Ethics, *S.R. 35 Requirements*,

https://www.senate.gov/legislative/Public_Disclosure/Rule_35_Travel.htm (last visited Apr. 28, 2023);

U.S. Senate, *Gift Rule/Outside Paid Travel Database*, <https://gift-rule-disclosure.senate.gov/> (last visited Apr. 28, 2023).

⁸⁰ "Under the previous version of the gift rule, the Standards Committee did not have authority to approve trips paid for by a private source. The previous rule placed on individual Members and officers, for themselves and their staff, the responsibility of making the determination that a particular trip was in connection with official duties and would not create the appearance of using public office for private gain. Pursuant to the rules adopted at the beginning of the 110th Congress, no such travel may be accepted without first receiving written approval by the Standards Committee." *House Ethics Manual* (2008), *supra* note 70, at 88; *See, e.g.*, Juan Williams, *Cleaning Up Capitol Hill After Abramoff*, NPR (Jan. 20, 2006), <https://www.npr.org/templates/story/story.php?storyId=5165211>.

rules appear to allow outside sources the ability to provide lavish trips to Justices without the public ever knowing the full nature of the relationship between the Justices and the hosts of the trips or other participants—or whether those parties have interests before the Court. Reform of the disclosure requirement is needed to restore public trust.

IV. The Supreme Court Recusal Requirement Lacks a Compliance Procedure

In all three branches of the federal government, recusal requirements exist to disqualify public officials from participating in decisions in which they have conflicts of interest. The legislative branch has limited recusal rules that apply only in very specific circumstances because of the concern that a lawmaker’s recusal from voting denies constituents representation.⁸¹ Although the executive and judicial branches have recusal requirements that apply to a broader range of matters, the frequency of allegations that Justices fail to recuse themselves from matters in which they have conflicts strongly suggests that the Supreme Court’s recusal requirement needs improvement. Increased transparency can improve public confidence in Supreme Court Justices’ recusal decisions.

A. Supreme Court Recusal Requirement

Federal law requires Supreme Court Justices to recuse themselves from any proceeding in which they have a conflict of interest as described in the disqualification statute, 28 U.S.C. § 455. The listed conflicts include, among others, “any proceeding in which [the Justice’s] impartiality might be reasonably questioned,” and circumstances in which the Justice has a financial interest or personal bias concerning a party.⁸²

The purpose of the recusal law is to resolve the ambiguity of previous recusal provisions.⁸³ Congress found “the existence of dual standards . . . couched in uncertain language” not only put judges and Justices in a difficult position to decide whether to recuse, but also could “weaken public confidence in the judicial system.”⁸⁴ Indeed, a Justice’s choice to recuse or not to recuse directly implicates

⁸¹ See *House Ethics Manual 2022 Print Ed.*, *supra* note 51, at 237 (“House precedents favor ‘the idea that there is no authority in the House to deprive a Member of the right to vote.’ Given the size of today’s districts, when a Member refrains from voting, well over half a million people are denied a voice on the pending legislation.”).

⁸² 28 U.S.C. § 455(a)-(b).

⁸³ Previously, there were two ethics provisions that judges and Justices had to consider. The first stated that a judge or Justice should not preside when a near relative is a party and the second stated that a judge or Justice should not participate in a case where their substantial personal interests are involved. Neither provision defined their terms, making it unclear what was considered a “near relative” or a “substantial interest.” H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6352.

⁸⁴ *Id.*

their oath of impartiality.⁸⁵ “Recusal aims to ensure both actual judicial impartiality and the appearance of judicial impartiality, which are necessary to ensure due process.”⁸⁶ Despite the intent of the recusal requirement to uphold the integrity of the Court and strengthen public confidence in the judicial system, public controversies involving Justices deciding not to recuse themselves persist.

During the past decade alone, there have been numerous allegations of Justices failing to comply with the recusal requirement. For example, in 2011, Justices Elena Kagan and Clarence Thomas were criticized for failing to disqualify themselves from participating in a decision to determine the fate of the Affordable Care Act. Justice Thomas’ perceived conflict of interest involved the political activities of his spouse in opposition to the healthcare law, while Justice Kagan was allegedly involved in developing the legal defense of the law during her prior role as Solicitor General.⁸⁷ From 2015 to 2022, there were at least 18 instances where Justices allegedly failed to recuse themselves despite perceived or actual conflicts of interest.⁸⁸ The allegations involve multiple Justices, including Justices Samuel Alito, Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, and Chief Justice John Roberts. The conflicts of interests range from owning stock in one of the parties to the litigation, to prior work on the matter while previously serving in government positions. In 2022, Justice Thomas was criticized for failing to recuse himself from participating in a case that determined whether certain White House records must be provided to Congress where correspondence from his spouse were later revealed in connection with the same investigation.⁸⁹

One reason for the recurrent criticism of the recusal law is the absence of any compliance procedure. The Justices alone decide if and when they should recuse

⁸⁵ Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 661 (2005).

⁸⁶ *Id.*

⁸⁷ See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, n.6 (2013) citing Editorial, *The Supreme Court’s Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38 (“Liberals in Congress have called for Justice Clarence Thomas to recuse himself from the review of the health care reform law because his wife, Virginia, has campaigned fervently against it. Conservatives insist that Justice Elena Kagan should remove herself from the case because, they claim, as solicitor general she was more involved in shaping the law than she lets on.”); Josh Gerstein, *No Sign Elena Kagan, Clarence Thomas will recuse on health care law*, POLITICO (Nov. 14, 2011), <https://www.politico.com/blogs/under-the-radar/2011/11/no-sign-elena-kagan-clarence-thomas-will-recuse-on-health-care-law-040802>.

⁸⁸ *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (Mar. 7, 2023), <https://fixthecourt.com/2022/01/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁸⁹ Jordan S. Rubin, *Where Ginni Thomas’s Texts Meet High-Court Ethics: Explained (I)*, BLOOMBERG LAW (Mar. 30, 2022), <https://news.bloomberglaw.com/us-law-week/ginni-thomas-texts-and-recusal-calls-top-court-ethics-explained>; Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022), <https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases>; Adam Liptak, *Justice Thomas Ruled on Election Cases. Should His Wife’s Texts Have Stopped Him?*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/supreme-court-clarence-thomas-recusal.html>.

themselves, and they are not required to provide any rationale for their decisions. In addition, there is not even an informal, non-binding review of the recusal decision to inform the public whether the decision is considered appropriate and aligns with prior decisions by other Justices. If a decision not to recuse raises questions about the Justice's impartiality, there is no investigatory body to conduct oversight of the decision.

B. Executive Branch Recusal Requirements

The Supreme Court's approach to compliance with its recusal requirement stands in stark contrast to the transparency of executive branch recusals. Federal criminal law and the executive branch code of conduct require that executive branch officials recuse themselves from participating in decisions in which they have conflicts of interest. The criminal statute, 18 U.S.C. § 208, requires recusal for conflicts involving certain financial interests. The code of conduct is broader and requires recusal "to avoid an appearance of loss of impartiality in the performance of . . . official duties."⁹⁰ Circumstances that create an appearance of loss of impartiality include those where the official has certain business or personal relationships with a party in the matter.⁹¹ In addition, political appointees are subject to an ethics pledge to ensure recusal from matters involving work performed prior to entering public service.⁹²

To facilitate compliance with the recusal requirement, OGE enters into ethics agreements with senior officials. These agreements list the matters from which an official will recuse, the financial interests they will divest, or the termination of business relationships that conflict with official duties. The disclosures are available online and enable the public to know about specific recusals from matters involving certain parties with personal or business relationships with the official; specific assets divested to avoid conflicts; recusals related to a spouse's employer; resignations from affiliated entities with conflicts; and other steps the official will take to avoid any actual or apparent conflicts of interest.⁹³ Furthermore, all ethics

⁹⁰ 5 C.F.R. § 2635.501(a).

⁹¹ 5 C.F.R. § 2635.502.

⁹² Exec. Ord. No. 13989, 86 Fed. Reg. 7029 (Jan. 25, 2021).

⁹³ See, e.g., Janet Yellen Ethics Agreement (Dec. 29, 2020), [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/18A4D129DD5675888525864F0081071C/\\$FILE/Yellen.%20Janet%20L.%20final%20EA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/18A4D129DD5675888525864F0081071C/$FILE/Yellen.%20Janet%20L.%20final%20EA.pdf); Antony Blinken Ethics Agreement (Dec. 30, 2020), [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/709E518A700361B08525864F008106BB/\\$FILE/Blinken.%20Antony%20%20final%20EA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/709E518A700361B08525864F008106BB/$FILE/Blinken.%20Antony%20%20final%20EA.pdf); Shereef Elnahal Ethics Agreement Supplement (May 16, 2022), [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3D6ED41B788CEB258525882D002E47C9/\\$FILE/Elnahal.%20Shereef%20%20AMENDEDfinalEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3D6ED41B788CEB258525882D002E47C9/$FILE/Elnahal.%20Shereef%20%20AMENDEDfinalEA.pdf).

pledge waivers, which are granted to officials only in limited circumstances,⁹⁴ are made public by OGE.⁹⁵

OGE does not have authority to enforce the recusal requirement or issue sanctions for those who do not comply with the recusal requirement.⁹⁶ However, publicly available ethics agreements facilitate compliance by creating precedents for the types of matters that officials determine require recusal. If an official fails to recuse when they should have, the matter can be investigated by an agency inspector general.⁹⁷

C. Reforming the Supreme Court Recusal Requirement

The executive branch demonstrates that increased transparency improves implementation of a recusal requirement. The Supreme Court can better achieve the purpose of § 455 if Justices are required to disclose the rationale of their recusal decision when a party before the Court requests recusal. Regardless of whether the party agrees with the recusal decision, publishing the rationale underlying the decision decreases uncertainty and speculation about the Justice's choice.

To support consistency with recusal decisions and provide needed guidance, the Committee on Codes of Conduct of the Judicial Conference should issue non-binding reviews regarding whether a recusal decision appears to comply with § 455. These reviews from the Judicial Conference would neither be disciplinary actions nor direct the Justices to recuse themselves or take any action. Instead, the reviews would create much-needed informal interpretations of the application of § 455, thus providing guidance to Justices regarding compliance with the recusal requirement.

V. Conclusion

Because of the relatively small size of the Supreme Court and the nature of the role of the judicial branch, the ethics laws that apply to Supreme Court Justices need not exactly match those that apply to the executive and legislative branches. Nevertheless, the history of repeated ethics concerns with Justices' potential conflicts of interest demonstrates the limits of the Supreme Court's current ethics practices. The Statement on Ethics Principles and Practices is not a substitute for legally binding ethics standards and actual enforcement of those standards. Establishing specific and relevant ethics practices that are effective in the other two branches to the Supreme Court can increase public trust in the judiciary.

⁹⁴ Exec. Ord. No. 13989, *supra* note 92, at Sec. 3.

⁹⁵ See, e.g., U.S. Off. of Gov't Ethics, *Pledge Waivers (E.O. 13989) – Biden Administration*, [https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+\(EO+13989\)](https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+(EO+13989)) (last visited Apr. 28, 2023).

⁹⁶ The Standards of Ethical Conduct for Employees of the Executive Branch calls for agencies to create their own corrective or disciplinary regulations. 5 C.F.R. § 2635.106.

⁹⁷ 5 C.F.R. § 2638.106.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

**Questions for the Record for Kedric Payne, Vice President, General Counsel,
and Senior Director of Ethics, Campaign Legal Center**

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous witness declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

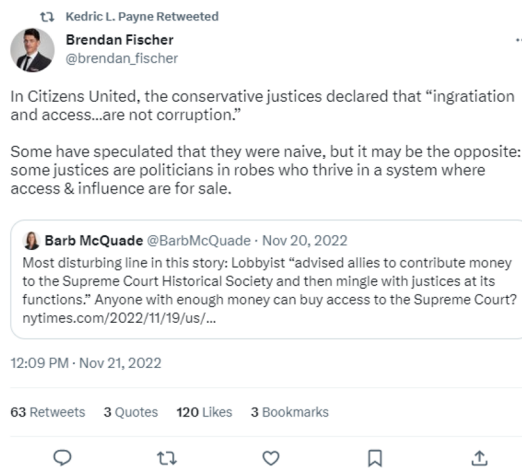
II. Questions

1. During Senator Kennedy’s questioning, he asked you about retweets from a Twitter account bearing your name and likeness. Is your Twitter account “@kedric_payne”?

RESPONSE: Yes.

2. Did you retweet this?

RESPONSE: Yes.



- a. Do you believe that “some justices are politicians in robes”?

RESPONSE: No.

- b. If you do not, then why did you retweet this post?

RESPONSE: This is a retweet of a New York Times article that reported that “in a letter to Chief Justice John G. Roberts Jr. and in interviews with The New York Times, the Rev. Rob Schenck said he was told the outcome of the 2014 case weeks before it was announced.” I

retweeted this because it concerns Supreme Court ethics.

3. Senator Kennedy also questioned you about a retweet that referred to Chief Justice John Roberts as “a disgrace.” You responded, “no, Senator, I did not retweet that.”

- a. Did you retweet this?

RESPONSE: Yes, as I stated on the record following Senator Kennedy’s question where he declined my request to provide me with a copy of the retweet to refresh my recollection.



- b. Do you believe that Chief Justice John Roberts is “a disgrace”?

RESPONSE: No.


- c. If you do not, then why did you retweet this post?

RESPONSE: This is a retweet of a New York Times article that reports that Chief Justice Roberts’ year-end statements “shed no light on the investigation into the leak of a draft opinion in May or on calls for more


rigorous ethics rules for the justices.” I retweeted this because it concerns Supreme Court ethics.

Accountable 

**STATEMENT FOR THE RECORD
for the
U.S. SENATE COMMITTEE ON THE JUDICIARY
hearing on
“SUPREME COURT ETHICS REFORM”
held on
MAY 2, 2023
prepared by
KYLE HERRIG
PRESIDENT AND CEO
and
ANGELA CANTERBURY
VICE PRESIDENT OF GOVERNMENT AFFAIRS**

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Accountable.US 

1919 M Street NW, Suite 450
Washington, DC 20036 

Thank you to Chairman Durbin, Ranking Member Graham, and members of the Committee for the opportunity to submit this statement for the record of the United States Senate Committee on the Judiciary hearing held on May 2, 2023 entitled "Supreme Court Ethics Reform."

Accountable.US is a nonpartisan organization that shines a light on corporations and special interests that too often wield unchecked power and influence in Washington and beyond. We conduct investigations and bring attention to our findings to help create an economy that works for everyone, a democracy that functions, and a sustainable environment for future generations. We believe corporations and special interests have too much power and the people have too little. It is our mission to change this.

In our view, immediate action is needed to address the corruption crisis at the Supreme Court of the United States. Since the news first broke of Justice Thomas's decades-worth of undisclosed luxury travel and gifts from billionaire conservative Republican megadonor Harlan Crow last month, new information continues to come to light involving highly questionable financial benefits received by Justice Thomas, as well as Justice Gorsuch, and even Chief Justice Roberts: Crow paid for private school for a relative that Justice Thomas said he was raising as a son; Justice Gorsuch sold property to the CEO of a major Supreme Court-involved law firm; and Chief Justice Roberts' wife made millions from elite law firms.

In the wake of this steady stream of revelations, that at the very least give an appearance of impropriety, Chief Justice Roberts has refused to act, forcing Congress to step in. Chairman Durbin, you have led the charge to address the crisis by organizing this hearing and calling on Chief Justice Roberts to testify—which he refused to do. Meanwhile, [your Republican colleagues](#) have abandoned their previous calls for judicial transparency and accountability, instead engaging in political stunts and peddling debunked conspiracies. Americans might reasonably wonder if this has anything to do with the fact that Republican members of the Committee have collectively received over \$450,000 in donations from Harlan Crow, according to Accountable.US [research](#).

Here are some of the recent corruption scandals plaguing the Supreme Court:

- [Justice Thomas Secretly Accepted Luxury Travel, Gifts from GOP Megadonor Without Disclosure](#) - On April 6, *ProPublica* revealed that Supreme Court Justice Clarence Thomas has secretly accepted lavish luxury travel and gifts for decades from billionaire Republican megadonor Harlan Crow without disclosure, an apparent repeat violation of ethics law. Conservative kingpin Leonard Leo is featured prominently alongside Thomas and Crow in a painting picturing a scene from one of their luxurious trips to Crow's private lakeside resort, the three deep in conversation with other conservative operatives. The painting is permanently displayed at Crow's resort, where Thomas has

vacationed virtually every summer for the past two decades.

- [Thomas Statement Refuted By Crow's Leadership Role with SCOTUS-Involved Group](#) - First Justice Thomas hid decades of lavish gifts and travel funded by Harlan Crow, and then he outright lied when he said this major conservative donor had no interest in the work of the Supreme Court. On April 7, Thomas released a statement arguing that the gifts were “not reportable” as Crow “does not have business before the Court.” That argument is directly refuted by the fact that for three decades, Crow has served on the Board of Trustees of the American Enterprise Institute (AEI) — which has published and taken credit for multiple amicus briefs filed with the Supreme Court by the group’s president and scholars.

Justice Thomas’s statement rests on the argument that “personal hospitality” from friends who do not have business before the Court does not require disclosure — but for decades, Harlan Crow has had business before the very same Court that Thomas serves on. Harlan Crow has been a member of American Enterprise Institute’s Board of Trustees since 1996, five years after Justice Clarence Thomas was first appointed to the Supreme Court. In that time, AEI’s scholars and senior leaders filed numerous briefs with the Court including in *Wyeth v. Diana Levine*, *AT&T Corp. v. Lila T. Gavin*, and *Davis v. Kentucky Dept. of Revenue*, and their annual reports have repeatedly cited their scholars’ “impact” on critical Supreme Court decisions.

- [Timeline Shows Clarence and Ginni Thomas Benefitted from Crow Over Decades](#) - Accountable.US released a timeline of Justice Thomas and wife Ginni’s close relationship with Harlan Crow, defined by decades-worth of corruption.

Timeline highlights:

- 2001: Harlan Crow and wife Kathy give Thomas a bible once owned by Frederick Douglass, worth \$19,000. That same year, Crow donated \$175,000 for a new “Clarence Thomas wing” at the Justice’s childhood library in Pin Point, Georgia.
- 2004: Thomas stops reporting gifts following a Los Angeles Times piece examining gifts received by Thomas and other Supreme Court justices. Over the following two decades, Thomas reports only two gifts — one of which comes from Crow.
- 2008: Crow bankrolls plans for a historical museum commemorating Thomas’s childhood community in Pin Point, Georgia, spending \$1.5 million on land to serve as the site of the museum.
- 2009: Crow donates \$500,000 to conservative political advocacy group

Liberty Central, founded by Ginni Thomas.

- 2018: The Harlan R. Crow Foundation, Inc. donates \$105,000 to Yale Law School for the “Justice Thomas Portrait Fund.”
- [Clarence Thomas Secretly Sold Property to Billionaire Benefactor Crow Without Disclosure](#) - On April 13, *ProPublica* revealed that Justice Thomas sold property directly to Harlan Crow and again failed to disclose the deal.
- [Thomas's Pattern of Corruption Continues With New Revelations](#) - On April 17, *The Washington Post* reported that Justice Thomas misstated annual financial disclosures regarding a defunct family real estate company, revealing a pattern of continued corruption.
- [Gorsuch Sold Property to CEO of Major SCOTUS-Involved Law Firm](#) - On April 25, *POLITICO* revealed that just days after his confirmation to the Supreme Court, Justice Neil Gorsuch sold a \$1.8 million mountain getaway to the CEO of major law firm Greenberg Traurig — which has since been active in at least 22 cases sent to the high court.
- [Crow's Business Interests Came Before Thomas on Supreme Court](#) - When news broke of Justice Clarence Thomas's decades-worth of undisclosed luxury gifts and travel from billionaire benefactor Harlan Crow, Thomas claimed the gifts were above board because Crow had no business before the Court. On April 26, the *HuffPost* revealed that in fact, Crow's financial interests as a real estate owner, landlord, and commercial, residential and industrial developer have come before Justice Thomas on the Court.
- [Chief Justice Roberts' Wife Made Millions From Elite Law Firms](#) - On April 28, new whistleblower documents provided to *Insider* revealed that Jane Roberts, who is married to Chief Justice Roberts, made \$10.3 million in commissions from elite law firms. At least one firm argued a case before Chief Justice Roberts after paying his wife hundreds of thousands of dollars.
- [Scalia Law School Under Fire for Cozy Relationships with SCOTUS Justices](#) - On May 1, the *New York Times* revealed that, over years, Scalia Law School has cultivated cozy relationships with conservative Supreme Court Justices through generous pay and unusual perks. In return, it got prestige, donations, and influence at the highest levels.
- [Crow Paid for Thomas's Son's Private School Tuition](#) - *ProPublica* reported on March 4 that billionaire GOP megadonor Harlan Crow paid for private school for a relative that Justice Clarence Thomas said he was raising “as a son,” an arrangement a top ethics lawyer called “way outside the norm.” This new revelation helped to paint a fuller picture of the many ways Harlan Crow has

helped fund the lives of Justice Thomas and his family.

- [Leonard Leo Directed Tens of Thousands of Dollars to Ginni Thomas and Tried to Hide It](#) - On March 4, *The Washington Post* revealed Leonard Leo as the architect of a plan to pay Ginni Thomas tens of thousands of dollars, raising serious ethical and legal questions. According to the *Post*, “Leo instructed the GOP pollster Kellyanne Conway to bill a nonprofit group he advises and use that money to pay Virginia “Ginni” Thomas... The same year, the nonprofit, the Judicial Education Project, filed a brief to the Supreme Court in a landmark voting rights case.”

Leonard Leo has written the definition of court corruption. These shady schemes are a call to action to bring about ethics reform at the highest levels of the judiciary. Accountable.US recently launched an effort to hold [Leonard Leo](#) accountable, alongside its [Monitoring Influence](#) database to arm Americans with information about the constellation of right-wing groups working to undermine our democracy.

The unmistakable pattern of unprecedented corruption at the Supreme Court shows just how fundamentally broken our Court is.

This hearing underscores the need for urgent action to restore public trust in the Court — and [bipartisan experts](#) agree. In [written testimony](#) submitted to this Committee ahead of the hearing, conservative former federal judge J. Michael Luttig called on the Court to enact a code of conduct that would “subject itself to the highest professional and ethical standards that would render the Court beyond reproach.” Luttig, considered a “[conservative legal heavyweight](#),” has maintained longstanding, close ties to the Court; he even helped prepare Justice Clarence Thomas for his controversial Senate confirmation hearings.

With his statement, Luttig joined a chorus of leading legal experts speaking out to address a pattern of troubling ethics issues that have undermined the legitimacy of the Supreme Court. Even so, Republican [lawmakers have ignored calls for reform](#). Instead, key Senate Republicans from Chuck Grassley to Ted Cruz saw the hearing as a place for political posturing — even as public trust in the Court is at a [historic low](#).

Our nation’s highest court should not have the lowest ethical standards. Supreme Court justices are not and cannot be above the law. Without immediate accountability and reform to restore credibility and integrity to our Court, public trust in one of our core American institutions will continue to plummet.

We urge you to take every measure necessary to restore the legitimacy of the highest court in the land. Thank you for your consideration.



Statement of Alliance for Justice
U.S. Senate Judiciary Committee
Hearing on Supreme Court Ethics Reform
May 2, 2023

Alliance for Justice is a national association of more than 150 organizations, representing a broad array of groups committed to a vibrant, ambitious, and multi-racial democracy. Since 1979, AFJ has advocated for a fair and independent justice system and empowered others to fight for their causes. Every day, federal judges defend the Constitution, provide institutional checks and balances, and help Americans find justice. AFJ assesses federal judicial nominations to ensure our courts are staffed with highly qualified judges that will safeguard the rights of all, not just the wealthy and powerful. For more than four decades, AFJ has worked to secure the confirmation of hundreds of highly qualified, fair-minded, and diverse federal judges. We also review and evaluate legislation that would reform our courts.

We write to express deep concern about the integrity and impartiality of the United States Supreme Court and to express our opinion that the Supreme Court must have a binding code of judicial conduct and that Congress must pass Supreme Court ethics reform legislation. On April 6, 2023, ProPublica revealed that, for more than a decade, billionaire Harlan Crow had adorned Justice Clarence Thomas with undisclosed gifts, among which were all-expense paid trips. A week later, on April 13, 2023, ProPublica added to its reporting with details about a property purchase between Crow and Thomas and the home Thomas's mother lived in rent free. This too was unreported. All the while, Crow served on the board of several conservative organizations with business before the Court and, on the several occasions that Thomas was Crow's guest, other parties with business before the Court shared Thomas's company. Like the luxury vacations and real estate purchase, none of these meetings were ever disclosed. ProPublica's reporting made one thing plain to the American people: The Court is enduring an ethical crisis unlike any in this country's history.

The Court is experiencing an ethics crisis highlighted by Justice Thomas's unethical and illegal conduct.

In a series of detailed and thoroughly reported articles, ProPublica revealed that Justice Clarence Thomas has received gifts totaling hundreds of thousands, if not millions, of dollars. First, on April 6th, Pro Publica [revealed](#) that Justice Thomas and his wife took international cruises on Crow's superyacht, flew on Crow's private jet, and regularly vacationed at Crow's private resort in the Adirondacks. In one instance, Thomas flew on Crow's jet from Washington Dulles airport to New Haven, Connecticut, then flew back three hours later. Thomas never reported the existence or value of these flights.

Second, on April 13th, ProPublica published a [report](#) detailing an even more direct financial transaction between Thomas and Crow. In 2014, Crow bought real estate including Thomas's childhood home for \$133,363 from its three co-owners—Thomas, his mother, and the family of Thomas' late brother. He then renovated that home and allowed Thomas's mother to continue living on the property rent-free under his ownership. He later purchased the home next door, which was known to be a nuisance to the neighborhood, and another empty lot. Crow has indicated he bought the property with plans to create a museum in Justice Thomas's honor.

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A [federal disclosure law](#) passed after Watergate requires justices and other officials to disclose the details of most real estate sales over \$1,000. [Thomas never disclosed](#) his sale of the Savannah properties—a violation of the post-Watergate legislation, the Ethics in Government Act.

Third, on May 4th, ProPublica [reported](#) that Crow also appears to have covered the tuition costs to send Thomas's grandnephew, Mark Martin, to private schools. Thomas was Martin's legal guardian and had been raising the then-teenager "as a son," but it was Crow who was paying tens of thousands of dollars a year for his education. While Thomas [disclosed](#) other gifts that supported Martin's tuition, he failed to include the tuition payments made by Crow in his financial disclosures. This latest reporting demonstrates the incredible financial control Crow has over Thomas's life.

Justice Thomas's [response](#) to the ProPublica was easily rebuttable. He claimed that the trips were "not reportable" and subject to the "personal hospitality" exception in Supreme Court ethics requirements. Yet, noted ethics experts have explained that none of those exceptions apply to the real estate transactions. With regard to the unreported gifts, there was an obvious conflict of interest that should have led the justice to report them: Crow has funded multiple groups that regularly litigate before the Supreme Court.

In addition, Thomas's response ignored that, over a decade ago, Thomas was made aware that his relationship with Crow likely violated his ethical obligations. Crow gifted Thomas a Bible that once belonged to the abolitionist Frederick Douglass, valued at \$19,000, and a bust of Abraham Lincoln worth \$15,000. When the Los Angeles Times [reported](#) on the flow of gifts from Crow to Thomas, Thomas did not stop accepting gifts. He simply stopped disclosing them. In 2011, it emerged that Crow [financed](#) a multimillion-dollar restoration of a Georgia cannery at the request of Justice Thomas and his wife, Virginia "Ginni" Thomas. Additionally, Crow has reportedly [donated](#) more than \$500,000 to Ginni Thomas' conservative group, funding her \$120,000 salary—another source of income Thomas has routinely failed to disclose or chosen not to disclose accurately.

Thomas has clearly been aware of his ethical obligations. He has chosen to ignore them and hide his behavior to the detriment of the Court's legitimacy and the rule of law.

These revelations are galling, yet unsurprising.

Justice Thomas's conduct is the worst known example of misconduct by a sitting justice. But the other justices have also violated commonsense ethical standards.

In 2022, Alliance for Justice released [Accountable to None: The Urgent Need for Supreme Court Ethics Reforms](#). That report catalogued dozens of additional allegations of extrajudicial and political misconduct by Supreme Court justices. Most recently, Justices Samuel Alito and Thomas were implicated in [Operation Higher Court](#), a multimillion-dollar effort by evangelical leaders to influence the Court on areas related to LGBTQ+ rights, abortion rights, and religious freedom. Also notable: Justice Thomas [failed](#) to recuse himself in cases that directly implicated his wife's communications regarding potential involvement in the January 6th insurrection.

Over the past month, the media has reported that [Justice Neil Gorsuch](#) and [Chief Justice Roberts](#) may have committed ethical and reporting violations. Gorsuch sold a 40-acre property to Greenberg Traurig, a law firm with regular business before the Supreme Court. The Chief Justice's wife, Jane Roberts, has made nearly \$10 million in her legal recruiting practice, perhaps leveraging the Chief Justice's position on the Court to for the Roberts' personal benefit.

Alliance for Justice
Statement for the Record
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Though those are also troubling allegations, none of the other justices appears to have been the beneficiary of largesse equivalent to Crow's immediate gifts to Thomas. Moreover, none has blatantly flaunted the federal requirement to report gifts to the same degree. As far as we know, Thomas is singular in his malfeasance; he is therefore singular in the disgrace and suspicion he has now brought upon the Court.

The stakes of a corrupt Supreme Court could not be higher.

In Federalist 78, Alexander Hamilton wrote, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." Without that independence, Hamilton explained, individual rights, the Constitution, and our faith in the rule of law are all threatened.

We now have good reason to believe that the Court's independence has been compromised. Justice Thomas has repeatedly ruled in favor of the rich and powerful. [According to the Constitutional Accountability Center](#), Thomas has ruled in favor of the Chamber of Commerce's position in cases 72 percent of the time. He also notably refused to recuse himself from the 2016 case *McDonnell v. United States*, which specifically examined the criminality of political leaders accepting gifts from conservative donors. Those decisions might have previously been presumed to be the result of Thomas's independent judgment. But Thomas's acceptance of these trips and failure to disclose call that presumption into question.

The consequences have been predictable: Public trust in the Court is at an [all-time low](#). Americans deserve impartial justices who adhere to the rule of law. The Supreme Court's decisions shape the lives of every American and, in cases of the greatest consequence, often turn on the vote of a single justice. We also believe that Justice Thomas' unethical conduct has tainted the integrity of the entire institution. In a [recent poll](#), nearly 3 in 4 voters felt that Justice Thomas should face serious repercussions for his actions.

Senate Democrats must pass Supreme Court ethics legislation to restore the legitimacy of the Court.

While all other federal judges are required to follow the Code of Conduct for United States Judges (the "Code") — a set of ethical guidelines codified and enforced by the U.S. Judicial Conference — the Supreme Court justices merely use the Code for "guidance." With the Court involved in a historically unprecedented ethical crisis, confidence in the Supreme Court at a low point, our democracy in peril, and the Court unwilling to police itself, **Congress has the Constitutional duty to act**. Several pieces of legislation have been recently introduced that seek to bolster accountability and transparency and enhance public trust in our judiciary. We urge the Senate to pass Supreme Court ethics reform legislation, such as the Supreme Court Ethics, Recusal, and Transparency Act of 2023 ([S.359](#)); the Supreme Court Ethics Act of 2023 ([S.325](#)); Supreme Court Code of Conduct Act of 2023 ([S.1290](#)); the Judicial Ethics and Anti-Corruption Act of 2022 ([S.4177](#)); and/or the 21st Century Courts Act of 2022 ([S.4010](#)). Supreme Court ethics reform is essential to reestablishing the respect and integrity of our federal judicial system and preserving our democracy.



New York University
A private university in the public service

School of Law

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*Distinguished Scholar in Residence and Senior Lecturer
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Yale Law School

CRISTINA RODRIGUEZ
Leighton Homer Surbeck Professor of Law

May 1, 2023

The Honorable Richard J. Durbin
 Chair
 Committee on the Judiciary
 United States Senate.
 Washington, D.C. 20510

The Honorable Lindsey Graham
 Ranking Member
 Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510

Dear Chair Durbin and Ranking Member Graham:

We served as Co-Chairs of President Biden’s Commission on the Supreme Court of the United States in 2021. We write now in our personal capacities in relation to the hearing on Supreme Court Ethics Reform scheduled for tomorrow, May 2, 2023, before the Senate Judiciary Committee. We take this opportunity to place before the Committee, for its consideration and hearing record, the Commission’s treatment of this important topic in its December 7, 2021, Report to the President.

Executive Order 14023, which established the Commission, required that it be bipartisan in composition and that its members include “constitutional scholars, retired members of the Federal judiciary, or other individuals having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States.” The President charged the Commission with providing an account of the contemporary reform debate and a “critical appraisal” of reform proposals. The Commission Final Report drew on an extensive review of available literature and writings, six public meetings at which it heard from forty-four witnesses, and more than 7,000 submissions from the general public and additional experts.

The Commission voted unanimously to issue its Report to the President. Chapter 5 of the Report addresses the Court’s internal processes and operations and specifically calls attention to the absence of a Code of Ethics for the Justices. It also considers how a code might be established—whether by the Court itself or by Congress—and the further question of enforcement and discipline.

The Commission concluded that: “A code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the Justices voluntarily consult the Code [directed to all other federal judges].” (p. 217) It further noted that “[m]ost significant public and private entities have adopted codes of conduct for their organizations and employees,” and that there is no clear reason to think that the Court “is best served by an exemption from what so many [institutions] consider best practice.” (p. 216) As the Report underscores, the Court’s “explicit adoption of a code could promote important institutional values”—values that the

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Commission defined to include the Court's legitimacy in the eyes of the public, which could be undermined by perceived or actual conflicts of interest. (p. 216) While offering an analysis of the costs, benefits, and consequences of different approaches to the adoption of a code, the Commission stressed that "experience in other contexts suggests that the adoption of an advisory code would be a positive step on its own, even absent binding sanctions." (p. 10)

Despite disagreeing on various aspects of the myriad reforms to the Supreme Court considered by the Commission, the Commission as a whole viewed favorably the adoption of a Code of Ethics for the Court.

We hope that the work of the Commission on this question will be of assistance to you as you consider the matter.

Very truly yours,



Bob Bauer

Best regards,



Cristina Rodriguez



**Testimony Submitted for the Record
Senate Committee on the Judiciary
Hearing on “Supreme Court Ethics Reform”
May 2, 2023**

**By Noah Bookbinder, President, Citizens for Responsibility and Ethics in
Washington**

Chair Durbin, Ranking Member Graham, and members of the Committee, thank you for the opportunity to submit testimony to address the ongoing ethical crisis engulfing the Supreme Court.

My name is Noah Bookbinder, and I am the President of Citizens for Responsibility and Ethics in Washington (“CREW”), a non-partisan non-profit committed to ensuring the integrity of our government institutions and promoting ethical governance. I submit this testimony on behalf of CREW to underscore the dire need for immediate action to ensure that our high court and the entire third branch are held to the highest standards of ethical conduct.

Over the past month, the public has learned of a previously unknown financial relationship between Justice Clarence Thomas and Harlan Crow, a reclusive billionaire and political activist who has donated “millions of dollars to groups dedicated to tort reform and conservative jurisprudence.”¹ These revelations come on the heels of a series of ethical scandals that have tarnished public faith in an institution whose entire existence depends on public support.

The details of Justice Thomas and Mr. Crow’s relationship are almost too sensational to believe. Over the course of more than 20 years, Justice Thomas accepted an unprecedented number of gifts from Mr. Crow—from opulent vacations to apparently beneficial real estate transactions. He disclosed almost none of them on his financial disclosure forms, despite his clear legal requirement to do so.

¹ Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

For instance, Justice Thomas accepted, but did not disclose on his financial disclosure reports, a 2019 trip to Indonesia onboard Mr. Crow's Bombardier Global 5000 jet so they could embark on a nine-day "island-hopping" cruise aboard Mr. Crow's 162-foot "superyacht," the *Michaela Rose*, which is "staffed by a coterie of attendants and a private chef."² *ProPublica*, which broke the story, estimated that the trip could have cost more than \$500,000 had Justice Thomas chartered the plane and yacht himself.³ He previously accepted a cruise on the *Michaela Rose* in New Zealand and on a river around Savannah, Georgia.⁴ He and his wife Ginni accept almost yearly vacations at Mr. Crow's 105-acre luxury resort in the Adirondacks called Topridge.⁵ Topridge features an artificial waterfall, more than 25 fireplaces, three boathouses, a clay tennis court, a batting cage, a hut that replicates the home of a Harry Potter character, a 1950s-style soda fountain where the staff fixes milkshakes, a great hall where guests are served meals prepared by private chefs, fishing guides, and private concerts.⁶ Rooms at one nearby resort that is less "exclusive" than Topridge start at \$2,250 a night.⁷

Notably, Justice Thomas and his wife are often joined on these vacations by people who have direct business before the Court, including corporate executives from Verizon and PricewaterhouseCoopers, which are major political donors, and by leaders of conservative think tanks like the American Enterprise Institute ("AEI").⁸

But Mr. Crow didn't just give Justice Thomas vacations. In 2014, Justice Thomas and his family members sold their interests in three Savannah, Georgia properties to a Texas company owned by Mr. Crow for the lump sum of \$133,363.⁹ The properties sold to Mr. Crow included Justice Thomas' mother's house, where Justice Thomas spent part of his childhood and where his mother continues to reside today without paying rent,¹⁰ and two vacant lots down the street.¹¹ After the purchase was finalized, Mr. Crow reportedly made "tens of thousands of dollars" of renovations to Justice

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Justin Elliott, Joshua Kaplan, and Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, *ProPublica* (Apr. 13, 2023),

<https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

¹⁰ Ariane de Vogue, *Clarence Thomas to amend financial disclosure forms to reflect sale to GOP megadonor*, *CNN* (Apr. 17, 2023),

<https://www.cnn.com/2023/04/17/politics/clarence-thomas-amend-disclosure-gop-megadonor/index.html>.

¹¹ Justin Elliott et al., *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, *ProPublica* (Apr. 13, 2023),

<https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

Thomas's mother's house, including adding a carport, repairing the roof, and adding new gates and fencing.¹² When asked about the sale, Mr. Crow explained that he purchased the properties to “one day create a public museum at the Thomas home dedicated to telling the story of our nation's second black Supreme Court Justice”—a gift of potentially immeasurable value to Justice Thomas.¹³

Justice Thomas also may have violated 28 U.S.C. § 455, which requires justices to recuse themselves from cases in which his “impartiality might reasonably be questioned,” certainly a risk in any case in which his “close personal friend” and “generous benefactor” had a “direct financial interest.”¹⁴ In January 2005, the Court declined to hear an appeal from an architecture firm suing Trammell Crow Residential Co., in which Mr. Crow's firm, Crow Holdings, owned a non-controlling interest, for \$25 million.¹⁵ Justice Thomas did not recuse himself, though he may have been required to do so; the Court's denial of certiorari helped ensure that Trammell Crow Residential Co. would not be on the hook for the \$25 million.

That Justice Thomas felt comfortable accepting these lavish gifts is a stunning indictment of our judiciary's deeply broken ethics system. That he failed to disclose them, or these troubling real estate transactions, demonstrates systemic problems in the Ethics in Government Act's legal regime. And that he likely will not be held accountable for his repeated ethical violations is a disaster for the Court's institutional legitimacy.

Justice Thomas's actions however are more than unethical. They may also be illegal, as my colleagues Virginia Canter, Norman Eisen, Richard Painter, and I said in a complaint to the Department of Justice and Supreme Court.¹⁶ But they did not occur

¹² *Id.*

¹³ Ariane de Vogue, *Clarence Thomas to amend financial disclosure forms to reflect sale to GOP megadonor*, CNN (Apr. 17, 2023),

<https://www.cnn.com/2023/04/17/politics/clarence-thomas-amend-disclosure-gop-megadonor/index.html>.

¹⁴ Zoe Tillman, *Clarence Thomas's Billionaire Friend Did Have Business Before the Supreme Court*, Bloomberg News (Apr. 24, 2023),

<https://www.bloomberg.com/news/articles/2023-04-24/clarence-thomas-friend-harlan-crow-had-business-before-the-supreme-court>. See also Greg Stohr, *Supreme Court's Thomas Says He Heeded Gift Disclosure Rules*, Bloomberg News (Apr. 7, 2023),

<https://www.bloomberg.com/news/articles/2023-04-07/justice-clarence-thomas-says-he-heeded-disclosure-rules-on-gifts>.

¹⁵ Zoe Tillman, *Clarence Thomas's Billionaire Friend Did Have Business Before the Supreme Court*, Bloomberg News (Apr. 24, 2023),

<https://www.bloomberg.com/news/articles/2023-04-24/clarence-thomas-friend-harlan-crow-had-business-before-the-supreme-court>.

¹⁶ CREW, Request for Investigation of Justice Clarence Thomas' failure to report gifts of private aircraft travel on his public financial disclosure report (Apr. 14, 2023),

<https://www.citizensforethics.org/wp-content/uploads/2023/04/Justice-Clarence-Thomas-DOI-Complaint-April-14-2023-5.pdf> (“CREW Complaint”).

in a vacuum. They are, rather, the latest manifestations of the ethical rot that is undermining the Supreme Court and the entire federal judiciary. For decades, conservative and liberal judges and justices have routinely and publicly tested the limits of the system's absurdly weak rules, while activists and advocates, regardless of motivation or ideology, have found troubling ways to exploit every gap they can find. As CREW has testified repeatedly at three Congressional hearings over the course of the last year and a half, 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 has become a public joke.¹⁷

Below I've detailed several actions that Congress can take under the Constitution to respond to this crisis. While many of these proposals have been included in CREW's prior congressional statements on this issue, today CREW is also endorsing a new policy: appointing an Inspector General tasked with overseeing the federal judiciary and rooting out corruption. It is time to rebuild public confidence in our judiciary. American democracy can no longer wait.

1. Creating and Establishing an Inspector General for the Judiciary

Offices of Inspectors General are charged with protecting the integrity of our government and are dedicated to preventing and detecting fraud, waste, and abuse in government agencies and programs. To do their jobs, IGs engage in serious investigative work and report their findings to the public, and, as appropriate, to law enforcement.¹⁸ The judiciary is the only branch of the federal government without an Inspector General. It is time for Congress to change that.

An Inspector General for the Judiciary situated within the Administrative Office of the U.S. Courts could investigate allegations of improper influence on judges and justices when they first occur, thereby preventing long-standing influence

¹⁷ Statement of Noah Bookbinder, 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 (Oct. 26, 2021), <https://www.citizensforethics.org/wp-content/uploads/2021/11/CREW-Statement-for-the-Record.pdf>; Testimony of Donald Sherman, Hearing on Undue Influence: Operation Higher Court and Politicking at SCOTUS, Before the H. Comm. on the Judiciary (Dec. 8, 2022), https://www.citizensforethics.org/wp-content/uploads/2022/12/Donald-Written-HIC-Testimony-12_8.pdf; Testimony of Donald Sherman, Hearing on Building Confidence in the Supreme Court Through Ethics and Recusal Reforms, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary (Apr. 27, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HJC-Oral-Testimony-Draft.pdf>.

¹⁸ While various Inspectors General have some limited law enforcement authority, we do not believe that an Inspector General for the Judiciary need be given even limited law enforcement power.

campaigns like “Operation Higher Court” from remaining hidden in the shadows.¹⁹ An IG could also investigate an array of other behavior, including allegations of sexual harassment,²⁰ reports of federal judges owning or trading stock in parties to their cases,²¹ or violations of justices’ disclosure obligations, and would be tasked with identifying, auditing, and investigating fraud, abuse, and mismanagement in the implementation of the judiciary’s \$8.5 billion budget.²² An IG’s auditing and fraud prevention function would be particularly useful right now, as the judiciary’s request for a \$600 million budget increase, which includes plans to enter into opaque contracts with outside parties to fund capital improvements to numerous parts of judiciary’s infrastructure, is heightening the potential for waste, fraud, and abuse.²³ Particularly if Congress is considering giving the judiciary such a large budget increase, it will be important to also consider adding an Inspector General for the Judiciary so that we can be certain that these additional funds do not lead to additional fraud and abuse.

At the federal level, IGs have been used successfully in the executive and legislative branches for 45 years.²⁴ Just last year, an investigation by the Inspector General of the Architect for the Capitol uncovered “a significant amount of administrative, ethical and policy violations [and] ...evidence of criminal violations” by J. Brett Blanton, the then-Architect of the Capitol.²⁵ The investigation, and the bipartisan

¹⁹ “Operation Higher Court” was the name of conservative activists’ long-running strategy to purchase access to Supreme Court justices in order to, in essence, encourage conservative justices to issue rulings that matched their hard-right political ideologies. See Peter S. Canellos and Josh Gerstein, *Operation Higher Court: Inside the religious right’s efforts to wine and dine Supreme Court justices*, *Politico*, (Jul. 8, 2022), <https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739>.

²⁰ See Abbey Meller and Joy Bagwell, *Sexual Harassment in the Judiciary*, Center for American Progress (Oct. 25, 2018), <https://www.americanprogress.org/article/sexual-harassment-judiciary/> (detailing numerous instances of judicial sexual misconduct).

²¹ Coulter Jones et. al, *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-1634306192?st=831ufdpgmt8787u6&reflink=desktopwebshare_permalink&mod=article_inline.

²² *The Judiciary Fiscal Year 2024 Congressional Budget Summary*, Administrative Office of the US Courts (Mar. 2023), <https://www.uscourts.gov/sites/default/files/FY%202024%20Congressional%20Budget%20Summary.pdf>.

²³ *Id.*

²⁴ See Inspector General Act of 1978, Pub. Law 95-452 (Oct. 12, 1978), <https://uscode.house.gov/statviewer.htm?volume=92&page=1101>. See also Ben Wilhelm, *Statutory Inspectors General in the Federal Government: A Primer*, Cong. Rsch. Service (Feb. 8, 2023), <https://crsreports.congress.gov/product/pdf/R/R45450>.

²⁵ 2021-0011-INVI-P- J. Brett Blanton, *Architect of the Capitol, Abused His Authority, Misused Government Property and Wasted Taxpayer Money, Among Other Substantiated Violations*, Inspector General of the Architect of the Capitol (Oct. 26, 2022), https://www.oversight.gov/sites/default/files/oig-reports/AOC/2021-0011-INVI-P-Oversight-Post-Final_0.pdf.

uproar that followed, caused President Biden to fire Mr. Blanton in February 2023.²⁶ Had the Inspector General's office not conducted its investigation, it is likely that Mr. Blanton's wrongdoing would not have come to light, and that he would have continued to waste taxpayer money and abuse his authority.

Admittedly, the IG system is not without its weaknesses, including the reality that presidents routinely fail to nominate, and the Senate routinely refuses to confirm, new Inspectors General. The Treasury Department, for instance, has been without a Senate-confirmed IG for almost four years.²⁷ Nonetheless, when fully staffed, they are effective independent investigators.

This sort of independent oversight is sorely needed in the judiciary because there are few, if any, real ways to bring about accountability for judicial misconduct. Under our current framework, the only real way to hold judges and justices accountable for judicial misconduct is impeachment. But in the almost 250-year history of the United States only a single justice has been impeached, Justice Samuel Chase, and even Justice Chase was spared removal from office by the Senate.²⁸ Impeachment and removal is also exceedingly rare at the circuit and district court level: only eight federal judges have ever been removed for malfeasance.²⁹ Investigations into judicial wrongdoing are also rare and, as the recent investigation into the *Dobbs* leak made clear, can be wholly insufficient even when they do occur. A fully funded and staffed IG for the judiciary would bring investigatory expertise to the third branch and ensure that corruption and malfeasance are brought to light before they rot the courts from within.

There is longstanding bipartisan support for establishing an Inspector General for the Judiciary. Sen. Chuck Grassley (R-IA) first introduced legislation to create a judiciary Inspector General with then-Rep. Jim Sensenbrenner (R-WI) in 2007;³⁰ and former Rep. Elijah Cummings (D-MD) and Rep. Gerry Connolly (D-VA) called for the

²⁶ See Dustin Jones, *Biden fires the architect of the Capitol after bipartisan criticism from lawmakers*, NPR (Feb. 13, 2023), <https://www.npr.org/2023/02/13/1156610999/biden-fired-capitol-architect-ethical-violations-misusing-government-property>.

²⁷ *Inspector General Vacancies*, Oversight.Gov, <https://www.oversight.gov/ig-vacancies>.

²⁸ Samuel Chase, Oyez, https://www.oyez.org/justices/samuel_chase.

²⁹ *Judges and Judicial Administration – Journalist's Guide*, United States Courts, <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide>.

³⁰ *Judicial Transparency and Ethics Enhancement Act of 2007*, S. 461, 110th Cong. (2007). See also Press Release, Grassley, Sensenbrenner See Need For Inspector General For The Judiciary, Office of Chuck Grassley (Jan. 31, 2007), <https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary>.

establishment of a judiciary IG as recently as 2019.³¹ This bipartisan support should not be surprising. After all, while Justice Thomas' improprieties are the crisis du jour at the Supreme Court, judicial misconduct is not limited by political ideology and affects conservative and liberal justices and judges alike.

2. A Supreme Court Code of Conduct

The Supreme Court needs a binding, clear, and public Code of Conduct to prevent ethical misconduct in the first place. Under the current system, Supreme Court Justices are the arbiters of their own recusal decisions and their numerous other ethical obligations. This allows justices to routinely make inconsistent decisions regarding what type of financial or personal conflict requires recusal, or the propriety of accepting entreaties from advocates like Rev. Robert Schenck, the architect of "Operation Higher Court."³² In the case of Justice Thomas, the absence of a clear and comprehensive Code of Conduct has allowed him to accept, and then not disclose, vacations and real estate deals.³³ A binding Code of Conduct would have provided Justice Thomas, or any justice, a set of rules by which to measure their conduct.

Any Code of Conduct should include the following key elements:

a. Gifts

Wealthy and well-funded activists have been purchasing access to Supreme Court Justices for decades by pushing the boundaries of the definition of "gifts." This is not limited to Justice Thomas, though his conduct is the most egregious. For instance, the late Justice Scalia reportedly accepted 258 privately funded trips to places like Hawaii and Ireland from 2004 to 2014.³⁴ And the late Justice Ruth Bader Ginsburg

³¹ Letter from Rep. Elijah Cummings and Rep. Gerry Connolly to James C. Duff, Director of the Administrative office of the U.S. Courts (Sept. 5, 2019), <https://drive.google.com/file/d/1EDs44ftpVHsi5T2sSSCnm6tdEpTwB5dl/view>. See also Jacqueline Thomsen, *House Democrats Urge Federal Judiciary to Add Inspector General*, Law.com (Sept. 6, 2019), <https://www.law.com/nationallawjournal/2019/09/06/house-democrats-urge-federal-judiciary-to-add-inspector-general/>.

³² Peter S. Canellos and Josh Gerstein, *'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court justices*, Politico (July 8, 2022), <https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739>. See also Testimony of Donald Sherman, Dec. 8, 2022.

³³ Kaplan, Elliott, and Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

³⁴ Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, New York Times (Feb. 26, 2016), https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html?partner=rss&emc=rss&_r=0.

disclosed 14 trips in 2018, the most of any other justice that year, and accepted transportation, food, and lodging from Israeli billionaire businessman Morris Kahn.³⁵ Mr. Kahn had recently won a victory at the Supreme Court as the justices refused to take up a patent-related case against his company, Amdocs (Israel) Ltd.³⁶

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. Under these circumstances, a reasonable person would question whether a justice who receives 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, 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

³⁵ Karl Evers-Hillstrom, *Supreme Court Justices continue to rack up trips on private interest dime*, Open Secrets (June 13, 2019), <https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips/>.

³⁶ *Openet Telecom, Inc. v. Amdocs (Israel) Ltd.*, 841 F.3d 1288, (Nov. 1, 2016), *cert. denied*, *Openet Telecom, Inc. v. Amdocs (Israel) Ltd.*, 138 S. Ct. 469, 470 (2017).

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

³⁸ Judicial Conference, *Guide to Judiciary Policy Vol. 2 § 620.25*, (Jan. 2020) <https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf>. See also Judicial Conference Regulations on Gifts, § 620.20.

³⁹ Joanna R. Lampe, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, Cong. Rsch. Serv. (2022), <https://sgp.fas.org/crs/misc/LSB10255.pdf>.

⁴⁰ Judicial Conference Regulations on Gifts, § 620.65.

⁴¹ In a "Statement of Principles" attached to Chief Justice Roberts's recent letter to Senator Durbin, the justices reiterated that they consult a wide range of authorities when making ethical decisions. See Letter to Sen. Richard Durbin, from Chief Justice John Roberts, (Apr. 25, 2023), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>. See also Chief Justice John G. Roberts, *2011 Year-End Report on the Federal Judiciary*, (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

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 Federal 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. If, as Chief Justice Roberts argues, recusals for ethics reasons are disfavored, the obvious response should be to increase the level of mandatory ethical guidelines that justices must meet in order to avoid potential conflict or recusal concerns in the first place.

Specifically, a Code of Conduct should contain a clear bar on accepting expensive gifts, with a cap on the value of any *de minimis* gifts that may be accepted in line with executive branch and legislative branch gift rules,⁴⁴ 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. Moreover, in the absence of evidence that a justice has a pre-existing personal friendship with a donor in which they exchange gifts of comparable value, a Supreme Court Code of Conduct should require the justice to decline expensive gifts. Relatedly, the Code of Conduct should also enhance and clarify the justices' public financial disclosure requirements, so that donations in support of a spouse's or dependent child's non-profit endeavors

⁴² *Id.*

⁴³ *Id.*

⁴⁴ In the executive branch, 5 C.F.R. § 2635.204(a) creates a \$20 threshold for the *de minimis* gift exception; the comparable *de minimis* exception for members of the House and their staff is \$50, see Gift Guidance, Committee On House Ethics, https://ethics.house.gov/house-ethics-manual/gifts#_Gifts_Worth_Less.

that give rise to similar potential conflicts of interest can be appropriately identified and addressed through recusal.⁴⁵

b. Personal and Financial Conflicts of Interest

The bombshell *Wall Street Journal* revelations of far-reaching financial conflicts of interest in the judiciary in the fall of 2021,⁴⁶ and the repeated scandals raising questions about Supreme Court justices' impartiality in the face of personal conflicts, have vividly demonstrated the need for a complete restructuring of the Court's conflict of interest regime.

The question of spousal conflicts is particularly relevant and remains unaddressed. In early 2022, news reports raised 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.⁴⁷ For example, despite his spouse's active support of and communications with Trump administration officials about President Donald Trump's unprecedented efforts to overturn the 2020 election, Justice Thomas failed to recuse from Supreme Court cases relating to the 2020 election. That included *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.⁴⁸ Justice Thomas' failure to recuse from this and various other cases not only undermines the Supreme Court's impartiality, it also potentially violates his ethical obligations under 28 U.S.C. § 455.

⁴⁵ 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>.

⁴⁶ 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 (Sept. 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?st=83tufdpgmt8787u6&reflink=desktopwebshare_permalink&mod=article_inline.

⁴⁷ Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, New Yorker (Jan. 21, 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. 28, 2022), <https://www.theguardian.com/law/2022/jan/28/clarence-thomas-supreme-court-affirmative-action-case-ginni-thomas>.

⁴⁸ 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/>.

The Supreme Court is also not immune from financial conflicts of interest. In fact, Justice Thomas is not the only justice to have engaged in a sale of real property to someone with business before the court. In April 2017, nine days after he was confirmed, a 40-acre tract of property on the Colorado River co-owned by Justice Gorsuch was sold to Brian Duffy, the CEO of Greenberg Traurig—a major American law firm.⁴⁹ While Justice Gorsuch disclosed the amount he made from the \$1.825 million sale (\$250,001-\$500,000), he did not disclose the name of the buyer.⁵⁰ In the years since the sale, Greenberg Traurig has been involved in some way in 22 cases before the Supreme Court, including representing parties and filing amicus briefs. In the cases in which his opinion was recorded, Gorsuch sided with Greenberg twice as many times as he did against it.⁵¹

Additionally, two currently-serving justices, Roberts and Alito, own individual stocks,⁵² and since 2015, each of them has participated in three cases in which they have a material financial interest.⁵³ And in 2015, recently retired Justice Stephen Breyer failed to recuse from a case involving a Federal Energy Regulatory Commission rulemaking in which he had an interest in one of the companies challenging the Commission's final rule.⁵⁴ His wife sold their \$33,000 stake in the company, Johnson Controls Inc, after a journalist inquired about the apparent conflict.⁵⁵

These conflicts, which occur across the ideological spectrum, harm the public's faith in the Court's impartiality and implicate the justices' recusal requirements under Section 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

⁴⁹ Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, Politico (Apr. 25, 2023),

<https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>.

⁵⁰ *Id.* (While Justice Gorsuch did not have an obligation to disclose the parties to the real estate transaction under EIGA, the sale could still create a conflict of interest.)

⁵¹ *Id.*

⁵² Those Justices are Chief Justice Roberts, Justice Samuel Alito, and retired Justice Stephen Breyer. See Fix The Court, *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest*, (sic) (Mar. 7, 2023),

<https://fixthecourt.com/2022/01/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁵³ *Id.*

⁵⁴ Greg Stohr, *Supreme Court Justice Hears Case Unaware of Stock Conflict*, Bloomberg, (Oct. 15, 2015),

<https://www.bloomberg.com/news/articles/2015-10-16/u-s-supreme-court-justice-hears-case-unaware-of-stock-conflict#xj4y7vzkg>.

⁵⁵ *Id.*

their impartiality might reasonably be questioned.⁵⁶ Congress added a series of examples to this general requirement, including that judges and justices must recuse from any matter in which they, their spouse, or minor child have a financial interest, or in which the judge knows that their spouse has “any . . . interest that could be substantially affected by the outcome of the proceeding.”⁵⁷ Under the Court’s current ethical framework, justices decide for themselves whether recusal is warranted under section 455.⁵⁸ Since recusal determinations are not subject to review, this process leaves justices largely unaccountable if they fail to properly recuse themselves from cases in which their impartiality may reasonably be questioned.

For executive branch employees, who are subject to a similar recusal standard, the integrity of the agency’s decision-making process is protected by the federal criminal conflict of interest statute, 18 U.S.C. §208, which governs financial conflicts of interest, and by requiring employees who are dealing with appearance issues to consult with an agency’s ethics official.⁵⁹ In determining whether an employee should participate in a specific matter, the agency’s ethics official weighs the appearance concerns against the interests of the government in the employee’s participation, while taking into account all relevant circumstances and a list of factors.⁶⁰

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

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. 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.”⁶¹ In the absence of a similar process to help members of the Court address concerns

⁵⁶ 28 U.S.C. § 455(a).

⁵⁷ 28 U.S.C. § 455(b)(4).

⁵⁸ 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>.

⁵⁹ 5 C.F.R. § 2635.502.

⁶⁰ *Id.*

⁶¹ U.S. Supreme Court Resolution, Jan. 18, 1991,

https://www.citizensforethics.org/wp-content/uploads/2022/03/1991_Resolution.pdf.

about impartiality, justices will continue to make these decisions for themselves on a seemingly ad hoc, opaque, and unregulated basis.

B. The Ethics in Government Act

Although the Ethics in Government Act (“EIGA”) establishes financial disclosure reporting requirements for justices and other judicial officers,⁶² spousal conflicts of interest based on their clients or outside positions are difficult to identify under EIGA’s current reporting regime because those relationships are not always required to be disclosed.⁶³ For example, when spousal compensation passes through a limited liability company (“LLC”) or similar legal entity, there is 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.⁶⁴ 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.⁶⁵ In the latter case, potential spousal conflicts of interest can be more easily identified.

C. Amicus Briefs

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. 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.

Similar conflicts occur when a justice accepts lavish gifts and other things of value from people who are affiliated with groups seeking to influence the court. For instance, Harlan Crow is on the board of AEI, which touted its impact on the court in its most recent Annual Report, saying that, “[t]hanks to a renewed emphasis on constitutional law and the Supreme Court, we have had our most direct impact on

⁶² 5 U.S.C. app. § 101(f)(11).

⁶³ 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).

⁶⁴ 5 U.S.C. app. § 102(e)(1)(A).

⁶⁵ *Id.*

the courts' evolving view of the administrative state. Specifically, an important AEI Press book on the topic helped shape a crucial Supreme Court decision."⁶⁶ During Mr. Crow's time on the board, and Justice Thomas' tenure on the bench, AEI has filed and publicized numerous amicus briefs supporting conservative causes at the Supreme Court.⁶⁷

In every circumstance, the justice must 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. When questions about the Court's impartiality are at issue, recusal needs to be the justices' default position rather than the exception.

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 or a wealthy benefactor's business interests and ideological pursuits. 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. Similar reporting requirements should also be put in place for other public disclosure filers, including elected officials and presidential appointees confirmed by the Senate.

CREW supports legislative efforts to ban Supreme Court Justices and all federal judges from owning or trading individual stocks, bonds, and other similar financial instruments, including requiring that such a ban be placed in a Supreme Court Code of Conduct. Such a ban is the best and only comprehensive way to ensure that

⁶⁶ AEI, *2022 Annual Report*,

<https://www.aei.org/wp-content/uploads/2023/03/2022-Annual-Report-Final.pdf?x91208>.

⁶⁷ See, e.g., Peter J. Wallison, *Supreme Court Amicus Brief Seeking Certiorari in AT Corp. V. Lila T. Gavin*, AEI (Feb. 8, 2007),

<https://www.aei.org/research-products/speech/supreme-court-amicus-brief-seeking-certiorari-in-at-corp-v-lila-t-gavin/>; John E. Calfee et al., *Supreme Court Amicus Brief Regarding Wyeth V. Diana Levine*, AEI (June 3, 2008),

<https://www.aei.org/research-products/testimony/supreme-court-amicus-brief-regarding-wyeth-v-diana-levine/>.

justices are not violating their duty to preside over cases as disinterested arbiters of law and fact. By imposing a ban, a Code of Conduct would limit the possibility for these conflicts of interest before any 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 too infrequently used to ever function as a true check on misconduct.

This requirement would not mean that justices 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.⁶⁸ Should justices and their close family members wish to continue to have investments in individual securities, they could place their assets in a qualified blind trust⁶⁹ and direct the trustee to divest from their current holdings and then reinvest the proceeds in individual stocks as the trustee sees fit. There is no question that this type of structure would effectively prevent financial conflicts of interest.

c. 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.⁷⁰ 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

⁶⁸ 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/>.

⁶⁹ A "qualified blind trust" as generally defined in 5 C.F.R. § 2634.402(e).

⁷⁰ 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>.

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.

d. 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.⁷¹ For example, recent reports have been critical of justices who speak at conferences that bar news media from covering their speeches.⁷² 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,⁷³ 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.”⁷⁴

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, and accepting related travel costs to desirable locations to participate in them, raises questions about appearances of impropriety.⁷⁵ Relevant provisions of the Judicial Code of Conduct include:

⁷¹ 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 Judicial Conference, *Guide to Judiciary Policy* (Jan. 2020),

<https://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf>; see also, Debra Cassens Weiss, *US judiciary drops draft opinion telling judges they can’t be Federalist Society members*, ABA Journal (July 31, 2020), <https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members>.

⁷² 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/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Code of Conduct for United States Judges*, US Courts (Mar. 12, 2019),

<https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b>.

- 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.”⁷⁶
- 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.⁷⁷
- Canon 5 mandates that judges refrain from political activity.⁷⁸

Executive branch employees are subject to similar standards of conduct that guard against preferential treatment.⁷⁹

Since justices are not subject to the *Code of Conduct for United States Judges*,⁸⁰ however, they are seemingly less constrained in terms of their outside speaking engagements and commitments. 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.

3. Apply the federal criminal conflict of interest statute, 18 U.S.C. § 208, to the Supreme Court and the federal judiciary.

The ethical crisis that has consumed the federal judiciary is not simply the result of the actions of individual justices. It is the result of decades of insufficient oversight

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 5 C.F.R. §§ 2635.101(b)(8), 2635.702.

⁸⁰ *Code of Conduct for United States Judges*, US Courts (Mar. 12, 2019), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b>.

and little to no discipline or accountability throughout the entire branch. There is no better example of this systemic ethical rot than the *Wall Street Journal's* revelations 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 that 61 judges or their families actively traded shares in a party to an ongoing case.⁸¹ These revelations have caused a wave of appeals, some of which threaten to overturn verdicts that could reach into the billions of dollars.⁸²

One clear way of providing some measure of accountability for this ethical crisis is by applying 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 and reassures the public that officials do not make decisions on the basis of their private interests. Specifically, it bars executive branch employees from participating in “particular matter[s]” focused on the interests of a discrete and identifiable class of persons or identified parties. In the case of judges and justices, Section 208 would apply to cases in which they have 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 then-Ranking Member of the House Judiciary Committee’s Subcommittee on the Courts Rep. Darrell Issa (R-CA) put it during a hearing in October 2021.⁸³

Justices are already required to recuse themselves from any cases in which they have a financial interest in a party to a proceeding.⁸⁴ Some federal judges however appear to treat conflict of interest law as simply a suggestion rather than a rule: applying Section 208 would add teeth to this now toothless legal regime.

⁸¹ James V. Grimaldi et al., *131 Judges Broke the Law by Hearing Cases Where They Had A Financial Interest*, Wall St. 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>; Coulter Jones et. al, *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-1634306192?st=83tufdpgmt8787u8reflink=desktopwebshare_permalink&mod=article_inline.

⁸² 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>.

⁸³ 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 (Oct. 26, 2021).

⁸⁴ 28 U.S.C. § 455.

As the *Wall Street Journal's* reporting demonstrates, many judges feel empowered to brush off these violations, admitting to being “remiss” and promising to “stay on [their] toes” in the future. Chief Justice Roberts dismissed concerns about these conflicts, explaining that the problem boils down to “a small number,” of judges who “did not take sufficient note” of their ethics training. In general, he said, these were “isolated violations” that were the result of “unintentional oversights.”⁸⁵ This type of cavalier attitude does more harm than good and is precisely why fundamental, structural reforms such as those we have suggested are necessary to protect the integrity and impartiality of the entire institution.

4. Constitutional Concerns

Congress imposing recusal rules, or a Code of Conduct, on the Supreme Court does not raise serious separation of powers concerns.⁸⁶

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.⁸⁷ Congress has changed the size of the Supreme Court by statute on several occasions.⁸⁸ Congress also has the authority to raise justices’ salaries, and, in extraordinary cases, remove justices via impeachment.⁸⁹

⁸⁵ Chief Justice John G. Roberts, *2021 Year-End Report on the Federal Judiciary*, Supreme Court (2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.

⁸⁶ Joanna R. Lampe, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, Cong. Rsch. Serv. (2022), <https://sgp.fas.org/crs/misc/1-SB10255.pdf> (“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, requiring the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress’s authority.”).

⁸⁷ 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.”).

⁸⁸ 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, Cong. Rsch. Service (2020), <https://crsreports.congress.gov/product/pdf/1/SB/1-SB10562>.

⁸⁹ 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.”).

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.⁹⁰ 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."⁹¹ 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 laws. For instance, it is illegal for a Supreme Court justice to take a bribe.⁹² 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

CREW has been warning of the precipitous decline in public faith in the judiciary and the Supreme Court for years. In my statement to the House Judiciary Committee in October 2021, I called on Congress to pass structural and systemic judicial ethics reforms because "public confidence that the system of law is fair and just is critical to maintaining democratic governance," and a conflicted and unethical judiciary undermines that confidence.⁹³ A year and a half and three massive scandals later, it is time for Congress to finally act to pass serious judicial ethics reform.

Justice Thomas' financial relationship with Mr. Crow and his failure to report more than two decades of private luxury vacations and real estate transactions in possible violation of the Ethics in Government Act and the Judicial Conference Gift Regulations constitute egregious misconduct. But this scandal did not occur in isolation, and it must not be addressed as if it had. Justice Thomas is not the reason the highest court in the land has the lowest bar for ethical compliance and

⁹⁰ *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).

⁹¹ Chief Justice John G. Roberts, *2011 Year-End Report on the Federal Judiciary* (Dec. 31, 2011),

<https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

⁹² 18 U.S.C. § 201.

⁹³ Statement of Noah Bookbinder (Oct. 26, 2021),

<https://www.citizensforethics.org/wp-content/uploads/2021/11/CREW-Statement-for-the-Record.pdf>.

accountability; Harlan Crow is not why we currently subject a low-level career civil servant to a higher standard of ethical conduct than we do the people who tell us whether or not we have the right to privacy, to bodily autonomy, or to vote. This is rather the result of decades of benign neglect and absence of accountability.

That neglect must end now. It is time for Congress to step in and impose some measure of accountability on the Supreme Court and the federal judiciary beginning with the creation of an Inspector General for the federal judiciary. Moreover, as CREW has been advocating consistently for over the past several years, Congress should expand the criminal conflict of interest status to cover the judiciary, and, if the Court will not develop a Code of Conduct, as it is becoming clear it will not, then Congress must impose one on it. Democracy is a promise that our elected and appointed representatives will govern with the best interests of the people, and not their own individual pocketbooks, as their guiding light. When that promise is broken, so too is the foundation of our democracy.

CREW looks forward to working with your committee as you address this important issue.

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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
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February 13, 2012

The Honorable John Roberts
 Chief Justice of the United States
 Supreme Court of the United States
 1 First Street, NE
 Washington, DC 20543

Dear Chief Justice Roberts:

We write to follow up on your discussion of ethics issues and the Supreme Court in the 2011 Year-End Report on the Federal Judiciary (hereinafter Year-End Report). We appreciate your effort to provide greater clarity about the Supreme Court's adherence to financial regulations and the Judicial Conference's Code of Conduct for United States Judges (hereinafter Code of Conduct).

Last fall, the Judiciary Committee held an important hearing entitled "Considering the Role of Judges Under the United States Constitution." We were honored to have Justices Scalia and Breyer participate in a lively and educational conversation. Senator Durbin posed several questions concerning financial and ethics restrictions. The response was similar to your clarification in the Year-End Report which implies that Justices of the Supreme Court do follow the Code of Conduct which binds lower court judges. We write today to request greater transparency about the internal resolutions the Court has adopted to address ethical issues.

On page six of the Year-End Report, you noted that the Members of the Court adopted "an internal resolution" in 1991 which stated that they agreed to follow the Judicial Conference's regulations on gifts and outside income, honoraria, and employment, which apply to other federal judges. Thank you for providing us with a copy of the resolution. We request that the Court make this internal resolution cited in the Year-End Report public, just as it did with its Statement of Recusal Policy in 1993. If there are any other Court resolutions of this nature, we suggest they be released as well.

As you noted in your Year-End Report, there have been a number of calls recently to make the Code of Conduct binding on the Court. You indicated that "the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues." As you point out, since the Code may not answer all ethics considerations, the Court, like all other federal judges, may also consult judicial opinions, treatises, scholarly articles, and disciplinary decisions. Since the Court already appears to follow the Code in practice, why not adopt a resolution, similar to the 1991 resolution, stating that Members of the Court abide by the Code of Conduct?

Because we have a high regard for the Supreme Court and its Members, we emphasize that we do not intend to question or impugn the ethics of any individual Justice or the Court itself by making these requests. We have worked for many years to increase openness and transparency in government, and we hope to increase public trust and confidence in all of our institutions, including the Supreme Court. We firmly believe that full disclosure of the Court's rules and its processes can only lead to greater confidence in the Court, and we look forward to working with you and the other Members of the Court to achieve this goal.

Sincerely,



RICHARD J. DURBIN
United States Senator



PATRICK LEAHY
Chairman



SHELDON WHITEHOUSE
United States Senator



AL FRANKEN
United States Senator



RICHARD BLUMENTHAL
United States Senator

“Supreme Court Ethics Reform”

Hearing Before the Senate Committee on the Judiciary

May 2, 2023

Statement of Gabe Roth, Executive Director of Fix the Court

Chairman Durbin, Ranking Member Graham and members of the Committee: Thank you for the opportunity to provide a statement for the record.

A lot of ink has been spilled in a short amount of time on the topic of Supreme Court ethics, and I believe it is important to put it into perspective before figuring out how to proceed. I will seek to do that here.

Having run Fix the Court, a nonpartisan organization that advocates for a more open and accountable federal judiciary, for nearly a decade, two things are apparent:

One, the Supreme Court is the most powerful, least accountable institution in Washington.

Two, the blueprint to fix the lack of accountability without imperiling judicial independence already exists: requiring the justices to follow the same exacting rules on ethics, gifts and travel as members of Congress and top executive branch officials. And since the justices have dug their heels in with an unilluminating “ethics statement” last week, it’s even clearer now that Congress must step in.

Is there a problem with ethics at the Supreme Court?

Yes, and it has existed for a long time. For years I have chronicled several dozen ethical lapses committed by all nine current justices and a few former justices.¹ Little has changed. But that does not mean it can’t. Take, for example, the ethics issues surrounding Justice Abe Fortas. Just months after he resigned over an outside income scandal, the justices filed reports on outside income and gifts.² An equivalent solution.

But the justices today have offered no such corresponding fix after one of their own was found to have accepted lavish trips and gifts that any neutral observer would see as imperiling institutional integrity. The Judicial Conference’s recent “revised guidance” on the personal hospitality rules is nowhere near sufficient. After all, the justices should strive to be the most ethical federal government officials. Moreover, they should not be able to hide behind overhyped “separation of powers” concerns as Congress seeks to legislate; to paraphrase a recent Justice Thomas quote, “separation of powers” is used “as a mantra when we don’t want to think.”³

What’s more, Justice Thomas has time and again failed to file accurate disclosure reports — concerning his wife’s jobs, a missing real estate transaction and missing reimbursements. These are violations of the Ethics in Government Act, and simply asking for an amendment for the umpteenth time⁴ does not cut it. (In addition, I have

¹ See Fix the Court, “Recent Ethical Lapses by Supreme Court Justices,” May 1, 2003. Available at <https://fixthecourt.com/wp-content/uploads/2023/04/Recent-Ethical-Lapses-by-the-Justices-FTC-May-2023.pdf>.

² See Fred P. Graham, “5 Supreme Court Justices File Income Reports,” *New York Times*, Aug. 4, 1970. Available at <https://www.nytimes.com/1970/08/04/archives/5-supreme-court-justices-file-income-reports-voluntary-declarations.html>.

³ The Justice Thomas quote, per a May 6, 2022, CNN.com article is, “We use stare decisis as a mantra when we don’t want to think.” Available at <https://www.cnn.com/2022/05/06/politics/clarence-thomas-stare-decisis-roe-v-wade-leak/index.html>.

⁴ Per the justice’s April 25, 2023, “Statement on Ethics Principles and Practices,” the Judicial Conference Committee on Financial Disclosure “reviews the information contained in these reports and either finds them to be in compliance with applicable laws and regulations or sends a letter of inquiry if additional information is needed to make that determination.” Available at <https://fixthecourt.com/wp-content/uploads/2023/04/Letter-to-Chairman-Durbin-04.25.2023.pdf>. But after how many willful omissions will the Committee, the Judicial Conference or the Justice Department take meaningful action?

in the last few days identified several unreported omissions from Thomas' disclosures and am working to confirm them.⁵)

To improve Supreme Court ethics, I envision two tracks:

Track 1 would be for Congress to require the Supreme Court to write and adopt a code of conduct that would set reasonable expectations for the justices' conduct on and off the bench and give the public a sense of what constitutes ethical behavior. That the justices said last week they "consult a wide variety of authorities to address specific ethical issues"⁶ is not a particularly useful statement. The public should know *the who* and *the what*.

As an aside, it is worth noting that, beyond a code, one section of the new Supreme Court Code of Conduct Act introduced by Sens. Angus King and Lisa Murkowski⁷ would give the Court's Marshal more access to investigative resources should another major breach, like a leak of a draft opinion, occur — a proposal Justice Alito seemed to support when he recently said the Marshal "did a good job *with the resources that were available to her*" (emphasis mine).⁸

Track 2 would be Congress giving the justices' (and lower court judges') travel and gift rules an ethical upgrade. Like lawmakers, judicial officers should:

- Get approval from an ethics body before accepting a free trip or a gift, even from a close friend, worth more than \$250
- Get a free trip's sponsor to file a report describing the purpose and agenda of the trip, as well as the expected costs — meaning dollar amounts — of transportation, lodging, entertainment and meals
- File a report themselves within 30 days of returning from a free trip that lists in dollars the actual cost of transportation, lodging, entertainment and meals, with that report then posted online for the public to see
- Indicate if the free trip or gift was given by anyone who is or recently was a party in a case or petition at the Court or has recently filed an amicus brief

Currently, the justices don't have an ethics office, don't have to get approval to accept a free trip or gift, don't have to file a post-trip report and don't have to report if anyone with business before the Court attended the free trip with them or offered a gift. They merely post a single line on their annual disclosure up to a year and a half after the fact that offers few details.⁹

Finally, what I will call Track 2A should be improvements in what is actually disclosed, which can be gleaned from three recent news stories that were nominally about the ethics of the justices but I see as primarily offering Congress and the public helpful suggestions about how to close various disclosure loopholes.

First, both the *New York Times*¹⁰ and ABC News¹¹ recently ran stories about the influence of certain universities and their law schools on the justices, looking at amicus filings, co-teaching in Europe and the like. I have long

⁵ Fix the Court has chronicled the justices' disclosure omissions and errors, "The Justices' Financial Disclosure Errors and Omissions Fix the Court," April 24, 2023. Available at <https://fixthecourt.com/2023/04/justices-financial-disclosure-omissions-this-will-be-updated-as-additional-info-becomes-available/>.

⁶ See note 4.

⁷ See S. 1290, 118th Congress.

⁸ See James Taranto and David B. Rivkin Jr., "Justice Samuel Alito: 'This Made Us Targets of Assassination'" Wall Street Journal, April 28, 2023. Available at <https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9>.

⁹ See generally Fix the Court, "The Justices' Latest Financial Disclosure Reports (2021), Plus Links to Earlier Ones," last updated May 1, 2023. Available at <https://fixthecourt.com/2021disclosures>.

¹⁰ See Steve Eder and Jo Becker, "How Scalia Law School Became a Key Friend of the Court," *New York Times*, April 30, 2023. Available at <https://www.nytimes.com/2023/04/30/us/supreme-court-scalia-law-school.html>.

¹¹ See Lucien Bruggeman, "'Inside baseball': Critics say academia has 'troubling' influence with the Supreme Court," ABC News, April 27, 2023. Available at <https://abcnews.go.com/US/inside-baseball-critics-academia-troubling-influence-supreme-court/story?id=9884911>.

said that it would be preferable if more liberal justices spoke and taught at conservative-leaning law schools, and more conservative justices spoke and taught at more liberal-leaning law schools. (Hopefully, the Judge Duncan incident at Stanford Law was a wakeup call for civility.) But that is not happening these days, and we are worse off for it. I believe, to start, the public should know the full, and often eye-popping, costs of the justices' university-paid flights, hotels and meals, especially when a public university is involved.

In addition, requiring a statement in a law professor's Court filing — whether during the merits stage, in a petition for certiorari or in an amicus filing — disclosing an academic relationship within, say, the last two years, e.g., "I co-taught a class with Justice X last year," or, "Four months ago, Justice Y spoke to one of my classes," seems more than reasonable.

Second, with Justice Gorsuch's second-home sale,¹² the real issue to me is the lack of exactness in the disclosure law. Was the 2017 sale of the mountain property he co-owned newsworthy? Yes; how was it suddenly sold nine days after Gorsuch's confirmation following two years on the market? But was it breathlessly so? No. I was not involved in the story but did request a correction: Gorsuch did not "report[] making between \$250,001 and \$500,000 from the sale"; rather, he recouped an amount in there. I believe it to be around \$360,000, which happens to be about how much he put in initially. That explains why the "gain code" on his report is left blank: the filing instructions tell filers to leave that field blank if you lose money or break even. That the home buyer's identity was not required to be listed under federal law is an oversight Congress should fix.

Might I suggest it would be even more instructive to put this in the context of other justices' real estate transactions: Who did Justice Sotomayor buy her U Street and West Village condos from? Who controls the other 7/8th of the cottage Chief Justice Roberts part-owns in southern Ireland? What about Justice Breyer's rental property in St. Kitts and Nevis — a well-known tax haven — or his land in New Hampshire? Had I the time or the staff, I would look into his 2016 Massachusetts land sale and the four high court petitions the buyer's former employer, Schneider Electric, won over the years by having cert. denied, with zero Breyer recusals.

Third, the recent story¹³ about the commissions that Chief Justice Roberts' wife Jane has received for her legal recruiting work is largely much ado about nothing. Would we be in a better place if the legal profession were more diffuse with, say, 200 or 500 or 1,000 law firms bringing cases to the Court? Sure. But we're not, so Jane should not be criticized too harshly for earning a living with the help of some of the firms that happen to be frequent filers at One First Street. Like the co-teaching example above, a line of disclosure in a brief — e.g., "I was recruited for this job by a Supreme Court justice's spouse" — within two years of said recruitment should suffice.

In the end, what we know for certain here is that more people are paying attention to the conflicts at the Supreme Court, both real and perceived, than ever before, and it's better to disclose information than to be caught trying to hide something.

And at a certain point, as more and more stories about the justices' ethical lapses come out — and I believe there will be more out soon about both liberal and conservative justices' lapses — opposition to reform becomes a political liability. Maybe we're not there today, but we're getting there.

Thank you for the opportunity to submit this statement.

¹² See Heidi Przybyla, "Law firm head bought Gorsuch-owned property," *Politico*, April 25, 2023. Available at <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>.

¹³ See Mattathias Schwartz, "Jane Roberts, who is married to Chief Justice John Roberts, made \$10.3 million in commissions from elite law firms, whistleblower documents show," *Insider*, April 28, 2023. Available at <https://www.businessinsider.com/jane-roberts-chief-justice-wife-10-million-commissions-2023-4>.

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United States Senate
WASHINGTON, DC 20510

May 4, 2023

COMMITTEES
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CHAIRMAN, STRATEGIC FORCES
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ENERGY AND
NATURAL RESOURCES
CHAIRMAN, NATIONAL PARKS
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VETERANS' AFFAIRS

Chairman Dick Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Lindsey Graham
Senate Judiciary Committee
224 Dirksen Senate Office Building
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Dear Chairman Durbin and Ranking Member Graham:

Thank you both for giving me the opportunity to submit a statement on this important issue. And thank you, Senator Whitehouse, for your leadership in this space.

A healthy democracy requires trust: trust in leaders, trust in public institutions, and trust in systems. As our founders warned in the Federalist Papers, preserving America's historically-rare democracy starts with citizens having faith in their government. But this trust is waning and our fragile system is facing a crisis of confidence.

Unfortunately, this erosion of faith over the years includes public views of the Supreme Court, resulting in all-time low confidence levels in this vital institution. It is for this reason that Senator Murkowski and I have come together across party lines to introduce the *Supreme Court Code of Conduct Act*. The bill is very straightforward—just three pages in length—and simply charges our highest justices with establishing and making public their own code of conduct and oversight structure. The bill is designed to help the court re-establish its reputation and the respect that it should have from all Americans, regardless of party affiliation or personal beliefs.

Our bill does not prescribe what the code of conduct should look like – based on the separation of powers, we defer to the Court on that. Our bill simply requires the Court to establish its own rules within one year, publish them, and appoint someone to review concerns or complaints. This is not extreme; it would simply bring the Court into alignment with the structure governing judicial conduct across the nation.

Virtually every judge in the country—whether in the state or the federal system—already follows a publicly available code of conduct. In fact, every state court across the nation has its own set of standards, as does the entire federal judicial system. All but the nine justices of the Supreme Court, that is.

The fundamental purpose for any judicial code of conduct is to reassure the public of the fairness and impartiality of those who serve and make decisions. For this reason, the core of every such code is that a judge must avoid impropriety, and just as importantly, avoid the mere appearance of it. That's a very high standard that judges across the country hold themselves to, and it is an aspect of maintaining public confidence in the courts. I see no reason why the U.S. Supreme

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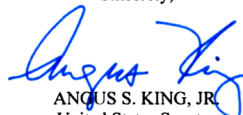
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Court, the highest court in the country, should be held to a lower standard, or as it currently stands, no defined standard at all.

The American people want to know that there is a guidebook for occupying a seat on our nation's highest court. The *Supreme Court Code of Conduct Act* will ensure that, and help rebuild the credibility gap that we have started to see in our highest judicial institution. The Supreme Court, uniquely in our three branches of government, is not elected by the people. The Court's authority rests entirely upon its credibility and integrity. This bill is simply trying to protect the Court's reputation.

I am hopeful that this committee hearing will lead to meaningful advances on this important topic, and I remain committed to restoring faith in our nation's most fundamental institutions.

Sincerely,



ANGUS S. KING, JR.
United States Senator



**STATEMENT OF
MAYA WILEY, PRESIDENT AND CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

HEARING ON “SUPREME COURT ETHICS REFORM”

MAY 2, 2023

Chair Durbin, Ranking Member Graham, and members of the committee:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations working to build an America as good as its ideals, we thank you for convening today’s hearing on “Supreme Court Ethics Reform.” We appreciate this opportunity to reiterate our ongoing calls for a judiciary that truly provides equal justice for all, including immediate passage of robust ethics reform and transparency legislation with an enforceable Code of Conduct for Supreme Court justices, as well as continued oversight and investigation into deeply concerning patterns of alleged ethics violations by justices.

Given the important role that the judiciary has in recognizing, protecting, and advancing our rights, for decades The Leadership Conference has convened the civil and human rights community to work together to bolster our democracy and create a judiciary that lives up to the promise inscribed above the Supreme Court — Equal Justice Under Law. We have a long way to go to achieve this vision, which is why we continue to bring organizations together to advocate for issues related to our 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 Supreme Court Ethics Crisis

To advance equal justice and strengthen our democracy, the Supreme Court must work for all of us, not just the wealthy and powerful. Yet media reports have alleged escalating and egregious patterns of ethics violations and misconduct by the justices who serve for life on our nation’s highest court. These concerns about our Supreme Court — and all our federal courts — are not academic or theoretical. Rather, they are fundamentally about who our courts serve and whose rights are upheld. There has been a long-term, well-funded agenda to roll back civil and human rights that has upended our most basic freedoms, and the lack of binding ethical standards and transparency around who has access to the most powerful jurists in our nation is deeply concerning. For our democracy to function, the Supreme Court must have the public’s faith that its decisions are informed by facts and law, not influenced by wealth and power. It is



unacceptable that the nine justices on our nation’s highest court are the only federal jurists who are not bound by a code of conduct. For years, this Court has ignored requests from across the political spectrum to initiate its own binding code of conduct, strengthen recusal standards, and increase transparency. Amidst constant reports of unethical and potentially unlawful behavior by justices, and the refusal of the Supreme Court to act, the need for serious and immediate congressional action on judicial ethics has never been more clear.

The judicial ethics crisis is not a recent phenomenon; it is an ongoing problem that the Supreme Court has declined to meaningfully solve. In a 2011 Senate Judiciary Committee hearing responding to similar ethics concerns, Chair Durbin questioned Justices Stephen Breyer and Antonin Scalia on whether the justices should be required to follow the Code of Conduct for United States judges.¹ This Code of Conduct, among other requirements, states that federal judges should “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and avoid even the appearance of improper behavior.² Then, as now, justices purport to consult this Code of Conduct, yet they are not required to do so. In the years since that hearing, people across America have seen the Supreme Court erode our most fundamental civil and human rights. This has occurred amidst an onslaught of reports of justices refusing to recuse themselves from cases where they have a personal interest,³ ultraconservative extremists attempting to purchase access to influence and embolden justices,⁴ justices failing to disclose lavish gifts and luxury travel funded by billionaires,⁵ and numerous other examples of misconduct. At a minimum, such reports call into question the actual and perceived impartiality of the justices. It is unsurprising that public confidence in the Supreme Court has plummeted to historic lows,⁶ and it is disappointing that the Court has refused to implement the binding reforms needed to create a fairer judiciary and restore the public’s faith that our nation’s highest court is not rigged in favor of the powerful few. It is past time for Congress to take action.

The Civil Rights Movement’s Continuous Calls for Ethics Reform

The civil rights community has consistently called for congressional action in response to the ongoing judicial ethics crisis. The Leadership Conference has long recognized that ethics reform is a critical part of the work to build an equal justice judiciary, and we have repeatedly urged Congress to prioritize passage of judicial ethics reform, including a Code of Conduct for Supreme Court justices, and further transparency measures.⁷ We reiterated these calls in July 2021, when our then-interim President and CEO Wade Henderson testified before the Presidential Commission on the Supreme Court of the United States,

¹ [“Considering the Role of Judges Under the Constitution of the United States: Hearing before the Committee on the Judiciary, United States Senate.”](#) 112th Congress (2011).

² Canon 2, [“Code of Conduct for United States Judges.”](#) *Judicial Conference*. Effective March 12, 2019.

³ Totenberg, Nina. [“Legal ethics experts agree: Justice Thomas must recuse in insurrection cases.”](#) *NPR*. March 30, 2022.

⁴ Kantor, Jodi and Becker, Jo. [“Former Anti-Abortion Leader Alleges Another Supreme Court Breach.”](#) *New York Times*. Nov. 19, 2022.

⁵ Kaplan, Joshua; Elliott, Justin; and Mierjeski, Alex. [“Clarence Thomas and the Billionaire.”](#) *ProPublica*. April 6, 2023.

⁶ [“Positive Views of Supreme Court Decline Sharply Following Abortion Ruling.”](#) *Pew Research*. September 1, 2022.

⁷ See [“The Leadership Conference on Civil and Human Rights Top Task Force Priorities for 118th Congress.”](#) *The Leadership Conference*, January 24, 2023; [“The Leadership Conference on Civil and Human Rights Priorities – 117th Congress.”](#) *The Leadership Conference*, November 24, 2020; [“Leadership Conference Priorities for the 116th Congress.”](#) *The Leadership Conference*, December 12, 2018.



urging the commission to consider in its review of the problems at the Court the ways in which the judiciary impacts the lives and rights of communities it has traditionally marginalized.⁸ We highlighted the need to implement changes that strengthen our democracy, including common-sense reforms such as a Supreme Court Code of Conduct.⁹

In December 2022, amidst reports that anti-abortion activist Rev. Rob Schenck attempted to influence and embolden particular justices, The Leadership Conference joined 100 other organizations in renewing the call for a Supreme Court ethics code and calling for an investigation into these deeply concerning reports.¹⁰ Most recently, in April 2023, we revived these calls in response to reporting that Justice Clarence Thomas has, for decades, failed to disclose lavish gifts he received from billionaire Republican donor Harlan Crow, despite the disclosure requirements in the 1978 Ethics in Government Act.¹¹ Media outlets continue to reveal new and concerning allegations, such as reports that Crow purchased three properties from Justice Thomas, which the justice similarly failed to disclose.¹² This escalating misconduct by justices who hold lifetime appointments is unacceptable and poisonous to our democracy. The status quo cannot continue.

Today, the civil rights community once more lifts up the demands for a judiciary that works for all of us, not just the privileged few. To that end, we call for:

- immediate passage of robust ethics legislation that includes, at a minimum, a Code of Conduct for Supreme Court justices and a mechanism to enforce adherence to ethics and recusal rules, in addition to further necessary recusal and transparency measures; and
- sustained oversight of and investigation into these reports and other instances of misconduct by Supreme Court justices and other federal jurists.

This must occur as the Biden administration and Senate continue to prioritize nominating and confirming ethical, fair-minded, and highly qualified judicial nominees who have a demonstrated commitment to civil and human rights and who reflect and represent our nation's rich diversity. Confirming such nominees helps to improve judicial decision-making and to build the public's trust in the federal judiciary.

Each of these strategies is necessary to build a judiciary that administers the equal justice that our nation needs and deserves. Ethics and transparency must be immediately strengthened, reports of unethical behavior must be fully investigated, and all judicial vacancies must be filled by diverse nominees who will meet the high ethical standards we expect of our public servants and who are committed to equal justice and the rights of all of us. Inaction will only excuse misconduct by justices and further erode the public's trust in the independence and fairness of our federal judiciary.

⁸ ["Statement of Wade Henderson to the Presidential Commission on the Supreme Court of the United States."](#) *The Leadership Conference*. July 20, 2021.

⁹ *Id.*

¹⁰ [Joint letter to Senate on the Supreme Court ethics crisis.](#) *Alliance for Justice; The Leadership Conference; National Women's Law Center; People for the American Way*. December 14, 2022.

¹¹ ["Leadership Conference Letter on Judicial Ethics."](#) *The Leadership Conference*. April 18, 2023.

¹² Elliott, Justin; Kaplan, Joshua; and Mierjeski, Alex. ["Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal."](#) *ProPublica*. April 13, 2023.

**The Need for Congressional Action**

These are urgent and enduring priorities for the civil rights community, and we are encouraged by the steps Congress has taken to address these issues. The Leadership Conference commends Chair Durbin's swift response to the ongoing judicial ethics crisis, including convening this hearing and inviting Chief Justice John Roberts or a justice of his choosing to testify.¹³ While we respect and protect judicial decision-making in cases that come before the Court, Congress plays an important constitutional role in the administration of our federal courts. Such administration is not limited to congressional impeachment powers, but also includes basic ethical and transparency measures. Thus, it is disappointing that the Chief Justice refused to appear or designate another justice to appear at this hearing, especially given the seriousness of the judicial ethics crisis, the resulting crisis of faith in the independence of the Supreme Court, and the history of this committee's work with Supreme Court justices.¹⁴ Indeed, it has been necessary and important for the public to hear directly from justices on this precise issue, such as the Senate Judiciary Committee's hearing in 2011 where Justices Breyer and Scalia testified on judicial ethics. Absent a strong response from the Court, such as creating a binding code of conduct or testifying about ways in which the Court has taken action, we are left with the impression that the Court is not taking this judicial ethics crisis seriously.

Additionally, we have long appreciated the calls for change from across the political spectrum and from both chambers. This includes recent bicameral calls led by Senator Sheldon Whitehouse and Representative Hank Johnson for the chief justice to investigate the allegations about Justice Thomas and other patterns of ethics violations,¹⁵ as well as their request for the Judicial Conference to refer Justice Thomas to the attorney general for further action.¹⁶ We applaud continued oversight and investigation, including Senate Finance Committee Chair Ron Wyden's request that Harlan Crow provide a full accounting of the properties he purchased from Justice Thomas as well as the lavish gifts he provided.¹⁷ And we are heartened to see renewed efforts, including some that are bipartisan, to pass legislation that would help address this crisis.

We welcome the opportunity to work with you and your colleagues in Congress to ensure that any legislative response to the ethics crisis is robust, transparent, and includes an enforcement mechanism to ensure Supreme Court justices are bound to ethics rules. Your work towards accountability and transparency is necessary to restore the public's faith in an institution whose independence has been compromised by consistent reports of unethical and potentially unlawful behavior. We urge you to continue this important oversight and investigative work alongside passage of robust, enforceable ethics reforms and continued processing of diverse judicial nominees who are fair-minded and committed to our rights.

¹³ [Chair Durbin invitation to Chief Justice Roberts to testify before the Judiciary Committee regarding Supreme Court ethics](#). U.S. Senate Committee on the Judiciary. April 20, 2023.

¹⁴ [Chief Justice Roberts letter to Chair Durbin declining to testify](#). April 25, 2023.

¹⁵ [Whitehouse-Johnson letter to Chief Justice Roberts to investigate ethics allegations](#). April 7, 2023.

¹⁶ [Whitehouse-Johnson letter to Judicial Conference regarding referral to Attorney General](#). April 14, 2023.

¹⁷ [Chair Wyden letter to Harlan Crow](#). U.S. Senate Committee on Finance. April 24, 2023.



For our democracy to work, all people need to be able to trust that jurists make decisions without bias and free from undue influence. Indeed, our communities depend on federal judges and justices to fairly administer justice for all of us. Congress must immediately address the ongoing judicial ethics crisis and ensure that our Supreme Court lives up to its promise of equal justice under law.

Thank you for the opportunity to submit this statement for the record. If you have any questions, please contact Lena Zwarenstejn, senior director of the fair courts program, at zwarenstejn@civilrights.org.

May 2, 2023

The Honorable
Members of the Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Durbin, Ranking Member Graham, & Members of the Senate Judiciary Committee:

I was invited by this Committee to elaborate on my public statements and views as to whether the Supreme Court should be bound to ethical standards of conduct. I am honored to do so.

Because of the reverence in which I hold the Supreme Court and the respect in which I believe all Americans should hold the Supreme Court, I have long held these views.

* * * * *

The Supreme Court of the United States is a sacred institution in America, by command of the Constitution of the United States.

As the guardian of the Constitution and protector of the Rule of Law in America, the Supreme Court is entitled to, and deserving of, abiding respect. Quite unlike its two coordinate branches of government, the Supreme Court is peculiarly and uniquely dependent upon respect, because respect for the Court is ultimately the source of the Court's "judicial Power." This, too, is by purposeful design of the Constitution.

As Alexander Hamilton explained the three branches of government and their respective powers in Federalist No. 78: "The judiciary [in contrast to the Executive and the Legislature] has no influence over either the sword or the purse;

no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

The only power the Supreme Court has is its mere judgment, and at that, it must depend for the efficacy of that mere judgment upon the respect and good faith of the Executive and the Executive’s power to execute the laws. The Supreme Court depends upon the respect and good faith of the Congress of the United States, as well. And each, the Congress and the Executive, depend upon the respect and good faith of the Supreme Court. In this way do the three branches of government depend and interdepend upon each other.

This is all toward the end of saying that the “judicial Power,” the power of the Supreme Court, is ultimately dependent on the respect that its judgments command, or not, from the American People. It depends on the respect of the American People, as opposed to any other, because as Alexander Hamilton also explained in Federalist No. 78, the will and the power of the American People -- the former expressed and the latter delegated by the People in the Constitution to their government -- are superior to the wills and the powers of all three, the Legislature, the Executive, and the Judicial, branches of government.

Accordingly, the Supreme Court’s power is greater or lesser as respect for its judgments by the American People waxes and wanes, ebbs and flows. This, too, is by constitutional design.

The Supreme Court is obligated under the Constitution to jealously preserve, protect, and defend its “independence” and its “judicial Power” from encroachment by the Legislature and the Executive, just as each, the Legislature and the Executive, is obligated to jealously preserve, protect, and defend, its independence from the other two branches of government.

Because the Supreme Court is obliged to preserve and protect the “judicial Power” that has been conferred upon it by the American People, the Court has no higher obligation than continually to assure and reassure the American People in every way both necessary and possible that the Court and its judgments are deserving of the abiding respect that the Court and its judgments are to be accorded.

The respect in which the Supreme Court is held by the American People is a function of both the respect that the Court's judgments command and the respect that the Court earns by virtue of the manner in which it comports itself publicly and privately in the course of discharging its solemn judicial duties. It is the Supreme Court's duty to acquit itself in the discharge of its judicial responsibilities so as to continually assure and reassure the American people that its judgments are deserving of respect. It is also the duty of each and every man and woman upon whom is conferred the privilege to serve on the Supreme Court to conduct themselves in their non-judicial conduct and activities in such a manner that they are individually deserving of respect -- indeed, beyond reproach, not only in fact, but also in appearance. This, at all times and places, in both public and in private.

The continuing obligation of the Supreme Court to ensure faith, respect, and confidence in the Court assumes a continuing need to reexamine itself as faith, respect, and public confidence in the Court ebbs and flows, which public confidence in the Court has historically done and can be expected to do in the future. This continuing obligation to assess itself -- to look in the mirror at itself if you will -- exists irrespective of whether the ebbs and the flows are believed to be justified by the Court.

Nothing less than all of this is required of the Supreme Court in order that it be able always to preserve, protect, and defend the sanctity of the institution of the Supreme Court, and thereby be able always to preserve, protect, and defend the sanctity of the Constitution of the United States against all enemies, foreign and domestic.

The nation should never have reason to question the ethical conduct of the Supreme Court. It is the responsibility of the Supreme Court, and of each Justice who serves on the Court, to ensure that there never even be such a question raised.

Thus, there should never come the day when the Congress of the United States is obligated to enact laws prescribing the ethical standards applicable to the non-judicial conduct and activities of the Supreme Court of the United States, even though it indisputably has the power under the Constitution to do so, but paradoxically, does not have the power to require the Court to prescribe such standards for itself.

But if that day were ever to come, it would hardly be a constitutional crisis or anything of the sort. The non-judicial conduct and activities of the Supreme Court are subject to law, just like every other citizen's conduct and activities are subject to the law. Much of the Justices' non-judicial conduct and activities are of course subject to law today.

Respectfully, the Congress should not want, or want to have, to prescribe ethical standards of conduct for the Supreme Court. By the same token, respectfully, the Supreme Court should not want Congress to prescribe ethical standards for the Court, either. For its part, the Supreme Court should want, without quibble, to subject itself to the highest possible professional and ethical standards that would render the Court beyond reproach, because such would ensure to the fullest extent possible that the Court is always beyond reproach in its non-judicial conduct and activities.

The Supreme Court should want to lead by the example that only it can set. It should want to conduct itself in its non-judicial activities in all ways such that it is beyond reproach. Indeed, such that it is beyond all reproach.

For, to whatever extent the Court does not subject itself to the highest possible professional and ethical standards -- or only grudgingly does so -- to an even greater extent does it depreciate not only its power to preserve, protect, and defend the institution of the Supreme Court, it also depreciates its power to preserve, protect, and defend the Constitution of the United States, which is the high charge that the American People have bestowed upon the Supreme Court.

Whether the Supreme Court is subject to ethical standards of conduct or not is emphatically not a partisan political issue and must not become one. But just as emphatically, the issue of the Court's ethical standards of conduct does not present a constitutional question, much less one of any constitutional moment.

This is not to say that the issue and question of whether the Supreme Court should be bound to ethical standards in its non-judicial conduct and activities is not important. It is unquestionably important. It is even of surpassing importance. But it ought not be thought of as anything more -- and certainly nothing less -- than the housekeeping that is necessary to maintain a Republic.

Lest the Congress and the Supreme Court ill serve the nation in the course of attempting to resolve the constitutionally fraught question before them, they should together address the question with the solemnity and wisdom that the question deserves and requires. If they do but this, they will almost assuredly conclude that the answer they seek is the answer they both should want.

Respectfully,

J. Michael Luttig



Advancing racial
justice since 1940

May 1, 2023

Chairman Dick Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Lindsey Graham
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I write to express our concerns about recent reports that underscore the urgency of judicial ethics reform legislation that includes an enforceable code of conduct for Supreme Court Justices and other needed transparency measures. We thank you for holding a hearing on these issues, and urge you to work with your colleagues to swiftly pass such legislation.

Founded in 1940 by Thurgood Marshall, who served on the United States Court of Appeals of the Second Circuit and later became the first Black Associate Justice of the Supreme Court, LDF is the nation's oldest civil rights law organization. Launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality, LDF has spent the past 80 years committed to achieving racial justice and an inclusive society. LDF has litigated numerous cases before the Supreme Court to vindicate the rights of Black people under the U.S. Constitution and federal law, including *Smith v. Allwright*, 321 U.S. 649 (1944), *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF continues to appear frequently before the Court to defend antidiscrimination laws and diversity programs,¹ and to challenge laws and policies that bar Black people from full political participation and equal opportunity.²

Pursuant to the U.S. Constitution, the Supreme Court is the highest court in the land, with the power to decide cases that affect the lives of millions of Americans. Every person must have faith that, if a case concerning a matter of importance in their lives were brought before the Court, it would be decided without prejudice or favor and based on objective application of the law alone.

¹ E.g. Br. of Amici Curiae 25 Harvard Student And Alumni Organizations in Support of Respondent President and Fellows of Harvard College, *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199 (Jul. 25, 2022), https://www.supremecourt.gov/DocketPDF/20/20-1199/230747/20220725132032325_2022-07-22%20FINAL%20Harvard%20Student%20Alum%20Orgs%20Amicus%20Brief.pdf; Brief of the NAACP Legal Defense & Educational Fund, Inc. & The National Association for the Advancement of Colored People in Support of Respondents, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (Jul. 25, 2022), https://www.supremecourt.gov/DocketPDF/21/21-707/230795/20220725154816100_21-707%20Amicus%20Brief%20of%20NAACP%20Legal%20Defense%20and%20Educational%20Fund%20Inc.%20et%20al.pdf.

² E.g. Br. of Appellees Evan Milligan, et al., *Merrill v. Milligan*, No. 21-1086 (Jul. 11, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1086/229773/20220711132550198_2022.07.11%20Milligan%20Br.%20for%20Appellees_A.pdf.

When wealthy and powerful individuals appear to have special access to the Justices, it raises concerns about the Court's commitment to equal justice under law—and particularly for groups that have historically and continue to experience discrimination, such as people of color.

Moreover, as the ultimate arbiter of the U.S. Constitution and federal law, the Supreme Court has the duty to check executive and legislative actions that discriminate against people of color and violate their rights. Yet the Supreme Court must rely on the persuasiveness of its legal reasoning and the moral authority of the body itself to persuade the other branches to follow and enforce its rulings. When faith in the Court falters, it undermines the Court's power, and weakens our democracy and the rule of law as a whole.

Despite the need for the Supreme Court to maintain an unimpeachable position of independence and neutrality, it is the only federal court that has no binding ethical code of conduct. While Justices claim to consult the Code of Conduct for United States judges,³ they are not required to do so. Recently, Chief Justice John Roberts sent the Senate Judiciary Committee a Statement of Ethics Principles and Practices to which he states all current Members of the Supreme Court subscribe.⁴ However, the Statement appears to leave it to each Justice to determine whether particular conduct complies with the Statement. Moreover, it remains unclear whether the Justices face any consequences for errors, omissions, or misrepresentations in the filing of their financial disclosures, or any penalties should they fail to abide by the Statement.

Recent reporting has revealed conduct that raises serious concerns about the Court's ability to police itself. According to ProPublica, for nearly 20 years, Supreme Court Justice Clarence Thomas received undisclosed gifts from real estate magnate Harlan Crow while serving on the Court.⁵ Mr. Crow's company also purchased properties totaling more than \$130,000 from Justice Thomas and his family during this time.⁶ The Ethics in Government Act of 1978 requires government officials to disclose most real estate transactions and gifts they receive, including travel on private jets. However, according to the *New York Times*, Justice Thomas stopped reporting any gifts from Mr. Crow after a number of gifts were publicized by the press in 2004.⁷ The property sale in 2014 was never disclosed.

The Supreme Court is long overdue to adopt a binding Code of Conduct. As the American Bar Association has stated, "The absence of a clearly articulated, binding code of ethics for the

³ Letter from Chief Justice John Roberts to Senate Judiciary Committee Chair Senator Dick Durbin (Apr. 25, 2023), <https://www.judiciary.senate.gov/imo/media/doc/letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>; Letter from U.S. Supreme Court Legal Office to Senators Whitehouse and Graham (Jul. 12, 2021), [https://www.whitehouse.senate.gov/imo/media/doc/2021-07-12%20Letter%20from%20SCOTUS%20\(Hospitality%20and%20Code\).pdf](https://www.whitehouse.senate.gov/imo/media/doc/2021-07-12%20Letter%20from%20SCOTUS%20(Hospitality%20and%20Code).pdf).

⁴ *Id.*

⁵ Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

⁶ Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

⁷ Abbie VanSickle, *Justice Thomas Failed to Report Real Estate Deal With Texas Billionaire* N.Y. TIMES (Apr. 13, 2023), <https://www.nytimes.com/2023/04/13/us/politics/clarence-thomas-harlan-crow-real-estate.html>.

Justices of the court imperils the legitimacy of the court.”⁸ Members of Congress have requested information about the Justices’ compliance with existing disclosure rules,⁹ and have raised similar concerns about the lack of a binding code of conduct and about the Court’s ability to regulate itself.¹⁰ Yet, the Supreme Court has failed to act.

In the absence of action from the Supreme Court to create its own binding ethical rules, we urge Congress to swiftly pass judicial ethics legislation that includes, at a minimum, a code of conduct for Supreme Court Justices with comprehensive disclosure and conflict-of-interest rules, as well as a strong mechanism to enforce these rules. We also urge Congress to continue its investigation into these reports, and its oversight of judicial ethics more broadly, including by considering what additional measures may be necessary to increase transparency.

Thank you for your time and attention to these important matters. Please contact Adam Lioz, Senior Policy Counsel (alioz@naacpldf.org) with any questions.

Sincerely,

Janai S. Nelson

Janai Nelson
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⁸ Am. Bar Assoc. Resolution 400 (Feb. 2023).

https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2023-midyear-supplemental-materials/400-midyear-2023.pdf.

⁹ Letter from Sen. Sheldon Whitehouse & Sen. John Kennedy to U.S. Attorney General Merrick Garland and U.S. Marshals Service Director Donald W. Washington (Jun. 4, 2021),

https://www.whitehouse.senate.gov/imo/media/doc/210604_DOJ%20Letter%20-%20Marshals%20Records%20Request.pdf; Letter from Sen. Sheldon Whitehouse & Sen. Lindsey Graham to Chief Justice John G. Roberts & the Hon. Scott S. Harris, Clerk of the Supreme Court of the United States (Feb. 4, 2021),

[https://www.whitehouse.senate.gov/imo/media/doc/2021-02-04%20Letter%20with%20Graham%20to%20SCOTUS%20\(Hospitality%20and%20Code\).pdf](https://www.whitehouse.senate.gov/imo/media/doc/2021-02-04%20Letter%20with%20Graham%20to%20SCOTUS%20(Hospitality%20and%20Code).pdf).

¹⁰ E.g. Sen. Sheldon Whitehouse, Whitehouse Releases Previously Undisclosed Correspondence With Scotus, Lower Courts On Poor Ethics And Transparency Standards in The Federal Judiciary (May 6, 2022),

<https://www.whitehouse.senate.gov/news/release/whitehouse-releases-previously-undisclosed-correspondence-with-scotus-lower-courts-on-poor-ethics-and-transparency-standards-in-the-federal-judiciary> (listing correspondence with the Supreme Court and the Administrative Office of U.S. Courts).



**Statement of NARAL Pro-Choice America
U.S. Senate Judiciary Committee
Hearing on Supreme Court Ethics Reform
May 2, 2023**

Thank you for the opportunity to submit a statement to the Committee on this critical issue. NARAL Pro-Choice America is a national advocacy organization dedicated to protecting and advancing reproductive freedom. For over 50 years, NARAL has fought to protect and advance reproductive freedom at the federal and state levels—including access to abortion care, birth control, pregnancy and post-partum care, and paid family leave. Through education, organizing, and influencing public policy, NARAL and our 4 million members from every corner of the country work to guarantee every individual the freedom to make personal decisions about their lives, bodies, and futures, free from political interference. For this reason, we are submitting this statement to highlight how recent corruption and ethics revelations, as well as anti-choice extremists' documented work to infiltrate and influence the Court, underscore the urgent need for investigations and ethics reforms. The Supreme Court's anti-abortion majority—influenced by anti-abortion mega-donors—poses a major and urgent threat to both reproductive freedom and our democracy itself.

Abortion rights and access are facing a crisis in the United States—largely exacerbated by an anti-abortion majority on the Supreme Court. Despite overwhelming public support for the legal right to abortion, we're in the midst of an all-out assault on reproductive freedom. The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade*, ending the federal constitutional right to abortion as we know it and signaling an ominous sign for the future of abortion rights in this country. The Court's ruling has empowered extremist state lawmakers to enforce total bans on abortion—several of which are now in place—and over half of the states in our country are at risk of following their lead.

The negative impact this cruel Supreme Court decision is inflicting cannot be overstated. This horrifying rollback of our fundamental rights is causing immediate and devastating harm to millions of people across the country who can no longer access the care they need in their own communities. Bans on abortion most harm those already marginalized at every turn by our systems and institutions, and losing *Roe*—even though its protections had long not been a reality for millions of people across the country—only compounds this. Women, Black, Latina/x, Asian American, Native Hawaiian, Pacific Islander, and Indigenous people; those working to make ends meet; the LGBTQ+ community; immigrants; young people; those living in rural communities; people with disabilities, and other historically oppressed communities are disproportionately impacted by these attacks on reproductive freedom.

This is part of a decades-long campaign waged by the anti-choice movement and the politicians that do their bidding to end *Roe* and decimate reproductive freedom. Even before *Roe* was overturned by the Court, the further evisceration of abortion access had ramped up.

State lawmakers seeking to advance their agenda of power and control have passed hundreds of state-level attacks on abortion access over the last decade that have made care extremely difficult, if not impossible, to access for many people across the country. Since *Roe* was overturned, over a dozen states are enforcing bans on abortion, with devastating consequences on the lives of millions of people. These systematic attacks on reproductive freedom and abortion access intentionally push access out of reach, and some go as far as criminalizing pregnant people and doctors who provide abortion care. And once-unthinkable policies, like instituting the death penalty for people who have abortions in violation of the law, are now being pushed into the mainstream by anti-abortion lawmakers and organizations.¹ Now, more than ever, the anti-choice movement is advancing its extremist agenda in plain sight.

The threat to our fundamental rights does not stop there. The same anti-choice, anti-freedom extremists working harder than ever to roll back abortion rights and access are also targeting our other fundamental freedoms, including birth control access, our freedom to vote, LGBTQ+ rights, civil rights, and more. There's simply no low they won't sink to in order to advance their quest for control and political gain. All of our most cherished rights and freedoms are also at risk.

We are seeing this right-wing agenda at work at this very moment in *Alliance for Hippocratic Medicine (AHM) v. U.S. Food and Drug Administration (FDA)*. In November 2022, anti-choice extremists filed a suit aimed at eliminating medication abortion care—the most common method of abortion care—as we know it. They filed their radical, lawless suit specifically in Amarillo, Texas, where it was guaranteed to be ruled on by a Trump-appointed, known anti-choice ideologue: Judge Matthew Kacsmaryk.

In April, Kacsmaryk issued a preliminary ruling in the case, which disregarded basic principles of law and parroted extremist talking points, granting the anti-choice plaintiffs' request to block access to mifepristone while underlying litigation continues. Kacsmaryk delayed his order, aiming to have it take effect on Friday, April 14. The Department of Justice (DOJ) and the defendant pharmaceutical company who produces mifepristone, Danco, then filed an appeal to the Fifth Circuit. A three-judge panel on the Fifth Circuit Court of Appeals, two of whom were anti-choice Trump nominees, refused to grant the DOJ's and Danco's request to overturn Kacsmaryk's ruling. Instead, they repeated the same disinformation and decided to reinstate medically unnecessary and outdated restrictions on mifepristone that had been lifted by the FDA based on sound science and extensive evidence of the safety and efficacy of the medication. The U.S. Supreme Court then granted the DOJ's request for a stay, blocking lower courts' dangerous rulings as the case proceeds through the Fifth Circuit and the Supreme Court. While mifepristone remains available for now, the unprecedented and lawless decisions by lower courts have created widespread confusion for health care providers and patients

¹ Rebecca Shabad, *S.C. Republicans propose bill that could subject women who have abortions to the death penalty*, NBC News, (Mar. 15, 2023), <https://www.nbcnews.com/politics/politics-news/sc-republicans-propose-bill-subject-women-abortion-s-death-penalty-rcna75060>

seeking abortion and miscarriage care. Justices Alito and Thomas dissented from this order, and would have allowed the Fifth Circuit's ruling to go into effect.

We did not get here by accident. The threats that our most cherished rights and freedoms face is the result of a decades-long far-right strategy to advance a radical and out-of-touch ideological agenda. In the late 1970s, radical conservatives weaponized the formerly non-political, back-burner issue of abortion rights as political cover for their efforts to maintain white patriarchal control amidst diminishing support for racist policies like school segregation, which had previously been the backbone of their movement. In the years immediately preceding and following *Roe v. Wade*, Evangelical Christians, who now form the backbone of the GOP, were overwhelmingly indifferent on the issue of abortion. But through the carefully crafted messages of Paul Weyrich, Jerry Falwell, and other architects of the Radical Right, abortion became the political tool of choice for a movement determined to maintain control in a changing world, and the trojan horse for a far-reaching array of ideologies meant to thwart social progress.²

In the intervening years, opposition to abortion has become a litmus test in far-right circles for a host of political and judicial positions. In order to advance their agenda—one that has always stood in direct opposition to the values of the majority of Americans—they developed and implemented a strategy for capturing and maintaining minority rule. This strategy included pushing regressive boilerplate legislation chipping away at access to abortion through state legislatures and Congress, as well as stacking the federal judiciary with anti-choice ideologues.

Anti-choice activists have spent decades building their influence over the federal judiciary through well-funded, secretive networks like the Federalist Society. Conservative activists have never been shy about the fact that their takeover of the federal judiciary is part of a broad strategy to quell the majority and cement minority rule, but the election of Donald Trump took this tactic to new heights.

In May 2016, Trump pledged to only nominate anti-choice judges, a promise he doubled down on in 2020.^{3,4} And with the help of Mitch McConnell, Trump installed anti-choice federal judges with lifetime appointments at a breakneck pace. We're seeing the impact of these anti-choice judges right now in the effort to ban a proven safe and effective medication used in the most common form of abortion care: Judge Kacsmaryk and two out of the three judges on the Fifth Circuit panel handling the mifepristone case were known anti-choice zealots when they were nominated to the bench for the purpose of pushing conservatives' unpopular agenda through the courts. At the time of their nominations, NARAL opposed all three Trump nominees due to their proven records of opposing reproductive freedom. More than a quarter of currently active

²Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAGAZINE, (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133>.

³Trump Letter on Pro-Life Coalition, Sept. 2016, <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf>.

⁴Pro-Life Voices for Trump 2020, Sept. 3, 2020, https://cdn.donaldjtrump.com/public-files/press_assets/pro-life-letter-potus.pdf.

federal judges are now Trump appointees, including Supreme Court justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—tipping the balance of the Court to a supermajority unmistakably hostile to reproductive freedom.⁵ Now, the work of these extremists has culminated in the end of *Roe v. Wade*, an anti-choice majority on the Court, and a federal judiciary stacked with ideologues that pose a threat to all of our most fundamental freedoms.

Public confidence in the Supreme Court's neutrality is further eroded by recent revelations uncovering corruption among the conservative justices. From colluding with anti-choice activists to accepting millions of dollars in gifts from an extremist GOP mega-donor, to failing to disclose real estate transactions with the head of a law firm who regularly appears before the Court, the conservative justices cannot be trusted to hand down fair and impartial decisions—especially as it relates to reproductive freedom. These revelations, as well as anti-choice extremists' documented work to infiltrate and influence the Court, underscore the urgent need for investigations and court reform. The Supreme Court's anti-choice majority—influenced by anti-choice mega-donors—poses a major and urgent threat to both reproductive freedom and our democracy itself.

All people—no matter who they are or where they live—should have the freedom to make their own decisions about whether to start or grow a family, free from political interference. While the Court's egregious decision in the *Dobbs* case is nothing short of devastating, the fight for reproductive freedom is far from over. The vast majority of Americans are with us. Polling shows that 8 in 10 Americans support the legal right to abortion.⁶ Lawmakers and judges who interfere with our reproductive freedom do not represent the values of the overwhelming majority of people in this country.

⁵John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

⁶Megan Brenan, *Record-High 47% in U.S. Think Abortion Is Morally Acceptable*, GALLUP, (Jun. 19, 2021), <https://news.gallup.com/poll/350756/record-high-think-abortion-morally-acceptable.aspx>

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National Council of Jewish Women

**National Council of Jewish Women Testimony
Senate Judiciary Committee
Hearing on Supreme Court Ethics Reform
May 2, 2023**

*Submitted electronically by Jody Rabhan, NCJW Chief
Policy Officer, on May 1, 2023*

Founded in 1893, National Council of Jewish Women (NCJW) is the oldest Jewish women's volunteer organization in the United States. Inspired by Jewish values, NCJW's 210,000 advocates strive for social justice by improving the quality of life for all people, and by safeguarding individual rights and freedoms. NCJW continues to carry out the organization's long tradition of social change through a powerful combination of education, service, and advocacy. With a presence in every state and through local sections, NCJW works on local, state, and federal issues.

NCJW's resolutions state our resolve to work for "A qualified, fair, independent, unbiased, and diverse federal judiciary with a commitment to the constitutional guarantee of equal justice for all." We know that a federal judiciary that is of and for the people, committed to equal justice for all, is fundamental to a strong and stable democracy.

Indeed, the federal judiciary is the only nonpartisan and politically independent branch of government. This is foundational to our democracy and, in fact, to the rule of law. The reports that some Supreme Court justices accepted lavish vacations and other gifts and engaged with individuals who had business before the Court smacks of impropriety and suggests that the justices' decisions from the bench can be bought. This not only calls into question their ethics, but it is antithetical to their sworn testimony during the confirmation process that they would be impartial arbiters of justice. Any actions like those reported in the press put the rule of law and our democracy at risk and create the perception that opinions issued by these justices are illegitimate. If a justice cannot be trusted to follow the law, how can we trust their opinions? How can we trust that they weren't influenced? Our system relies on trust in the courts — trust that judges and justices are independent and impartial, rendering equal justice to all and are not beholden to any powerful interest. This is both a crisis for the judiciary and democracy overall.

We believe that transparency and accountability — key tenets of any democracy — apply to the Supreme Court. Justices who sit in lifetime seats on our nation's highest court should be held to the highest standard. As with all other federal judges, the Supreme Court must be bound by a code of ethics. The Supreme Court is not immune from the kinds of ethical questions that arise at all levels of the judiciary. The absence of a written code leaves justices without consistent guidance on ethical issues and results in a lack of accountability. A transparent code of ethics at the Supreme Court would create uniformity around issues like participation in leisure activities, selling property, and political gatherings, and would prevent conflicts of interest. Now more than ever,

establishing a code of ethics is an urgent, critical task to deepen the legitimacy of the Court's decisions and reinforce to the public its independence.

The Court's nine justices must also assure its impartiality by adhering to a clear recusal policy. This is vital to buttress public trust and ensure our rights are protected. Justices should not be able to rule on cases where they have personal relationships that intersect with the case. When such a conflict of interest arises, they must be required to recuse themselves, yet currently, there is no mechanism to ensure this happens. The Supreme Court should be held to the same standard as the rest of the federal judiciary, with a clear recusal requirement in place to support their capacity to advance equal justice for all.

Along with accountability, transparency is critical to a healthy democracy. Improving public access to courtroom proceedings will increase confidence in the federal courts and support an informed electorate. The Supreme Court is the least transparent branch of the federal government. Adopting technology, such as by live-streaming Court proceedings and using accurate captions and American Sign Language interpretation as part of recordings would increase accessibility for all. Opening the courtroom by making proceedings immediately available to the public would give people an opportunity to be more informed about the judicial process and rulings that affect their everyday lives. Supporting transparency in this way is also critical to promoting trust in the legitimacy of the courts, and it can get us closer to building a federal judiciary that truly prioritizes all of the people over the rich and powerful.

NCJW works every day for a truly representative judiciary where individuals can have their day in court without undue delays caused by an overwhelmed justice system. Because we know that judges confirmed to lifetime seats on federal courts, including the Supreme Court, have the power to impact almost every aspect of our lives. Therefore, judges must be fair, qualified, and independent with the requisite experience and temperament and a commitment to equal justice. Further, for our courts to work for all of us, they must look like all of us. That is why the federal judiciary must be demographically inclusive and reflect the vast diversity of experience in the legal profession. Bringing different experiences and perspectives to the bench allows judges to make better-informed decisions, increases public confidence in their rulings, helps address existing inequalities, and safeguards our civil and human rights.

Judaism's call to pursue justice inspires our work, especially when it comes to improving the federal judiciary. Jewish teachings — from the Torah onward — are clear about the importance of unbiased judges as well as fair and impartial courts. In fact, Deuteronomy's clarion call, "Justice, justice you must pursue!" is found in the context of verses commanding the establishment of an unbiased judiciary.

Our Jewish values and organizational commitment to equality and justice inspired the launch of BenchMark: NCJW's Judicial Nominations Campaign in 2001, one of the first national organizational campaigns devoted to educating and mobilizing grassroots and communities nationwide on the issue of the federal judiciary and judicial nominees. Over the decades, BenchMark has engaged thousands of NCJW members and educated the general public through hundreds of events in dozens of communities

nationwide. Early on, NCJW understood the importance of coalescing with other organizations, including interfaith partners around this issue, building coalitions in states around the country — work that we continue to sustain and expand. Today, we run Courts Matter Coalitions in Florida, Illinois, Louisiana, Maine, Michigan, Minnesota, Missouri, and Nebraska as well as the Interfaith Courts Coalition. We provide a dedicated website (www.courtsmatter.org) with information about the courts and the nominees on which NCJW has taken a position, and host in-person and virtual gatherings with The Leadership Conference Education Fund to provide education, trainings, and networking opportunities for our collective network of courts advocates across the United States.

NCJW looks forward to working with the Senate Judiciary Committee on Supreme Court ethics reform and other transparency measures to rebuild trust in our highest court. Thank you for holding a hearing on this critical issue and for the opportunity to provide testimony. If you have any questions, please contact Jody Rabhan, NCJW Chief Policy Officer, JRabhan@ncjw.org.



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Executive Director

May 2, 2023

U.S Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator:

On behalf of our 3 million members and the 50 million students they serve, we are pleased to submit the following comments for the record of today's hearing on Supreme Court Ethics Reform.

NEA supports a judicial code of conduct for Supreme Court justices. We expect their ethics to be beyond reproach. We expect them to be impartial. And we expect them to rule based on factual and legal analysis—not wealth, power, or politics. When those expectations are unmet, we have little recourse because, alone among judicial bodies, the Supreme Court oversees itself.

In recent years, we have witnessed the overturning of longstanding decisions not because of new evidence, but because of changes in the composition of the court itself. Such rulings are even more alarming in light of reported conflicts of interest, efforts to buy access, and failure to disclose financial transactions as required by law. This behavior is unethical, unacceptable, and undermines the promise engraved above the entrance to the Supreme Court: equal justice under law. As the code of conduct for federal judges says, "A judge should avoid impropriety and the appearance of impropriety in all activities."

The Biden administration has made remarkable progress in reshaping the federal judiciary to reflect America today. To continue that progress, Supreme Court justices need to be subject to the same scrutiny as other federal judges. As Justice Louis Brandeis said, sunlight is the best disinfectant.

We thank you for the opportunity to submit these comments.

Sincerely,

Marc Egan
Director of Government Relations
National Education Association



Senate Judiciary Committee
Hearing: Supreme Court Ethics Reform
 May 2, 2023

Testimony of People For the American Way

People For the American Way works to inspire and mobilize community and cultural leaders to advance Truth, Justice and the American Way. We're convening courageous Americans, producing compelling media and organizing campaigns to defend our democracy from authoritarian threats and advance America's promise that everyone will enjoy freedom, safety and a vote that counts.

Since our founding in the 1980s, we have advocated for fair courts and the nomination and confirmation of fair-minded, federal judicial nominees who understand that the justice system should protect all of us, not just the wealthy and well-connected.

People For the American Way is pleased that the Senate Judiciary Committee is holding this hearing on Supreme Court ethics reform. The Court is long overdue for a binding and enforceable code of ethics. If it does not adopt one voluntarily, then Congress must impose one. On the specific matter of Justice Clarence Thomas, the Department of Justice should pursue both civil and criminal fines against him for his recently uncovered ethics violations.

The Impact of this Issue on Our Lives

Federal courts make decisions that affect all of us. Judges impact our access to healthcare, our right to abortion, our ability to hold violent police officers accountable, our ability to vote, and much more. Judges who are true to their calling make real the Constitution's promises of equal justice under the law. Insulated from political considerations like having to be reelected, federal judges can empower the marginalized and protect individuals and communities from being unfairly and unlawfully victimized by those with political and economic power.

At their best, the Supreme Court and lower federal courts drove a stake into Jim Crow when elected officials were still standing in the schoolhouse door; held that people arrested by the police have a right to an attorney; imposed much-needed limitations on abuses by law enforcement; prevented states from criminalizing private decisions such as those involving abortion and contraception; recognized our right to impose reasonable limits on corporations' mistreatment of working people and our environment; and much more.

But in the past generation, we have seen the rise of a different kind of judge. Enormous amounts of money have been spent to transform our courts into institutions that will protect the wealthy and powerful. Far too often, law enforcement officials escape accountability for using deadly force against Black Americans; laws making it harder for people of color to vote are upheld; burdens on the lives of immigrants are upheld; people are denied access to legally protected health care, including abortion care; working people are prevented from effectively getting

higher wages and better working conditions; and companies are protected when they discriminate against employees.

When we walk into a courtroom, we deserve a judge – or a justice – who will hear our case fairly. We are entitled to someone who will protect the rights of all of us, not just the wealthy and powerful.

All federal judges are empowered to make important rulings. But only the Supreme Court has the final word. So, the public is rightly concerned that the justices wielding this power are not subject to the same binding and enforceable code of ethics that apply to every other federal judge.

**“Trust Us” Is Not Enough:
The Supreme Court Must Have a Binding Code of Ethics**

The American public’s respect for the Supreme Court has been plummeting. Just this week, [a survey by the Marist Institute for Public Opinion, NPR, and the PBS NewsHour](#) indicated that 62 percent of Americans have little or no confidence in the Supreme Court. That is a sharp rise from the 36 percent who felt that way [just four years ago](#).

In part, that is because a 6-3 far-right majority of questionable legitimacy has stripped Americans of our constitutional right to abortion, among other dangerous rulings. The Court increasingly decides cases in ways unmoored from any principle except to help the privileged and powerful. In areas touching our lives like abortion care, gun violence, the rights of working people, and the right to vote, the current majority casts aside laws and precedents they disagree with.

Against that backdrop, justices who behave as if they are above the law are doing even more to undermine the Court’s legitimacy. Justice Thomas’s repeated decisions not to report information about his financial transactions with and gifts from right-wing billionaire Harlan Crow are just the latest examples, which we discuss in detail below. Other examples include:

- [Justice Thomas participated in a case](#) involving the efforts to overturn the 2020 presidential election, even though his wife was involved in those efforts.
- [Justice Alito’s draft opinion in *Dobbs* was leaked to the press](#), signaling the majority’s plan to overrule *Roe v. Wade*. The subsequent “investigation” controlled by the chief justice [did not require justices to answer questions under oath](#) like their clerks and Court employees.
- [Justice Alito is reported to have revealed the *Hobby Lobby* result](#) to an anti-abortion activist over dinner weeks before the opinion was released. Their meeting was part of a multi-year campaign coordinated by far-right leader Rob Schenck in which political activists pursued personal relationships with conservative justices and lobbied them.

- [Justice Barrett has participated in cases involving Shell](#), where her father worked for many years. As a Seventh Circuit judge, she had recused herself from Shell cases, as ethics rules require. But those rules do not bind her as a justice.
- [Justice Gorsuch sold property in Colorado but did not report the identity of the buyer](#). The property had sat unsold for nearly two years. The sale closed just days after his confirmation to the Supreme Court. *Politico* discovered that the buyer was a prominent attorney whose firm has since had several cases before the Court.
- A judicial panel [dismissed 83 ethics complaints against Brett Kavanaugh](#) for misconduct during and before his Supreme Court confirmation hearings. Once he was confirmed, he was no longer subject to the ethics rules that had previously bound him.

By its own term, the [Code of Conduct for United States Judges](#) does not apply to Supreme Court justices. In his 2011 year-end report to Congress, Chief Justice Roberts insisted that the Court is not exempt from the code's ethical principles, because the justices "consult" it. He makes the same argument now. In rejecting Judiciary Committee Chair Dick Durbin's invitation to appear before the committee for this hearing, Roberts wrote:

Justices, like other federal judges, consult a wide variety of authorities to address specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, disciplinary decisions, and the historical practice of the Court and the federal judiciary. They may also seek advice from the Court's Legal Office and from their colleagues.

They "may." That means they might, and they might not – the choice is theirs. That's a far cry from being bound to follow the rules that apply to all lower court judges.

And the consequences of noncompliance are quite different. Lower court judges who violate the canons are subject to formal discipline from ethical panels comprised of other federal judges. But there is no similar accountability for Supreme Court justices who behave in unprofessional ways. Short of impeachment by the House and removal by the Senate, there is no mechanism to address even the rankest corruption.

Essentially, the chief justice is saying, "trust us." But that goes against the fundamental idea that there must be checks against potential abuses of governmental power. Indeed, the constitutional separation of powers reflects the American people's recognition that in a democracy, we don't simply trust people with power without checks.

The Supreme Court needs a binding and enforceable code of ethics. There is currently a robust and healthy public discussion, both in and out of Congress, on what that code should look like. But the need for such a code cannot seriously be doubted.

The Court has the ability to adopt a code on its own initiative. Unfortunately, the chief justice's response to Chair Durbin's invitation does not give cause for confidence.

For instance, Chair Durbin invited Roberts “or another Justice whom you designate” to appear before the committee. Roberts’ reply provided reasons that he felt *a chief justice* should not appear before the committee to discuss this issue. But he notably ignored the invitation to the other eight justices. That is not the action of a person who is engaged on this issue in good faith.

If the Court will not act, then Congress must. We do not believe that the Constitution prohibits Congress from imposing reasonable ethics obligations on justices of the United States. Indeed, a Supreme Court unmoored from ethical practices poses a threat to that very Constitution. The current situation is untenable.

Accountability Concerning Justice Thomas

In addition to adoption of an ethics code for the Supreme Court going forward, it is crucial to provide accountability for past ethical misconduct by Justice Thomas. People For and many others have called for Thomas’ [resignation](#) for this serious misconduct, which is considered more “[egregious](#)” than what caused Justice Abe Fortas to resign in the 1960s, but recognize that Thomas is unlikely to do the “[decent and honorable thing](#).” So other methods of providing accountability are necessary.

As discussed below, clear evidence indicates that Thomas has violated binding federal ethics law by failing to report extensive travel, vacation, and other [gifts](#) from billionaire Harlan Crow since 2004, as well as by failing to disclose a 2014 [real estate deal](#) with Crow which produced over \$44,000 and other benefits to Thomas. The Justice Department clearly can and should investigate and pursue civil and criminal penalties.

Justice Thomas Violated Federal Ethics Law by Failing to Report Crow’s Gifts and Real Estate Transaction

Post-Watergate federal ethics law, which applies to federal officials in all three branches, including Supreme Court justices, has long required disclosure of gifts on a form that must be submitted every year. See 5 U.S. Code 13103, 13104. The law defines “gift” as the receipt of money or “any thing of value,” including “overnight lodging.” 5 U.S. Code 13101 (5), (5) (D).

Pro Publica recently [reported](#), however, that Justice Thomas has received very frequent and significant travel and vacation gifts from billionaire Crow without reporting them since 2004. Many of Crow’s gifts were luxurious vacations with him, Thomas, and others. These have included an island-hopping cruise in Indonesia worth around \$500,000, vacations to the all-male Bohemian Grove resort in California, an extended cruise around New Zealand, and frequent vacations to Crow’s Lakeside resort Camp Topridge in upstate New York.

According to Pro Publica, Crow has also gifted Thomas with use of his private jet, sometimes with Crow to or from these vacations, and sometimes for Thomas’ own use to a “destination” he is visiting, without any apparent participation by Crow. For example, Crow gifted the use of his private jet to Thomas for a trip to New Haven valued at around \$70,000.

In a written [response](#) to these revelations, Justice Thomas has not denied the facts, but claimed that he was “advised” by colleagues that he did not need to report these gifts because they were “personal hospitality” from a friend, which did not need to be reported until the issuance of guidelines this year from the Judicial Conference. This claim is wrong for several reasons.

First, the statute is clear on its face that at least some of the largesse from Crow should have been reported. As someone required to comply with the law and as a strict textualist, Thomas should have paid attention to the language of the ethics law. While the Judicial Conference has provided helpful guidance concerning the ethics reporting requirements, it cannot – and did not – change the law itself.

Specifically, the statute itself defines the “personal hospitality” exception as including “food, lodging or entertainment” (not transportation) that is “extended” either “at” a friend’s residence or “on” their “property or facilities.” 5 U.S. Code 13101 (14), 13104(a)(2)(A). It might be arguable that on the yacht trips, Crow “extended” food, beverages and sightseeing while “on” his yacht property. But nothing in the language of the law could possibly cover the private jet travel gifts to Thomas. This includes travel to the yachts and other vacation venues as well as reported examples where Crow gave Thomas personal use of his private jet for other purposes, not connected to any of his junkets. As Dahlia Lithwick and Mark Joseph Stern put it, [“Thomas broke the law, and it isn’t particularly close.”](#)

In addition, Thomas’ own behavior concerning gift disclosure contradicts his explanation. The [Los Angeles Times](#) published a 2004 story relating to Thomas’ past acceptance of a [“wealth of gifts”](#) based on disclosure forms he and other justices filed up to 2004. It reported that Thomas had accepted and disclosed a number of valuable gifts from Crow, including a [1997 trip to and stay](#) at the Bohemian Grove in California. After the 2004 article concerning gifts to him appeared, however, Thomas effectively [stopped disclosing](#) almost all gifts, and never again disclosed trips and stays at the Bohemian Grove or similar largesse from Crow. If the 1997 Bohemian Grove trip and stay were reportable gifts by Thomas, there is no good reason why similar handouts should not have been reported after 2004.

With respect to the real estate transaction, Thomas’ violation appears even more clear. As [Pro Publica](#) has [reported](#), a Crow corporation in 2014 purchased three properties in Savannah, where Thomas grew up, in which Thomas owned a 1/3 share. The cash benefit to Thomas (1/3 of the reported \$133,363 sales price) would thus have been over \$44,000. The federal ethics law requires reporting of any real estate transaction over \$1000 except for those relating to the filer’s personal residence or with spouse or children. See 5 US Code 13104(a)(5). None of those exceptions apply, but Thomas has [never](#) disclosed and reported the 2014 sale.

[The Justice Department Should Investigate and Pursue Appropriate Civil and Criminal Penalties Against Thomas](#)

The federal ethics statute contains specific provisions for enforcing its requirements. [See](#) 5 US Code 13106. With respect to lower court judges, among other things, possible violations are reported to the Judicial Council for the Circuit of the judge. 5 US Code 13106 (b). The Council or the Judicial Conference can undertake a number of [enforcement actions](#) against lower court

judges, including public or private censure or reprimand, ordering that no further cases be assigned to the judge on a temporary basis, and requesting that the judge resign.

None of this judicial discipline applies to Supreme Court justices like Thomas. But the general federal ethics law also contains other enforcement mechanisms that apply to all those subject to it, including Supreme Court justices. Although never used against any justice to our knowledge, the ethics law's enforcement methods include investigation by the Justice Department and possible civil and criminal penalties.

Specifically, 5 U.S. Code 13106(a)(1) authorizes the Attorney General to investigate and "bring a civil action" in court "against any individual who knowingly and willfully" either falsifies a report listing gifts and other information or "fails to file or report" any such information. The law prescribes a civil penalty of "up to \$50,000." The statute is unclear as to whether the penalty can be assessed multiple times for Thomas' multiple failures to report.

In addition, 5 U.S. Code 13106 (a)(2)(B)(ii) provides that such conduct is also a criminal offense for which an individual "shall be fined under Title 18." The amount of such a fine would be up to \$5000. 18 U.S. Code 3571(b). Again, the statute is unclear as to whether the fine can be assessed multiple times for multiple failures to report.

A DOJ investigation of Justice Thomas for violating binding federal ethics law and failing to report extensive gifts from and a property sale to billionaire Crow, coupled with appropriate civil and criminal penalties, can provide an important measure of accountability and justice for Thomas' blatant misconduct. People For and a number of individuals and organizations have called for such an investigation, including members of this Committee. More than 11,000 people have signed our petition urging such action by DOJ.

We also welcome and support action by this Committee to investigate and report on Thomas' misconduct. This hearing is an important start to that effort. We urge the Committee to continue its work on general Supreme Court ethics reform, as well as on the issue of accountability for the ethical misconduct of Justice Thomas.



April 16, 2023

Brian M. Boynton
Principal Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Via email to civil.feedback@usdoj.gov and United States mail

Dear Principal Deputy Assistant Attorney General Boynton:

On behalf of the Project On Government Oversight (POGO), we write to urge the Department of Justice to investigate the recently reported decades-long failure of Supreme Court Justice Clarence Thomas to disclose his receipt of gifts potentially worth millions of dollars.

Unless the investigation reveals that the facts differ radically from what has been reported, the Department of Justice should thereafter initiate an action against Justice Thomas under the Ethics in Government Act seeking a civil monetary penalty for each knowing and willful omission from his financial disclosure reports. The penalty is \$71,316 per omission.¹

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. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

For over two decades, Justice Thomas accepted gifts of luxury vacation packages potentially worth millions of dollars from a billionaire political activist he met only after his appointment to the Supreme Court. He completed a strange real estate transaction with this same benefactor in 2014.

The Ethics in Government Act required Justice Thomas to disclose these gifts and the transaction. He did not. His public explanation suggested that he thought the gifts qualified for a disclosure exception. They did not. Contrary to what Justice Thomas and his defenders would have you believe, limitations on use of that exception, which render it inapplicable to the gifts he received, are not new.

¹ Judicial Conference of the United States, *Guide to Judiciary Policy*, vol. 2, pt. D, § 620.10(a), <https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf>; 5 C.F.R. § 2634.701, Table 1 (2023), <https://www.law.cornell.edu/cfr/text/5/2634.701>.

Circumstances surrounding the concealment of these reportable items strongly support the conclusion that these violations of the law were knowing and willful. The law was clear. All four federal supervising ethics offices had issued helpful explanations of the law. Three other justices showed they knew to disclose these types of gifts. Justice Thomas himself has disclosed such gifts in the past. He stopped after they prompted embarrassing media coverage in 2004. Furthermore, this is not the first time Justice Thomas has been caught failing to disclose information he should have: In 2011, he had to amend 20 years' worth of disclosures because he had not reported his wife's employment information.

The Department of Justice has a duty to hold Justice Thomas accountable for this flagrant and repeated law breaking, unless an investigation reveals that the facts radically differ from what has been reported. The department has enforced the disclosure law against other federal officials. There is no reason to treat Justice Thomas differently.

The Gifts, the Sale, and the Reporting Requirements

Justice Thomas accepted gifts of luxury vacations potentially worth millions of dollars that, under the Ethics in Government Act, should have been disclosed in his annual financial disclosure forms.

According to a shocking April 6, 2023, report by *ProPublica*, Justice Thomas and his wife, Virginia Thomas, have accepted luxury vacation packages from a man named Harlan Crow “virtually every year” for over 20 years.² According to *ProPublica*, these vacations included flights on private luxury jets, all-inclusive stays at exclusive resorts, guided tours, cruises, food, drink, clothing, and, based on the news outlet's reference to an interview of a scuba diving instructor, possibly various excursions.

In a rare public statement on April 7, 2023, Justice Thomas confirmed that the couple had accepted vacations from Mr. Crow and that those gifts were not reported in his annual financial disclosure report.³

The cost of the gifts is breathtaking. As *ProPublica* wrote, the “extent and frequency of Crow's apparent gifts to Thomas have no known precedent in the modern history of the U.S. Supreme Court.”⁴ According to the news outlet, to charter a plane and yacht comparable to those used on just one of the trips could have cost Justice Thomas more than \$500,000 if he had spent his own money. Extrapolating from this reporting, the full tally of Mr. Crow's gifts may well have been worth millions of dollars.

The gifts Justice Thomas accepted from Mr. Crow in most of the last 20 years vastly exceed the reporting thresholds. Applying the legal requirements, Justice Thomas clearly had a duty to disclose these gifts.⁵ But despite having accepted Mr. Crow's extraordinary gifts, Justice Thomas failed to disclose them in his annual financial disclosure reports. Instead, he affirmatively declared

² Joshua Kaplan, Justin Elliott, and Alex Mierjeski, “Clarence Thomas and the Billionaire,” *ProPublica*, April 6, 2023, <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

³ “Statement from Justice Clarence Thomas,” April 7, 2023, <https://www.documentcloud.org/documents/23745868-clarence-thomas-statement-4-7-23>.

⁴ Kaplan, Elliott, and Mierjeski, “Clarence Thomas and the Billionaire” [see note 2].

⁵ 5 U.S.C. § 13104 (2023), <https://www.law.cornell.edu/uscode/text/5/13104>.

that he had no gifts to report in his disclosure for calendar year 2019, which was the year of a trip to Indonesia that *ProPublica* described.⁶

After Justice Thomas issued his April 7 statement, *ProPublica* published another startling revelation: Justice Thomas also did not disclose a 2014 sale of real estate to a company owned by Mr. Crow.⁷ This sale, as reported, resembles a gift more than it does an arms-length transaction. The sale included a house and two vacant lots in which Justice Thomas had inherited a one-third interest. Though Justice Thomas had previously valued that one-third interest as worth \$15,000 or less, Mr. Crow reportedly purchased the properties for \$133,363.⁸ According to *ProPublica*, Justice Thomas' mother lived in the house before the sale and continued living there after the sale, and it is unclear whether she paid rent. Workers undertook tens of thousands of dollars' worth of renovations soon after the sale.⁹ As of the date of this letter, Justice Thomas has not issued a public statement explaining his nondisclosure of the unusual transaction.

The public financial disclosure provisions of the Ethics In Government Act of 1978 apply to Supreme Court justices, just as they do to officials in all three branches of government.¹⁰ Congress enacted that law to “preserve and promote the accountability and integrity of public officials.”¹¹ One section of the law requires covered officials to file annual financial disclosure reports on May 15 each year; another establishes detailed requirements for the contents of those reports.¹² The requirements include an obligation to disclose real estate transactions exceeding \$1,000 and gifts worth more than \$166 from any source whose gifts during the calendar year were worth more than \$415 in the aggregate.¹³

⁶ Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2019 [filer: Clarence Thomas]), at 3 (section V), May 14, 2020, <https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/3200/clarence-thomas-disclosure.2019.pdf>; Kaplan, Elliott, and Mierjeski, “Clarence Thomas and the Billionaire” [see note 2].

⁷ Justin Elliott, Joshua Kaplan, and Alex Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn’t Disclose the Deal.” *ProPublica*, April 13, 2023, <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

⁸ Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2014 [filer: Clarence Thomas]), at 5 (section VII, line 1), May 15, 2015, <https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/3200/clarence-thomas-disclosure.2014.pdf>; Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7].

⁹ Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7].

¹⁰ 5 U.S.C. §§ 13101(11), 13103(f)(11) (2023), <https://www.law.cornell.edu/uscode/text/5/part-IV/chapter-131/subchapter-1>.

¹¹ Senate Committee on Governmental Affairs, *Report of the Committee on Governmental Affairs United States Senate to Accompany S. 553*, S. Rep. No. 95-170, 1 (1977), <https://www.ogp.gov/pdffiles1/Digitization/63796NCJRS.pdf>.

¹² 5 U.S.C. § 13103 (2023) (Persons required to file), <https://www.law.cornell.edu/uscode/text/5/13103>; 5 U.S.C. § 13104 (2023) (Contents of report) [see note 5].

¹³ 5 U.S.C. § 13104(a)(2) (2023) [see note 5]. Note that these reporting thresholds applied to gifts received in 2020 through 2022, and the aggregate threshold calculation excludes gifts worth \$166 or less. See Office of Government Ethics, “Increased Gifts and Travel Reimbursements Reporting Thresholds for Financial Disclosure Reports and Nonsponsor Widely Attended Gatherings Gift Exception Ceiling,” LA-20-04, June 25, 2020, [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/43795F3BAF869CE3852585BB005DA325/\\$FILE/LA-20-04%20Increased%20Gifts%20and%20Travel%20Reimbursements%20Thresholds%20and%20WAG%20Exception%20Ceiling.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/43795F3BAF869CE3852585BB005DA325/$FILE/LA-20-04%20Increased%20Gifts%20and%20Travel%20Reimbursements%20Thresholds%20and%20WAG%20Exception%20Ceiling.pdf?open). For gifts received in 2018 and 2019, the aggregate threshold was \$390, and the individual gift threshold was \$156. See Office of Government Ethics, “Increased Gifts and Travel Reimbursements Reporting Threshold for Financial Disclosure Reports and Nonsponsor Widely Attended Gatherings Gift Exception Ceiling,” Legal Advisory LA-17-07, June 8, 2017, [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/EA746350CB2EE66F852585BA005BEC40/\\$FILE/LA-17-](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/EA746350CB2EE66F852585BA005BEC40/$FILE/LA-17-)

While the Ethics in Government Act provides a disclosure exception for “personal hospitality,” the gifts that Justice Thomas accepted do not qualify for that exception.

A statutory exception to the disclosure requirement does exempt gifts of “personal hospitality.” Crucially, however, the statutory language limits this exception to gifts of “food, lodging, or entertainment.”¹⁴ The language further limits this exception to gifts provided by an “individual.”¹⁵ The Ethics in Government Act reiterates this latter limitation in a separate statutory definition of “personal hospitality,” which states that gifts from “a corporation or organization” are ineligible for the exception.¹⁶ As we explain in this section, Justice Thomas has always been required to disclose any such gifts under the Ethics in Government Act, which applies to Supreme Court justices.

Several gifts described in *ProPublica*’s story failed to qualify for the “personal hospitality” exception because they did not constitute “food, lodging, or entertainment.”¹⁷ Gifts of clothing, excursions, and possibly activities reported in the *ProPublica* article were clearly not food, lodging, or entertainment. The flights on Mr. Crow’s personal jet would require reporting for the same reason, as illustrated by a 2011 federal appeals court decision upholding the conviction of a federal official who, among other things, failed to disclose gifts of chartered jet flights in his annual financial disclosure report.¹⁸ We view the yacht voyages as ineligible for the exception as well, since they were not food, lodging, or entertainment.

Even if one does not share this view, however, there is an additional reason Mr. Crow’s gifts of private flights and yacht trips would not qualify for the personal hospitality exception: They were provided by a corporation or other entity.¹⁹ Mr. Crow’s private jet was owned by HRZNAR LLC, according to Federal Aviation Administration data.²⁰ Mr. Crow’s 161-foot superyacht, the

[07%20Increased%20Gifts%20Threshold%20and%20Nonsponsor%20WAG%20Gift%20Exception%20Ceiling.pdf?open](#).

¹⁴ 5 U.S.C. § 13104(a)(2)(A) (2023) [see note 5].

¹⁵ 5 U.S.C. § 13104(a)(2)(A) (2023) [see note 5].

¹⁶ 5 U.S.C. § 13101(14) (2023), <https://www.law.cornell.edu/uscode/text/5/13101>.

¹⁷ 5 U.S.C. § 13104(a)(2)(A) (2023) [see note 5].

¹⁸ See *U.S. v. Safavian*, 649 F.3d 688 (D.C. Cir. 2011) (upholding conviction based on the defendant’s failure to disclose a trip that included chartered jet flights in his annual financial disclosure report and rejecting the defendant’s argument that new evidence regarding the cost of the private plane charter should have been ruled inadmissible), [https://www.oge.gov/Web/OGE.nsf/Resources/U.S.+v.+Safavian,+649+F.3d+688+\(D.C.+Cir.+2011\)](https://www.oge.gov/Web/OGE.nsf/Resources/U.S.+v.+Safavian,+649+F.3d+688+(D.C.+Cir.+2011)); *U.S. v. Safavian*, 644 F. Supp. 2d 1 (D.D.C. 2009), <https://casetext.com/case/us-v-safavian-9>, *United States v. David Hossein Safavian*, Case 1:05-cr-00370-PLF, Document 167 (“Superseding Indictment”), sections 18, 21, 30-37, October 8, 2008, <https://www.govexec.com/pdfs/101008rb1.pdf>.

¹⁹ 5 U.S.C. § 13101(14) (2023) [see note 16].

²⁰ POGO identified the plane from the tail number in a *ProPublica* video. This tail number corresponds to an entry for a Bombardier Global 5000 jet in the FAA plane ownership registry, which identifies the owner as HRZNAR LLC. That company is owned by HRZN Global, Inc. Harlan Crow is CEO, director, and president of HRZN Global, Inc. In addition, public flight data from ADS-B Exchange, a repository of data broadcast from planes, shows flights that match the June 2019 trips described in *ProPublica*’s reporting. See *ProPublica* (@propublica), “Supreme Court Justice Clarence Thomas has been treated to luxury vacations by a GOP megadonor for years,” TikTok, April 7, 2023, <https://t.co/Mev3o83FCq>; Federal Aviation Administration, FAA Registry (serial no. 9298), issued January 30, 2009, <https://www.documentcloud.org/documents/23746099-faa-registration-n900gx-aircraft-inquiry>; Texas Comptroller of Public Accounts, Form 05-102, Texas Franchise Tax Public Report, November 9, 2021, <https://www.documentcloud.org/documents/23746098-hrznar-llc-tx-pif>; Texas Comptroller of Public Accounts, Form

Michaela Rose, is likewise registered to a business entity, Rochelle Marine Ltd.²¹ That means the flights and yacht cruises, including those *ProPublica* valued at \$500,000, were ineligible for the “personal hospitality” exception. *ProPublica*’s report also explained that at least one of the resorts at which Justice Thomas and his spouse stayed, Topridge, is owned by a company, and other facilities where they stayed may have similarly been owned by legal entities. That makes the stays at Topridge ineligible for the exception; stays at other locations may be ineligible for the same reason.

The law is clear: Justice Thomas had a duty to disclose these gifts. He did not do so.

Justice Thomas’ sale of real estate to Harlan Crow should have been reported as a transaction, and evidence appears to indicate that other aspects of that transaction should have been reported as gifts.

There is no doubt that the undisclosed 2014 real estate transaction was reportable, and (as of the date of this letter) Justice Thomas has not publicly denied that it was. The Ethics in Government Act requires disclosure of any transaction exceeding \$1,000 of real estate. The only exclusion from the disclosure requirement applies to the sale of a filer’s personal residence.²² The house and the two vacant lots in which Justice Thomas had a one-third investment interest were not his personal residence.²³ The sale, therefore, was unquestionably reportable.

05-102, Texas Franchise Tax Public Report, November 9, 2021, <https://www.documentcloud.org/documents/23746096-hrzn-global-inc-owner-of-hrznar-llc-harlan-crow>; Kaplan, Elliott, and Mierjeski, “Clarence Thomas and the Billionaire” [see note 2]; ADS-B Exchange (data for June 30, 2019, flight to Washington, DC), <https://globe.adsbexchange.com/?icao=ac6fd8&lat=35.526&lon=-88.140&zoom=5.8&showTrace=2019-06-29>, (data for June 30, 2019, flight to Hawaii and then toward Indonesia), <https://globe.adsbexchange.com/?icao=ac6fd8&lat=25.935&lon=-142.926&zoom=4.0&showTrace=2019-06-30>, and (data for June 30, 2019, flight to Hawaii and then toward Indonesia), <https://globe.adsbexchange.com/?icao=ac6fd8&lat=23.097&lon=-152.871&zoom=4.8&showTrace=2019-07-10>.

²¹ Documents retrieved from the public EQUASIS database by POGO’s Jason Paladino show that the *Michaela Rose* is registered to Rochelle Marine Ltd in Guernsey, an island jurisdiction known for minimal regulation and taxation, belonging to a British Crown dependency. A corporate registry in Guernsey identifies M. Kevin Bryant as a manager of Rochelle Marine Ltd. Mr. Bryant is the general counsel of Crow Holdings. See Electronic Quality Shipping Information System (EQUASIS), “Michaela Rose” (International Maritime Organization number 1002756), <https://www.documentcloud.org/documents/23746100-rochelle-marine-llc-equasis-shipinfo>; Guernsey Registry, Annual Validation – 2019 (submission no. 863422), November 2, 2020, <https://www.documentcloud.org/documents/23746101-corp-doc-rochelle-marine>; Crow Holdings, “Kevin Bryant” <https://www.crowholdings.com/team/kevin-bryant/> (last viewed April 15, 2023). Revealing that the yacht is used for commercial purposes, another document, filed with the U.S. Patent and Trademark Office, shows that in 2021 a trademark for “Michaela Rose,” registered for “yacht charter services for entertainment,” was filed by “Rochelle Charter, Inc.,” a Delaware corporation that lists the same address as Crow Holdings headquarters in Dallas. U.S. Patent and Trademark Office, “Michaela Rose” (registration no. 6399377, serial no. 88648013), April 13, 2021, <https://www.documentcloud.org/documents/23779217-trademark-registration-michaela-rose>. In addition to a disqualification based on corporate ownership, use of the yacht for commercial purposes would further disqualify any reliance on the personal hospitality exception for “food, lodging, or entertainment.” See Administrative Office of the U.S. Courts, *Filing Instructions for Judicial Officers and Employees*, (March 2023), 25, https://www.uscourts.gov/sites/default/files/financial_disclosure_filing_instructions.pdf.

²² 5 U.S.C. § 13104(a)(5)(A) (2023) [see note 5].

²³ Justice Thomas was one of three owners, and the house was his mother’s residence. Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7].

Evidence reported by *ProPublica* appears to indicate that other aspects of the arrangement were also reportable — as gifts. *ProPublica* reported that Savannah Historic Developments, LLC, owned by Mr. Crow, agreed to pay \$133,000 for the properties in October 2014.²⁴ Inasmuch as Justice Thomas had a one-third share in the properties, the value of his interest was \$43,333. In his financial disclosure covering calendar year 2014, filed seven months after the sale, he reported that his interest was worth “\$15,000 or less.”²⁵ This discrepancy between the reported value and what Mr. Crow’s company actually paid is irreconcilable. If Justice Thomas believed he had sold his interest for far more than it was worth, he should have disclosed the difference as a gift from Mr. Crow’s company.

The evidence appears to indicate that Justice Thomas received additional gifts for the benefit of his mother. His mother continued living in the house after the sale. *ProPublica* indicates that Justice Thomas and Mr. Crow declined to say whether Justice Thomas’ mother paid rent after the sale. Whether she paid rent or not, she benefited from renovations to her home undertaken after the sale.²⁶ Any objective observer would conclude under the circumstances that the renovations benefiting Justice Thomas’ mother and the possibly free housing were gifts given to her by Mr. Crow for Justice Thomas. Justice Thomas showed he understood the legal concept of constructive receipt in the context of financial disclosure when he previously disclosed a gift of \$5,000 cash for his grandnephew’s education from someone who entered his life after he joined the Supreme Court.²⁷

Thus, the sale was reportable as a transaction, and the improvements to the home and any free rent were reportable as gifts, unless Mr. Crow’s company was paid rent and reimbursed for the improvements. But Justice Thomas did not report these items.

The circumstances also support the conclusion that Justice Thomas’ failure to disclose the sale of his real estate interest was knowing and willful.

Circumstances support the conclusion that Justice Thomas’ violation of the disclosure law with respect to the sale was also knowing and willful. The strongest evidence of his intent is an affirmative measure he took that hid his 2014 sale of property to Mr. Crow. In May 2016, Justice Thomas filed a financial disclosure report, again disclosing his one-third ownership of real estate in Liberty City, Georgia.²⁸ But, according to *ProPublica*, he had not owned the real estate

²⁴ Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7].

²⁵ Form AO-10 (Financial Disclosure Report for Calendar Year 2014 [filer: Clarence Thomas]), at 5 (section VII, line 1) [see note 8].

²⁶ Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7].

²⁷ Richard Serrano and David Savage, “Justice Thomas Reports Wealth of Gifts,” *Los Angeles Times*, December 31, 2004, <https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html>. Regulations of the Office of Government Ethics offer another example of the relevance of the concept of constructive receipt to government ethics. See 5 C.F.R. § 2635.807(a)(2)(iv) (2023) (“Receive means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use”), <https://www.law.cornell.edu/cfr/text/5/2635.807>.

²⁸ Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2015 [filer: Clarence Thomas]), May 15, 2016, <https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/3200/clarence-thomas-disclosure.2015.pdf>.

properties since 2014.²⁹ That means his one-third interest in the properties should not have appeared in the report, which covered calendar year 2015.

The Ethics in Government Act requires disclosure of “The identity and category of value of any interest in property held during the preceding calendar year in a trade or business, or for investment or the production of income, which has a fair market value which exceeds \$1,000 as of the close of the preceding calendar year.”³⁰ This “interest in property” was no longer “held” by Justice Thomas in 2015. He had no interest in the properties that he could say “exceeds \$1,000” in 2015. Yet he included that interest in his 2016 report.³¹

On his disclosure form, Justice Thomas added a note reading “The asset ... does not receive any rental income for this property.”³² He had to know that readers would construe the note not as indicating that he sold the properties but only that the stream of income had ended, possibly because a renter had vacated the house.³³ No reasonable reader would conclude from this note that he had sold the properties.

Had he disclosed the sale of the real estate properties, Justice Thomas would have had to publicly disclose the purchaser’s identity.³⁴ His decision to continue reporting his interest in the properties after having sold them, and his obfuscating note, strongly support a conclusion that the failure to report the sale to Mr. Crow’s company was knowing and willful. One can reasonably infer that the failure to disclose the associated gifts also was knowing and willful.

Knowing and Willful Failure to Report Information Required to be Reported Under the Ethics in Government Act

The law is clear. And it is supported by guidance and additional examples provided by all four supervising ethics offices.

The Ethics in Government Act has designated four “supervising ethics office[s]” for the federal government: the Judicial Conference, the Select Committee on Ethics of the Senate, the Committee on Ethics of the House of Representatives, and the Office of Government Ethics.³⁵

²⁹ Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7].

³⁰ 5 U.S.C. § 13104(a)(3) (2023) [see note 5].

³¹ Form AO-10 (Financial Disclosure Report for Calendar Year 2015 [filer: Clarence Thomas]), at 4 (section VII, line 1) [see note 28].

³² Form AO-10 (Financial Disclosure Report for Calendar Year 2015 [filer: Clarence Thomas]), at 6 (section VIII) [see note 28].

³³ In 2013, for example, Justice Thomas reported that he had received between \$1,001 and \$2,500 in rent from the property. See Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2012 [filer: Clarence Thomas]), at 5 (section VII, line 2), May 15, 2013.

<https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/3200/clarence-thomas-disclosure.2012.pdf>.

³⁴ The form Justice Thomas filed in 2015 for calendar year 2014 included a field in which filers disclose the “purchaser” of any reported financial interest for private transactions of this sort. See Form AO-10 (Financial Disclosure Report for Calendar Year 2014 [filer: Clarence Thomas]), at 5 (section VII, line 1, column 5) [see note 8].

³⁵ 5 U.S.C. § 13101(18) (2023) [see note 16].

The Supreme Court has taken the position that the Judicial Conference, the judicial branch's supervising ethics office, has no authority over the Supreme Court.³⁶ Whether or not it has authority over justices, the Judicial Conference has correctly emphasized that the Ethics in Government Act of 1978 applies to the justices.³⁷ The Ethics in Government Act covers "judicial officers," and the statutory definition of that term begins with the following language: "The term 'judicial officer' means the Chief Justice of the United States, the Associate Justices of the Supreme Court ... [and additional officers]."³⁸ What matters, therefore, are the requirements of that law.

In addition to the plain language of the law, guidance on the scope of the personal hospitality exception is available from several sources. All four supervising ethics offices have developed a wealth of expertise in applying the Ethics in Government Act to over 25,000 public financial disclosure filers, and they routinely issue informational materials for public financial disclosure filers.³⁹ Inasmuch as two chief justices have contended that the Judicial Conference lacks authority over the justices, there is no reason they could not also turn to publications of the other supervising ethics offices for helpful explanations of the law.

These explanations make it clear that the gifts of private plane and yacht travel that Justice Thomas accepted do not qualify for the "personal hospitality" exception to the disclosure law.

The Senate Select Committee on Ethics explained in its 2003 ethics manual that the personal hospitality exception was unavailable for gifts of transportation accepted in lieu of commercial travel.⁴⁰ The 2008 *House Ethics Manual* offered the following example: "Member N obtains written permission from the Committee to accept from a personal friend \$500 in travel expenses to attend their college reunion. Member N must report the gift."⁴¹ Discussing a related gift rule

³⁶ In 1991, Chief Justice William Rehnquist signed a "Resolution" declaring that regulations of the Judicial Conference pertaining to financial disclosure "do not apply to officers and employees of the Supreme Court." In the document, he pledged they would comply with the "substance" of the regulations, but that compliance was voluntary. William H. Rehnquist, "Resolution," January 18, 1991, https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991_Resolution.pdf. Two decades later, Chief Justice John Roberts reiterated that the Judicial Conference has no authority over the justices: "Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body." John Roberts, *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), 4, <https://www.supremecourt.gov/publicinfo/year-end/2011/year-endreport.pdf>. Consistent with the Supreme Court's position as to the Judicial Conference's lack of authority, the landing page on the website of the Administrative Conference of the U.S. Courts states that its financial disclosure regulations apply only to "judges" and "judicial employees," with no reference to justices. Administrative Office of the U.S. Courts, "Judiciary Financial Disclosure Regulations," accessed April 15, 2023, <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/financial-disclosure-report-regulations>.

³⁷ *Guide to Judiciary Policy*, vol. 2D, ch. 1, §§ 140, 170 [see note 1]; 5 U.S.C. § 13013(f)(10) (2003) [see note 12].

³⁸ The coverage of judicial officers is established in a section of the Ethics in Government Act establishing who must file disclosure under that law. 5 U.S.C. § 13101(10) (2023) [see note 16]; 5 U.S.C. § 13103(f)(11) (2023) [see note 12].

³⁹ Office of Government Ethics, *Fiscal Year 2009 Performance Accountability Report* (November 2009), i, [https://www.oge.gov/web/OGEnsf/0/D8874CAFC5F3D5D9852585B6005A12CC/\\$FILE/c8baa1b845ec48b88ca8989395047a62.pdf](https://www.oge.gov/web/OGEnsf/0/D8874CAFC5F3D5D9852585B6005A12CC/$FILE/c8baa1b845ec48b88ca8989395047a62.pdf).

⁴⁰ Senate Select Committee on Ethics, United States Senate, *Senate Ethics Manual*, S.Pub-108-1 (2003), 37, <https://www.ethics.senate.gov/downloads/pdf/manual.pdf>.

⁴¹ Committee on Standards of Official Conduct, *House Ethics Manual* (2008), 259,

https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

exception, the 2008 manual emphasized that personal hospitality does not include private plane travel for a vacation.⁴² The executive branch's 2004 financial disclosure manual likewise explained that the exception was inapplicable to transportation.⁴³

Both the disclosure law itself and the guidance of the supervising ethics offices further reaffirm that the personal hospitality exception is inapplicable to gifts from corporations and other legal entities. A March 2000 version of the executive branch financial disclosure form included a hypothetical that concluded, "A gift of this nature — hospitality at a lodge owned by a corporation rather than an individual — would not qualify as a 'personal hospitality' exclusion."⁴⁴ The 2008 House ethics manual included discussion of a related gift rule permitting receipt of personal hospitality: "Property or facilities owned by a corporation or a firm may not be used under this provision, even if the corporation or firm is wholly owned by an individual."⁴⁵ In a similar discussion of a related gift rule, the 2003 Senate ethics manual included two examples illustrating that the concept of "personal hospitality" did not include a stay at a property owned by a corporation or at a resort used for commercial purposes.⁴⁶

These materials can serve as good sources of information for the justices because the financial disclosure law covering the justices also covers other officials in all three branches of government.⁴⁷ Written for a large workforce, these materials have the added advantage of being drafted by authors who can be more objective about the filing requirements than one can be with respect to the one's own disclosures or, as in the case of the Supreme Court, the disclosures of a small number of colleagues.

The claim by some commentators that these gifts were not reportable before 2023 is false.

Some commentators have incorrectly suggested that the gifts Justice Thomas accepted were not reportable before a "rule change" in 2023.⁴⁸ This commentary is wrong to the point of being sloppy.

There was no applicable rule to change because the reporting requirement does not come from a rule — it comes from the Ethics in Government Act, which has always required disclosure of the types of gifts Justice Thomas accepted. These mistaken arguments refer to financial disclosure guidance issued by the Judicial Conference in March 2023.⁴⁹

⁴² *House Ethics Manual* (2008), 62-63, Example 50 [see note 41].

⁴³ Office of Government Ethics, *Public Financial Disclosure: A Reviewer's Reference* (November 2004), 3-22, https://permanent.fdlp.gov/lps57672/rf278guide_04.pdf.

⁴⁴ Office of Government Ethics, Standard Form 278, OMB No. 3209 – 0001, (2000), 9, https://web.archive.org/web/20040725102118/http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/forms/fr278_00.pdf.

⁴⁵ *House Ethics Manual* (2008), 62 [see note 41].

⁴⁶ *Senate Ethics Manual*, examples 18 and 20 [see note 40].

⁴⁷ See 5 U.S.C. § 13103(f) (2023) [see note 12].

⁴⁸ See Gail Collins and Brett Stephens, "Clarence Thomas Decided Against the Staycation," *New York Times*, April 10, 2023, <https://www.nytimes.com/2023/04/10/opinion/clarence-thomas-harlan-crow-donald-trump.html>; Nina Totenberg, "Justice Thomas explains why he didn't report trips paid for by billionaire," *NPR*, April 7, 2023, <https://www.npr.org/2023/04/07/1168649656/justice-thomas-trips>; Abbie VanSickle, "Justice Thomas Says He Was Advised Lavish Gifts Did Not Need to Be Reported," *New York Times*, April 7, 2023, <https://www.nytimes.com/2023/04/07/us/politics/clarence-thomas-supreme-court-travel.html>.

⁴⁹ *Filing Instructions for Judicial Officers and Employees*, 25 [see note 21].

But the Supreme Court has said the Judicial Conference has no authority over the nine justices.⁵⁰ Any rules or guidance issued by the Judicial Conference — while useful guidance for justices seeking to comport themselves ethically — are no more binding on the justices than are the rules and guidance of the Senate Select Committee on Ethics, the House Ethics Committee, or the Office of Government Ethics.

The notion that the judiciary substantively changed its regulations in March 2023 is also misguided. Limitations on the “personal hospitality” exception applied to the justices long before 2023. The Judicial Conference issued a new version of its financial disclosure instructions in March 2023, in part to expand the explanation of the exceptions that were contained in earlier versions of the instructions.⁵¹

The Judicial Conference explained in 2023 that personal hospitality excludes “gifts extended at property or facilities owned by an entity, rather than by an individual or an individual’s family, even if the entity is owned wholly or in part by an individual or an individual’s family” and “gifts extended at a commercial property, e.g., a resort or restaurant, or at a property that is regularly rented out to others for a business purpose.”⁵²

In a recent letter to a senator, the Administrative Office of the U.S. Courts characterized the change as a clarification.⁵³ The new guidance merely expanded the discussion by adding specific examples of gifts that do not qualify for the personal hospitality exception. Though this level of detail in the Judicial Conference’s explanation of the law was new in 2023, the disclosure exception was unavailable for corporate gifts long before then. The 2018 version of the Judicial Conference’s instructions (the earliest version we could find) stated the exception plainly: “Hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or his family.”⁵⁴ That language tracks the limiting language in the disclosure law applicable to the justices.⁵⁵

The Judicial Conference itself has taken the position that these types of gifts were reportable prior to 2023. In 2008, the Judicial Conference recommended that the House of Representatives consider impeaching United States District Judge G. Thomas Porteous. Though not the primary focus of its referral, the Judicial Conference cited, as one of several bases for its recommendation, Judge Porteous’s failure to disclose gifts he had received.⁵⁶ Other allegations against Judge

⁵⁰ Roberts, *2011 Year-End Report*, 4 [see note 36].

⁵¹ *Filing Instructions for Judicial Officers and Employees*, 25 [see note 21]. See Kaplan, Elliott, and Mierjeski, “Clarence Thomas and the Billionaire” [see note 2].

⁵² *Filing Instructions for Judicial Officers and Employees*, 25 [see note 21].

⁵³ Roslynn R. Mauskopf, director, Administrative Office of the U.S. Courts, to Sheldon Whitehouse, senator, about actions taken by the Judicial Conference to clarify its regulations on “personal hospitality,” March 23, 2023, [https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20\(Final\).pdf](https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20(Final).pdf).

⁵⁴ *Guide to Judiciary Policy*, vol. 2, pt. D, § 330.30 [see note 1].

⁵⁵ 5 U.S.C. § 13104(a)(2)(A) (2023) [see note 5].

⁵⁶ The Judicial Conference wrote that, “Judge Porteous repeatedly committed perjury by signing false financial disclosure forms under oath in violation of 18 U.S.C. § 1621. This perjury concealed the cash and things of value that he solicited and received from lawyers appearing in litigation before him.” See letter from James C. Duff, secretary,

Porteous were even more serious. Nonetheless, drafters of the House report pertaining to the impeachment likewise considered his nondisclosure of gifts worth mentioning: “Judge Porteous did not disclose the 2000, 2001, or 2003 Diamond hunting trips on his Financial Disclosure Reports, nor did he disclose his 2002 Rowan hunting trip.”⁵⁷ The Senate later convicted and removed Judge Porteous, though for reasons that were broader than solely these nondisclosures.⁵⁸

The House of Representatives also demonstrated that these gifts were reportable when it took action against one of its own members who was covered by the same disclosure law applicable to Supreme Court justices. In 2014, the House Ethics Committee issued a report sanctioning Representative Don Young for improperly relying on a “personal hospitality” exception to a gift prohibition for gifts that included hunting trips, including free flights on private planes and stays at private resorts.⁵⁹ The House ethics manual cites the 2014 House report on Representative Young as illustrating limits of the disclosure exception for personal hospitality.⁶⁰ The 2014 House report faulted him for “failing to report certain gifts on his Financial Disclosure Statements.”⁶¹ Among other things, the report discussed gifts associated with “hunting trips,” which included “air travel provided by personal friends,” and concluded that “Representative Young had not reported any of the proper or improper gifts or trips that should have been reported on his Financial Disclosure Statements for the relevant periods.”⁶² Emphasizing that these items were reportable, the committee found that “Representative Young’s conduct violated the Ethics in Government Act,” citing the gift reporting threshold in a footnote.⁶³ A contemporaneous report in a news outlet from Representative Young’s home state shows that the value of these gifts was a fraction of the value of the gifts Justice Thomas accepted: “The House Ethics Committee said Friday that Rep. Don Young violated Congressional rules by improperly accepting nearly \$60,000 in hunting trips, rides on private planes and other gifts and failing to report them on his financial disclosure forms.”⁶⁴

As discussed above, the publications of other supervising ethics offices, which were equally available to Justice Thomas, have long provided explanations of the personal hospitality exception’s limitations.⁶⁵ But what matters most is that the plain language of the Ethics in

Judicial Conference of the United States, to Nancy Pelosi, speaker of the House, about the impeachment of United States District Judge G. Thomas Porteous, June 18, 2008,

https://web.archive.org/web/20110522081532/http://blog.nola.com/news_impact/2008/06/porteous.pdf.

⁵⁷ U.S. House of Representatives, *Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana*, H.R. Rep. 111-427, at 136 (2010),

<https://www.congress.gov/111/crpt/hrpt427/CRPT-111hrpt427.pdf>.

⁵⁸ Jennifer Steinhauer, “Senate, for Just the 8th Time, Votes to Oust a Federal Judge,” *New York Times*, December 8, 2010, <https://www.nytimes.com/2010/12/09/us/politics/09judge.html>.

⁵⁹ Liz Ruskin, “House Ethics Committee says Rep. Don Young accepted improper gifts,” *KTOO Public Media*, June 20, 2014, <https://www.ktoo.org/2014/06/20/house-ethics-committee-says-rep-don-young-accepted-improper-gifts/>; House Committee on Ethics, *In the Matter of Allegations Relating to Representative Don Young*, H.R. Rep. No. 113-487, at 3, 8, 21, 67 (2014), <https://www.congress.gov/113/crpt/hrpt487/CRPT-113hrpt487.pdf>.

⁶⁰ Ethics Committee, U.S. House of Representatives, *House Ethics Manual*, Gifts-43 – Gifts-44, n. 51 (2022 print), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/2022/House-Ethics-Manual-2022-Print.pdf>.

⁶¹ *In the Matter of Allegations Relating to Representative Don Young*, 1 [see note 59].

⁶² *In the Matter of Allegations Relating to Representative Don Young*, 3 [see note 59].

⁶³ *In the Matter of Allegations Relating to Representative Don Young*, 3 [see note 59].

⁶⁴ Richard Mauer, “Alaska Rep. Don Young rebuked by ethics committee,” *Anchorage Daily News*, June 20, 2014, updated September 28, 2016, <https://www.adn.com/alaska-news/article/alaska-rep-don-young-rebuked-ethics-committee/2014/06/20/>.

⁶⁵ See *House Ethics Manual* (2008), 62-63, 259 [see note 41]; *Public Financial Disclosure: A Reviewer’s Reference*, 3-22 [see note 43]; *Senate Ethics Manual*, 37 [see note 40]; Office of Government Ethics, Standard Form 278, OMB

Government Act, which applies to the justices, is clear as to these limitations on the personal hospitality exception — and the statute unquestionably applies to the nine justices.⁶⁶ These gifts have always been reportable under the Ethics in Government Act, and commentators would do well to stop spreading the false narrative that these gifts were not reportable before 2023.

For all of these reasons, there can be no doubt that the disclosure law has long excluded from the coverage of its personal hospitality exception gifts of transportation and gifts from corporate entities. Such items must be disclosed. This guidance material has long been available to Justice Thomas and all other public filers in the three branches of government who are subject to the disclosure requirements of the Ethics in Government Act.

Other Supreme Court justices have shown they understood these types of gifts needed to be disclosed — and Justice Thomas has disclosed similar gifts in the past.

The justices demonstrated their understanding that these types of gifts were reportable before 2023. Justice Antonin Scalia wrote in 2004 about the requirement to disclose gifts of transportation. In a memorandum articulating his decision not to recuse from a case involving the vice president, Justice Scalia insisted that rides gifted to him on government aircraft did not need to be reported. He made this argument in part by noting that government aircraft were exempted from the Ethics in Government Act's required "annual reporting of transportation provided or reimbursed."⁶⁷

Justices Ruth Bader Ginsburg and Stephen Breyer both reported gifts of transportation in their disclosures.⁶⁸ In a disclosure for calendar year 2018, Justice Ginsburg disclosed a "tourist trip" to Israel funded by billionaire Morris Kahn. In 2013, Justice Breyer disclosed the gift of a trip to Nantucket on the private plane of hedge fund magnate David Rubenstein.⁶⁹

Past disclosures appear to confirm that Justice Thomas also understood the need to report gifts of private plane travel and other items. In financial disclosures for 2000 and 2002, Justice Thomas

No. 3209 – 0001, at 9 (2000).

https://web.archive.org/web/20040725102118/http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/forms/fr278_00.pdf.

⁶⁶ As explained earlier, the law itself limits the exception to gifts of "food, lodging, or entertainment" provided by an "individual," with a definition section reiterating that gifts from a "corporation or organization" are ineligible for the exception. 5 U.S.C. §§ 13101(14), 13104(a)(2)(A) (2023), <https://www.law.cornell.edu/uscode/text/5/part-IV/chapter-131/subchapter-1>.

⁶⁷ Memorandum of Justice Scalia, *Richard B. Cheney, Vice President of the United States, et al. v. United States District Court for the District of Columbia et al.*, 542 U.S. 367 (2004), <https://www.law.cornell.edu/supct/html/03-475.ZA.html>.

⁶⁸ Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2018 [filer: Ruth Bader Ginsburg]), at 3 (section IV, line 9), May 15, 2019, <https://fixthecourt.com/wp-content/uploads/2019/06/Ginsburg-2018.pdf>; Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2013 [filer: Stephen Breyer]), at 3 (section IV, line 5), April 29, 2014, <https://www.documentcloud.org/documents/1202525-breyer-stephen-2013>.

⁶⁹ "Thanks to Private Jet Ride, Justice Breyer Makes Appearance at Private Wedding Public," *Fix the Court*, December 2, 2014, <https://fixthecourt.com/2014/12/thanks-private-jet-ride-justice-breyer-makes-appearance-private-wedding-public/>; Form AO-10 (Financial Disclosure Report for Calendar Year 2013 [filer: Stephen Breyer]), at 3 (section IV, line 5) [see note 68].

disclosed free passage on private planes on five occasions.⁷⁰ A 2002 news report indicates that Justice Thomas previously disclosed Mr. Crow's gift of a Bible once owned by Fredrick Douglass and a free plane ride.⁷¹

A subsequent change in Justice Thomas' behavior makes a strong case that his conduct was knowing and willful. In 2004, the *Los Angeles Times* published a story about gifts Justice Thomas had disclosed.⁷² In a new piece on April 7, 2023, staff writer David Savage recalled Justice Thomas' reaction to this embarrassing media coverage: "Thomas refused to comment on the article, but it had an impact: Thomas appears to have continued accepting free trips from his wealthy friend. But he stopped disclosing them."⁷³ This timing suggests Justice Thomas stopped disclosing gifts because he wanted to avoid further negative media coverage of his receipt of gifts.

Whatever the nature of Justice Thomas' association with Mr. Crow may have been, Justice Thomas had ample incentive to conceal his acceptance of gifts of vacations that had the practical effect of giving a political activist extraordinary access to him. Mr. Crow is well known as a political funder, a man who *Insider* describes as a "major backer of libertarian think tanks and political action committees."⁷⁴ For years, his interests have intersected with the work of both Justice Thomas and Ms. Thomas. In 2011, for example, he gave \$500,000 to a group that, according to *ProPublica*, paid Ms. Thomas a salary of \$120,000.⁷⁵

In a 2011 article about Justice Thomas and Mr. Crow, the *New York Times* noted that at that time, Mr. Crow had not been personally involved as a party in a case before the Supreme Court litigation, but his companies had been "involved in federal court cases, including four that went to the appellate level. And he has served on the boards of two conservative organizations involved in filing supporting briefs in cases before the Supreme Court."⁷⁶ Mr. Crow has also served on the board of the Supreme Court Historical Society, which a recent headline characterized as a "back door" through which wealthy board members could gain access to justices.⁷⁷ It would be hard, too,

⁷⁰ Private flights included transportation for speeches at the Oklahoma Council of Public Affairs, the Greater Omaha Chamber of Commerce, and St. Benedict's Preparatory School. See Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2000 [filer: Clarence Thomas]), at 2 (section IV, lines 1, 2 and 7), May 15, 2001, <https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/3200/clarence-thomas-disclosure.2000.pdf>; Administrative Conference of the U.S. Courts, Form AO-10 (Financial Disclosure Report for Calendar Year 2002 [filer: Clarence Thomas]), at 2 (section IV, lines 1, 2, 6, 7, and 8), May 15, 2003, <https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/3200/clarence-thomas-disclosure.2002.pdf>.

⁷¹ Tony Mauro, "Retirement Rumors and Pricey Gifts Reach High Court; Are Protesters Next?" *American Lawyer Media*, June 10, 2002, <https://web.archive.org/web/20020804164356/http://www.law.com/jsp/article.jsp?id=1022954292436>.

⁷² Serrano and Savage, "Justice Thomas Reports Wealth of Gifts," [see note 27].

⁷³ David Savage, "Los Angeles Times reported about Justice Thomas' gifts 20 years ago. After that he stopped disclosing them," *Los Angeles Times*, April 7, 2023, <https://www.latimes.com/politics/story/2023-04-06/the-times-reported-about-justice-thomas-gifts-20-years-ago-after-he-just-stopped-disclosing-them>.

⁷⁴ Katherine Long and Jack Newsham, "The Supreme Court's back door," *Business Insider*, January 11, 2023, <https://www.businessinsider.com/supreme-court-nonprofit-anti-abortion-access-1>.

⁷⁵ Kaplan, Elliott, and Mierjeski, "Clarence Thomas and the Billionaire," [see note 2].

⁷⁶ 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>.

⁷⁷ Long and Newsham, "The Supreme Court's back door," [see note 74]; Kenny Holston, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, November 19, 2022, <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>.

to overlook the fact that Justice Thomas and Mr. Crow did not even know each other until after Justice Thomas joined the Supreme Court.⁷⁸

Though Mr. Crow insists he has never sought to influence the justice's rulings, these gifted vacation packages placed Mr. Crow and apparently other activists, including former Federalist Society Vice President Leonard Leo, in the company of Justice Thomas.⁷⁹ (*ProPublica* recently reported that “activist Leonard Leo and his associates are spending millions of dollars to influence some of the Supreme Court’s most consequential recent cases.”⁸⁰ The public, which did not know until April 6, 2023, of the full extent of Justice Thomas’ acceptance of these gifts, has no way of knowing who else was present or what was discussed. It is easy to understand that the disclosure of these gifts is embarrassing to Justice Thomas. Contemporaneous disclosure in compliance with the law would have enabled years of public debate of the propriety of his actions and, likely, media investigations into the nature of communications occurring on these trips.

Justice Thomas’ public response to the reporting does not excuse his failure to disclose the gifts.

A day after *ProPublica* published its bombshell report, Justice Thomas issued a statement to explain his conduct: “Early in my tenure at the Court, I sought guidance from my colleagues and others in the judiciary, and was advised that this sort of personal hospitality from close personal friends, who did not have business before the Court, was not reportable.”⁸¹ This explanation fails to excuse his violations of law, and circumstances support a conclusion that his failure to disclose information that the Ethics in Government Act required him to disclose was knowing and willful. The explanation also appears to be contradicted by Justice Thomas’ earlier disclosures, as well as the disclosures of at least two other justices.

The clarity of the statutory language is, itself, evidence that Justice Thomas’ conduct was knowing and willful. He had no need to ask unnamed “colleagues” and “others in the judiciary” for guidance because the plain language of the law is not ambiguous; to know the exception is to know its limitations. The law states that the exception applies only to gifts provided by “individuals” and only to gifts of “food, lodging, and entertainment.”⁸² A statutory definition of “personal hospitality” reiterates that the exception is inapplicable to any gift from a “corporation or organization.”⁸³ These limitations preclude reliance on the exception for transportation, trips on vessels owned by corporations, or stays at resorts owned by corporations.

Justice Thomas’ claim that he relied on the bad advice of colleagues, presumably justices who are fellow financial disclosure filers, is no defense. The public has no way of knowing whom Justice

⁷⁸ McIntire, “Friendship of Justice and Magnate Puts Focus on Ethics,” [see note 76].

⁷⁹ Kaplan, Elliott, and Mierjeski, “Clarence Thomas and the Billionaire,” [see note 2].

⁸⁰ Andy Kroll, Andrew Perez, and Aditi Ramaswami, “Conservative Activist Poured Millions into Groups Seeking to Influence Supreme Court on Elections and Discrimination,” *ProPublica and the Lever*, December 14, 2022, <https://www.propublica.org/article/leonard-leo-scotus-elections-nonprofits-discrimination>.

⁸¹ Lawrence Hurley, “Clarence Thomas says trips paid for by billionaire were ‘personal hospitality,’ not business,” *NBC News*, April 7, 2023, <https://www.nbcnews.com/politics/supreme-court/justice-clarence-thomas-explains-failure-report-trips-paid-conservativ-rcna78696>.

⁸² 5 U.S.C. § 13104(a)(2)(A) (2023) [see note 5].

⁸³ 5 U.S.C. § 13101(14) (2023) [see note 16]; Justice Thomas is also acutely aware of the distinct legal personhood of corporate entities, which means he knew enough to ask if gifted items were corporate property. See *Citizens United v. FEC*, 558 U.S. 310 (2010), <https://www.law.cornell.edu/supct/pdf/08-205P.ZX1>.

Thomas consulted, how he may have characterized the facts, or whether he raised the issue in a way that signaled he was seeking thoughtful legal guidance requiring research. In a criminal case against David Safavian, a former top executive branch official, the court upheld Mr. Safavian's conviction on a count alleging that he had misled his agency's ethics official by omitting a relevant fact when he sought ethics advice.⁸⁴ Justice Thomas also had no right to rely on bad advice that ran contrary to the plain language of the statute.

Rather than consulting fellow financial disclosure filers, who may face similar temptation to minimize disclosure requirements, Justice Thomas could have consulted professional government ethics officials. The appropriate source for any filer seeking objective guidance would have been the experienced staff of any of the four supervising ethics offices. Their published guidance was readily available to Justice Thomas. As discussed earlier, that guidance explained that these types of gifts were reportable.

It bears noting that the statement Justice Thomas issued on April 7, 2023, in response to the *ProPublica* reporting was not the first time he pleaded ignorance of the rules. In 2011, he amended 20 years of financial disclosure reports from which he had omitted his spouse's employment information.⁸⁵ Justice Thomas asserted that the information was "inadvertently omitted due to a misunderstanding of the filing instructions."⁸⁶ The discovery that he had failed to comply with the law for so long put him on notice of the need to seek objective advice. In that context, his latest claim of ignorance of the rules is implausible.

Even if the plain language of the law, the guidance of four supervising ethics offices, the examples of his fellow justices, and his own past compliance with the law were not enough to inform Justice Thomas, common sense should have counseled him not to conceal his acceptance of gifts potentially worth millions of dollars. For context, the Senate ethics manual recounts words of Senator Paul Douglas from a 1951 Senate report that sounds like they were written for Justice Thomas himself:

What is it proper to offer to public officials, and what is it proper for them to receive? A cigar, a box of candy, a modest lunch . . . Is any one of these improper? It is difficult to believe so. They are usually a courteous gesture, an expression of good will, or a simple convenience, symbolic rather than intrinsically significant. Normally they are not taken seriously by the giver nor do they mean very much to the receiver. At the point at which they do begin to mean something, however, do they not become improper? Even small gratuities can be significant if they are repeated and come to be expected. . . . Expensive gifts, lavish or frequent entertainment, paying hotel or travel costs, valuable services, inside advice as to investments, discounts and allowances in purchasing are in an entirely different category.⁸⁷

⁸⁴ *U.S. v. Safavian*, 649 F.3d 688 (DC Cir. 2011) [See note 18].

⁸⁵ Ariane de Vogue and Devin Dwyer, "Justice Clarence Thomas Amends 20 Years of Disclosure Forms with Wife's Employers," *ABC News*, January 24, 2011, https://abcnews.go.com/Politics/Supreme_Court/justice-clarence-thomas-amends-financial-disclosure-reports-virginia/story?id=12750650.

⁸⁶ Clarence Thomas, associate justice of the Supreme Court, to the Committee on Financial Disclosure, about calendar year 2009 financial disclosure report, January 21, 2011, https://www.politico.com/pdf/PPM153_clarence.pdf.

⁸⁷ *Senate Ethics Manual*, 21 [see note 40].

News stories about Justice Thomas' failures to comply with the Government in Ethics Act could not come at a worse time for the Supreme Court. With popular outrage over the Supreme Court's lack of an ethics code reaching an all-time high, the court is facing a crisis of public confidence. A resolution by the American Bar Association has proclaimed that the lack of an ethics code for the justices erodes trust in the Supreme Court, and "if the legitimacy of the Court is diminished, the legitimacy of all our courts and our entire judicial system is imperiled."⁸⁸ A recent news report cited the "drumbeat of criticism aimed at the court for perceived ethical lapses and failures to deal with them."⁸⁹ Bob Bauer, a former co-chair of the Presidential Commission on the Supreme Court of the United States, has warned that "[w]ithout the formal adoption of ethical standards, the Court may begin to seem more like a political body than a guardian of the rule of law."⁹⁰

Justice Thomas' recent refusal to recuse from at least one case affecting his spouse's interests heightened concerns and may well have violated the recusal law applicable to Supreme Court justices and all other federal judges.⁹¹ But this latest discovery of his pattern of concealing gifts and the sale of real estate, which in the aggregate are worth many times his annual salary, deals a crushing blow to whatever remains of public trust in the ethics of the high court's members.

The Role of the Department of Justice

The Department of Justice is responsible for enforcing the disclosure requirements. There are criminal penalties for knowing and willful omissions or false statements, but those provisions are not the subject of this letter.⁹² The law also authorizes the attorney general to file an action for civil monetary penalties against any person who knowingly and willfully fails to "report any information that such person is required to report" under the Ethics in Government Act.⁹³ The penalty per omission was originally \$50,000, but it has been adjusted periodically to account for inflation.⁹⁴ That penalty is \$71,316 per violation (\$50,000 for any violation occurring on or before

⁸⁸ Lydia Wheeler, "American Bar Association Urges Ethics Code for US Supreme Court," *Bloomberg Law*, February 7, 2023, <https://news.bloomberglaw.com/us-law-week/american-bar-association-urges-ethics-code-for-us-supreme-court>.

⁸⁹ Nina Totenberg, "Outside groups take a first stab at a Supreme Court ethics code," *NPR*, March 9, 2023, <https://www.npr.org/2023/03/09/1162324746/outside-groups-take-a-first-stab-at-a-supreme-court-ethics-codex>.

⁹⁰ Bob Bauer, "The Supreme Court Needs an Ethics Code," *Atlantic*, May 18, 2022,

<https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-roe-leak-ethics-code/629884/>.

⁹¹ Douglas Koith, Alicia Bannon, and Amanda Powers, "Ginni Thomas Texts Show Why the Supreme Court Needs a Code of Conduct," Brennan Center, April 13, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/ginni-thomas-texts-show-why-supreme-court-needs-code-conduct>.

⁹² 5 U.S.C. § 13106(a)(2)(A)(ii) (2023), <https://www.law.cornell.edu/uscode/text/5/13106>; 18 U.S.C. § 1001 (2023), <https://www.law.cornell.edu/uscode/text/18/1001>.

⁹³ 5 U.S.C. § 13106(a)(2)(B)(i) [see note 92].

⁹⁴ 5 U.S.C. § 13104(a)(2)(A) (2023) [see note 5]; Bipartisan Budget Act of 2015, Pub. L. 114-74, 129 Stat. 584, 599, § 701 (2015), <https://www.govinfo.gov/content/pkg/PLAW-114publ74/pdf/PLAW-114publ74.pdf>; Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890 (1990), <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg890.pdf#page=1>.

November 2, 2015).⁹⁵ A five-year statute of limitations may apply to a civil action for civil monetary penalties.⁹⁶

The Justice Department's Civil Division could not have better circumstances laid before it to support a case for civil monetary penalties than those of a high official who discloses lavish gifts from a billionaire, suffers the humiliation of a news story about the disclosure, and then stops disclosing his continuing receipt of lavish gifts from that same billionaire. To shirk the responsibility of holding that official accountable would be an act of cowardice or bias in favor of the top tier of the political class.

The Department of Justice has demonstrated a willingness to enforce the financial disclosure law against federal officials, and there is no reason to treat Justice Thomas differently.

The Department of Justice has held other federal officials accountable for disclosure violations. These officials were subject to the same financial disclosure law that applies to Supreme Court justices. There would be no justification for holding Justice Thomas to a lower ethical standard than the rest of the federal government.

When the Department of Justice prosecuted a former high-ranking official of the General Services Administration, David Safavian, the indictment included a count predicated partly on his failure to disclose gifts of free flights on a chartered plane from lobbyist Jack Abramoff.⁹⁷ A federal appeals court for the DC Circuit upheld Mr. Safavian's conviction on that count.⁹⁸ Notably, the department's Criminal Division prosecuted Mr. Safavian under a false statements statute that required proof beyond a reasonable doubt. In a civil monetary penalties case against Justice Thomas, the Civil Division would have to meet only the burden of proving his guilt by a preponderance of the evidence.

The Department of Justice also prosecuted a Department of the Interior employee, Donald Howard, for failing to disclose gifts that included hunting trips. Unlike Justice Thomas, who failed to disclose what may have amounted to millions of dollars' worth of gifts, Mr. Howard failed to disclose gifts valued in the aggregate at \$6,678. Mr. Howard ultimately pleaded guilty to just "one count of making false statements on a financial disclosure form."⁹⁹

In 2021, the Department of Justice entered into a non-prosecution agreement with former Transportation Secretary Ray LaHood. Much like Justice Thomas, Secretary LaHood failed to disclose the largesse of a billionaire benefactor: News reports said that "Former Transportation Secretary Ray LaHood admitted to federal prosecutors that he intentionally excluded from his

⁹⁵ See *Guide to Judiciary Policy*, vol. 2, pt. D, § 620.10(a) (explaining that the penalty is "adjusted by the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended") [see note 1]; 5 C.F.R. § 2634.701, Table 1 (2023) (listing the adjusted penalty amount).

<https://www.law.cornell.edu/cfr/text/5/2634.701>.

⁹⁶ 28 U.S.C. § 2462 (2023), <https://www.law.cornell.edu/uscode/text/28/2462>.

⁹⁷ *United States v. David Hossein Safavian*, Document 167 ("Superseding Indictment"), 18, 21, 30-37 [see note 18].

⁹⁸ *U.S. v. Safavian*, 649 F.3d 688 [see note 18].

⁹⁹ Office of Government Ethics, "2009 Conflict of Interest Prosecution Survey," Legal Advisory DO-10-017 (November 9, 2010), 11-12.

[https://www.oge.gov/Web/OGEnsf/News+Releases/C4F8CD0D11A7BE3A852585BA005BECA6/\\$FILE/b3268d9bc79c44119ba12300ff80b36a1.pdf](https://www.oge.gov/Web/OGEnsf/News+Releases/C4F8CD0D11A7BE3A852585BA005BECA6/$FILE/b3268d9bc79c44119ba12300ff80b36a1.pdf).

financial disclosures a \$50,000 loan he obtained while in office from a billionaire foreign donor.”¹⁰⁰ Under the agreement, former Secretary LaHood agreed to repay the loan and pay a fine.

The Department of Justice has also taken enforcement action against numerous other rank-and-file federal employees for disclosure violations.¹⁰¹ In 2021, the department’s Criminal Division prosecuted a Walter Reed Medical Center employee in part for failing to disclose travel provided by an outside source; an Army sergeant major in part for failing to disclose gifts and travel reimbursements; a senior project manager at the Tennessee Valley Authority for failing to disclose debts and income; and a National Aeronautics and Space Administration employee in part for failing to disclose payments he received as “either compensation, other assets and income, or a gift.”¹⁰²

From 2015 through 2020, the Criminal Division prosecuted employees of the Bureau of Prisons, the Centers for Disease Control, the Department of the Army, the Department of Energy, the Department of Health and Human Services, the Department of State, the Department of Veterans Affairs, the Drug Enforcement Agency, the Environmental Protection Agency, the Federal Aviation Administration, the Fish and Wildlife Service, the Indian Health Service, the Securities and Exchange Commission, and the U.S. Postal Service for omissions or false statements in their financial disclosures.¹⁰³ The department’s Civil Division has also pursued civil monetary penalty cases against numerous federal officials — including civil actions against a member of Congress and a former presidential aide.¹⁰⁴

¹⁰⁰ Josh Gerstein, “Ray LaHood admitted hiding \$50K loan from foreign billionaire,” *Politico*, March 31, 2021, updated April 1, 2021, <https://www.politico.com/news/2021/03/31/lahood-loan-foreign-billionaire-478813>.

¹⁰¹ In addition to lower-level officials, the Justice Department has also prosecuted a member of Congress on grounds that included omissions from financial disclosure reports. See Department of Justice, “Former U.S. Congresswoman Corrine Brown and Two Others Sentenced to Prison for Fraud Scheme Involving Bogus Non-Profit Scholarship,” December 4, 2017, <https://www.justice.gov/opa/pr/former-us-congresswoman-corrine-brown-and-two-others-sentenced-prison-fraud-scheme-involving>.

¹⁰² Office of Government Ethics, “2021 Conflict of Interest Prosecution Survey,” Legal Advisory LA-22-06, July 22, 2022, [https://www.oge.gov/Web/OGEnsf/0/69A64B4389390D0C85258887005CF4C0/\\$FILE/LA-22-06.pdf](https://www.oge.gov/Web/OGEnsf/0/69A64B4389390D0C85258887005CF4C0/$FILE/LA-22-06.pdf).

¹⁰³ Office of Government Ethics, “2020 Conflict of Interest Prosecution Survey,” Legal Advisory LA-21-08, August 2, 2021, [https://www.oge.gov/Web/OGEnsf/0/1B505A4C17E7289685258726004F63B7/\\$FILE/LA-21-08.pdf?open](https://www.oge.gov/Web/OGEnsf/0/1B505A4C17E7289685258726004F63B7/$FILE/LA-21-08.pdf?open);

Office of Government Ethics, “2019 Conflict of Interest Prosecution Survey,” Legal Advisory LA-20-05, July 20, 2020, [https://www.oge.gov/Web/OGEnsf/0/B9EB1903D588C162852585BB005DA326/\\$FILE/LA-20-05.pdf](https://www.oge.gov/Web/OGEnsf/0/B9EB1903D588C162852585BB005DA326/$FILE/LA-20-05.pdf);

Office of Government Ethics, “2018 Conflict of Interest Prosecution Survey,” Legal Advisory LA-19-05, July 24, 2019, [https://www.oge.gov/Web/OGEnsf/0/B915D6C37138F1D9852585BA005BEC19/\\$FILE/LA-19-05%202018%20Conflict%20of%20Interest%20Prosecution%20Survey.pdf](https://www.oge.gov/Web/OGEnsf/0/B915D6C37138F1D9852585BA005BEC19/$FILE/LA-19-05%202018%20Conflict%20of%20Interest%20Prosecution%20Survey.pdf);

Office of Government Ethics, “2017 Conflict of Interest Prosecution Survey,” Legal Advisory LA-18-09, July 17, 2018, [https://www.oge.gov/Web/OGEnsf/0/3AFEB8DA55B30DD0852585BA005BEC30/\\$FILE/LA-18-09%202017%20Conflict%20of%20Interest%20Prosecution%20Survey.pdf](https://www.oge.gov/Web/OGEnsf/0/3AFEB8DA55B30DD0852585BA005BEC30/$FILE/LA-18-09%202017%20Conflict%20of%20Interest%20Prosecution%20Survey.pdf);

Office of Government Ethics, “2016 Conflict of Interest Prosecution Survey,” Legal Advisory LA-17-08, August 7, 2017, [https://www.oge.gov/Web/OGEnsf/0/E15D086E908893B1852585BA005BEC3F/\\$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf](https://www.oge.gov/Web/OGEnsf/0/E15D086E908893B1852585BA005BEC3F/$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf);

Office of Government Ethics, “2015 Conflict of Interest Prosecution Survey,” Legal Advisory LA-16-05, July 27, 2016, [https://www.oge.gov/web/oge.nsf/0/39588D5F785A0A0A852585BA005BEC59/\\$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207_26_16.pdf](https://www.oge.gov/web/oge.nsf/0/39588D5F785A0A0A852585BA005BEC59/$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207_26_16.pdf).

¹⁰⁴ See *United States v. Lairy*, 19-2488 (RC) (D.D.C. July 17, 2020), <https://casetext.com/case/united-states-v-lairy>; *United States v. Dozier*, 1:14-cv-01778 (D.D.C. Complaint 2014), <https://www.courtlistener.com/docket/4213128/1/united-states-v-dozier/>; *United States v. Harrison*, 1:06-cv-02107 (D.D.C. Complaint 2006), <https://www.courtlistener.com/docket/4206160/1/united-states-v-harrison/>; *United States v.*

Conclusion

If recent news reporting is correct, Justice Thomas has violated the disclosure requirements of the Ethics in Government Act in nearly all of the last 20 years. Until April 6, the public had no knowledge of the sheer volume of vacation packages that Justice Thomas chose to omit from his annual disclosures. Nor did it have knowledge of his sale of real estate to Mr. Crow. These are not the only problems with his disclosures.¹⁰⁵ Circumstances support a conclusion that these omissions were knowing and willful.

Justice Thomas had ample incentive to hide these gifts from the public. Whatever motive Mr. Crow may have had for gifting these vacations, they had the effect of placing Mr. Crow and other political activists in the company of a Supreme Court justice and placing their conversations with him out of view of the public. Even if, as Mr. Crow insists, the conversations were innocuous, the appearance of a Supreme Court justice luxuriating in the splendor provided by a billionaire political activist whom he only met after joining the Supreme Court is destructive of public trust in the court and embarrassing to Justice Thomas. His receipt of gifts potentially worth millions is a shocking revelation.

A justice of the Supreme Court could not have failed to understand that these extraordinary gifts were reportable. To know that the “personal hospitality” exception exists is to know its limitations, for they are spelled out in the plain text and reinforced by a statutory definition. Justice Thomas’ colleagues, Justices Breyer, Ginsburg, and Scalia, demonstrated an understanding that these types of gifts were reportable. And the *Los Angeles Times* has observed that Justice Thomas used to report these types of gifts — that is, until they became the subject of embarrassing media scrutiny.

The nondisclosure of the sale of property partly owned by Justice Thomas is equally suspicious. Abundant motivation for Justice Thomas to hide this sale can be found in the strange story of his mother’s continued residence in that home after the sale, Mr. Crow’s magnanimous renovation of the property while she remained there, and questions about the sale price.

Gant, 268 F. Supp. 2d 29 (D.D.C. 2003), <https://www.casemine.com/judgement/us/5914793badd7b049343f3df6>; *United States v. Chaney*, No. 04-cv-2219, Mem. Op. (D.D.C. Feb. 28, 2005), <https://www.documentcloud.org/documents/23780092-chaney-v-united-states>. The Office of Government Ethics has also highlighted some civil monetary penalty settlements negotiated by the Civil Division. See Office of Government Ethics, “2015 Conflict of Interest Prosecution Survey,” LA-16-05, July 27, 2016, 11-12, [https://www.oge.gov/web/oge/nslf/0/39588D5F785A0A0A852585BA005BEC59/\\$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207_26_16.pdf](https://www.oge.gov/web/oge/nslf/0/39588D5F785A0A0A852585BA005BEC59/$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207_26_16.pdf); Office of Government Ethics, “2014 Conflict of Interest Prosecution Survey,” LA-15-10, July 27, 2015, [https://www.oge.gov/Web/OGES/nslf/0/1E0C2218B69EDD3C852585BA005BEC62/\\$FILE/LA-15-10.pdf](https://www.oge.gov/Web/OGES/nslf/0/1E0C2218B69EDD3C852585BA005BEC62/$FILE/LA-15-10.pdf); *United States v. Rose*, 28 F.3d 181 (D.D.C. 1994), <https://casetext.com/case/us-v-rose-35>; Josh Gerstein, “Judge imposes \$61K penalty on Omarosa for failing to file financial disclosure,” *Politico*, March 15, 2022, <https://www.politico.com/news/2022/03/15/judge-imposes-61k-penalty-omarosa-financial-disclosures-00017539>.

¹⁰⁵ Since *ProPublica* broke the news of Justice Thomas’ undisclosed vacations on April 6, 2023, additional stories about Justice Thomas’ failures to disclose have made news, including the revelation of his real estate sale and — as recently as the date of this letter — a new report of problems with Justice Thomas’ income reporting. Kaplan, Elliott, and Mierjeski, “Clarence Thomas and the Billionaire,” [see note 2]; Elliott, Kaplan, and Mierjeski, “Billionaire Harlan Crow Bought Property from Clarence Thomas” [see note 7]; Shawn Boburg and Emma Brown, “Clarence Thomas has for years claimed income from a defunct real estate firm,” *Washington Post*, April 16, 2023, <https://www.washingtonpost.com/investigations/2023/04/16/clarence-thomas-ginger-financial-disclosure/>.

Basic common sense should have counseled Justice Thomas on the need for scrupulous attention to disclosure requirements when one of the highest officials in the land is accepting what may have amounted to millions of dollars in gifts or selling the home in which his mother resided to the same benefactor. For further guidance, he could have turned to the publications of the federal government's supervising ethics offices, which addressed limitations on the "personal hospitality" exception.

The nondisclosure of these gifts and the sale was no mere oversight of bureaucratic protocol: Financial disclosure serves a crucial function in our system of governance. As another Supreme Court justice, Louis Brandeis, famously wrote: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."¹⁰⁶

Justice Thomas has betrayed a fundamental duty of high office: the duty of transparency.

This disgraceful lawbreaking is precisely the sort of thing Congress has charged the attorney general with responsibility for addressing. It would be an absolute dereliction of duty if the Department of Justice were to fail to investigate these omissions. And, unless the reporting is incorrect, it would be a dangerous declaration of impunity for high officials if the department failed to seek civil monetary penalties for these flagrant and repeated violations of the Ethics in Government Act.

Sincerely,



Walter M. Shaub, Jr.
Senior Ethics Fellow



Sarah Turberville
Director, The Constitution Project at POGO

¹⁰⁶ Louis Brandeis, *Other Peoples' Money and How the Bankers Use It*, (New York: The McClure Publications, 1913), 92.

The Supreme Court Integrity Project**The Supreme Court Integrity Project****Statement for the Record
Before****The U.S. Senate Committee on the Judiciary
Hearing on Supreme Court Ethics Reform
May 2, 2023**

The Supreme Court Integrity Project (SCIP)¹ urges the Committee on the Judiciary to help restore public trust in the Supreme Court by proposing appropriate legislation requiring the Court to create and adopt a binding, transparent, and enforceable ethics code. Faith in the impartiality of the Court and in the integrity of its members is a fundamental tenet of our justice system. But recent allegations of ethical impropriety have compromised public trust in the Court, eroded the Court's reputation, undermined the integrity of the judiciary, and endangered the rule of law.

While we recognize that some may portray this issue as a partisan concern, allegations of unethical conduct or potential conflicts of interest have for decades been leveled against Justices appointed both by Democratic and by Republican presidents. The Court itself has been unwilling or unable to adopt a clear, transparent, and enforceable set of standards for appropriate behavior. Recently, ethics reform has become increasingly urgent as the drumbeat of allegations of misconduct—ranging from sitting on cases despite apparent conflicts of interest and omitting critical information from financial disclosure forms to accepting lavish gifts and hospitality from partisan organizations and wealthy individuals—has dragged confidence in the Court even lower. Indeed, polls reveal that Americans' confidence in the integrity of the Supreme Court is at an all-time low.

Despite calls for the Court to investigate and address allegations of unethical conduct, no meaningful action to create an ethics code has materialized. Accordingly, the time has come for Congress to act—by passing legislation requiring the Court to create and submit to Congress an ethics code and proposed enforcement mechanism. In our constitutional system of checks and balances, each branch has a legitimate role to play in assuring the proper functioning of the other branches, so that the public may retain full confidence in each of them.

As the branch empowered to enact legislation that regulates the appropriate behavior of government officers and employees, Congress already has established standards of conduct for members of the judicial branch and the executive branch as well as for members of Congress and congressional employees. While Congress has power to prescribe such standards even for the Supreme Court, we recognize that there is value in allowing the Court some discretion and flexibility in regulating the conduct of its members. Accordingly, we do not call upon Congress at this point to formulate specific rules and mechanisms. Instead, we urge the Committee to develop legislation that encourages the Court to exercise its own, parallel authority over its affairs. Such legislation need only require the Court to act promptly and definitively, through a process of notice and comment similar to the process followed for adopting other judicial rules, in order to articulate

¹ SCIP is a group of lawyers, former government officials, and advocates working toward a common goal of increasing public confidence in the Supreme Court.

clear and binding standards for the Justices and a mechanism for addressing potential complaints in a transparent way.

We would be pleased to work with the Committee and its staff and other interested parties in developing such legislation.

Doing nothing should no longer be an option.

Respectfully submitted.

The Supreme Court Integrity Project

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April 30, 2023

The Honorable Richard J. Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for inviting me to submit a statement to the Senate Judiciary Committee hearing on May 2. I am pleased to accept your invitation and ask that my statement be entered into the record.

I will confine this statement to the general principles that I believe should guide Congress in addressing what some view as a crisis in legitimacy affecting the ability of the U.S. Supreme Court to perform its vital role in our system of government under law. I leave to others the question of whether that crisis is sufficiently grave to call for particular legislative measures, although I would be less than candid were I not to confess that I regard legislation to impose ethical norms in a binding way on the Justices as eminently sensible.

Put simply, I see such legislation as a necessary though probably not sufficient response to the current situation. Indeed, even if the Court were not beset by growing doubts about the extrajudicial behavior of its Members as highlighted by recent media reports, it would seem to me to be entirely prudent for Congress to enact norms in the form of rules binding on the Justices if only as a prophylactic measure, to prevent the development of circumstances casting the Court under an ever-darker shadow unhelpful to the esteem required for it to perform its function as a branch of government lacking both the sword and the purse and thus dependent on public respect for its integrity if the judgments it renders are to be followed.

First and foremost, whatever one's views of the conduct of particular Justices, I think all should agree that it is particularly important that the Supreme Court and its Justices be beyond suspicion with respect to the external influences on their discharge of their solemn duty to "say what the law is," to quote the classic language of *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Whatever one's position on the increasingly controversial question of just how "supreme" the Court's role ought to be vis-à-vis the other branches of the Federal Government in the ongoing constitutional conversation that charts the path of our republic, that those who populate our highest judicial body should earn and retain respect in the discharge of their vital roles ought to be a given.

Second, I would argue that the especially great power of the U.S. Supreme Court in a system that secures the independence of its members through such devices as life tenure and that enshrines the influence that accompanies the privilege of having the last word on all matters of federal law, whether they reach the Court through the lower federal courts or through the state judicial systems, combine to suggest that the Justices should be bound to rules of behavior *more* rather than *less* strict than those that bind the members of any other judicial tribunal.

The idea that, because the Supreme Court sits atop our legal system and is created by the Constitution itself to perform that function, its members should be *less constrained* than those of lower judicial tribunals has things exactly backwards and upside-down. It is not just an adage popularized by Spider-Man that “with great power comes great responsibility.” That maxim, which embodies wisdom as enduring as it is current, was apparently first uttered in 1817 by William Lamb, a member of Britain’s Parliament, during a debate over the suspension of habeas corpus.

Congress should not be intimidated by the power and prestige of the Justices, whose position of privilege – as they pass final judgment on the most contentious issues of the day from the comfort of the Marble Palace they occupy – ought to be its own reward. As many of us learned only in recent years, the Constitution itself, in Article II, §1, Cl.7, imposes an especially onerous limit on presidential receipt of any domestic “Emolument” over and above the ban in Article I, §9, Cl. 8, on *any* federal officeholder’s receipt of any foreign “present, Emolument, Office, or Title, of any kind whatever.”

Although no constitutional provision similarly imposes exceptional limits on a Supreme Court Justice’s receipt of valuable blandishments from friends foreign or domestic, and especially on the receipt of such potentially influential favors without full public disclosure, it is entirely appropriate for Congress to fill the resulting gap by enacting necessary and proper legislation to ensure that the judges of our apex Court be at least as insulated as are the judges of lower federal courts from potentially tempting favors done for them or their families by those with an interest, direct or indirect, in shaping the trajectory of federal jurisprudence.

One argument in particular should be addressed and refuted head-on: It is the argument that, because *the Constitution itself* in some sense creates the Supreme Court’s position atop the judicial ladder, there are especially grave separation of powers concerns and worries about preserving judicial independence when Congress either investigates, or puts in place a system to investigate, the non-judicial conduct of Supreme Court Justices. That is a plain non sequitur. Whether such investigation is performed with the aid of subpoena power by a Committee of Congress, or by an Inspector General created to enforce rules of ethical behavior, or by the Department of Justice in its role of enforcing legislation requiring ethics in government, there is nothing about the separation of powers or the system of checks and balances that undergirds it to suggest that the Justices of the Supreme Court ought to be especially immune to the very same rules of conduct that apply to the judges of “such inferior Courts as the Congress may from time to time ordain and establish.” Art. III, §1. *All* such judges are creatures of the Constitution, whether congressional legislation is needed in order to “ordain and establish” them pursuant to Art. III or pursuant to Art. I, §8, Cl. 9’s power to “constitute Tribunals inferior to the supreme Court,” or they are created by the text of Art. III itself.

Indeed, although Art. III’s language expressly specifies that the “judicial Power of the United States” be “vested in one supreme Court” along with the so-called “inferior Courts” that Congress might or might not opt to “ordain and establish” under Art. III or “constitute” under Art. I, it is obvious that, without enabling legislation and annual appropriations that Justices regularly testify are indispensable for them to discharge their duties, the Supreme Court itself would be but an unfulfilled idea, akin to what Justice Jackson once famously called “a munificent bequest in a pauper’s will.” *Edwards v.*

California, 314 U.S. 160, 186 (1941). There is nothing at all to the idea that the Supreme Court, notionally born of the Constitutional text unlike the lower federal courts, is somehow more sacrosanct when it comes to the need for, or the propriety of, subjecting the Justices in how they conduct themselves vis-à-vis the world at large to rules of behavior and disclosure at least as strict as those imposed and enforced with respect to their “inferior” counterparts. It does nothing to denigrate the high respect the nation should ideally have for the Justices of the Supreme Court to recall that they are mere mortals, subject to all the temptations and distortions of judgment that beset us all, including the judges of the U.S. district courts and the U.S. Courts of Appeals.

Third, it is beyond doubt that Congress has ample affirmative authority, delegated by the Constitution itself, to enact binding laws governing the non-judicial conduct of Supreme Court Justices just as it has authority to enact such laws governing the non-judicial conduct of lower federal court judges. Even a law like 28 U.S.C. §455, mandating that any “justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,” which some seem not to have noticed applies to Justices no less than to lower court judges, would otherwise be beyond Congress’s authority to enact. And, although that recusal law is not presently accompanied by any civil or criminal penalty even for intentional violations, the constitutional power to enact that mandate carries with it, especially in light of Chief Justice John Marshall’s generous understanding of the Necessary & Proper Clause in *McCulloch v. Maryland*, 17 U.S. 316 (1819), the power to enact laws to “carry[] into execution” that recusal requirement.

So too, the power to require judges to disqualify themselves in circumstances that might lead people “reasonably” to question their impartiality carries with it, under the Necessary & Proper Clause, the power to require judges, in the conduct of their social and economic affairs, to avoid *creating* those potentially compromising circumstances. It would make no sense at all – and the Constitution is, after all, meant to be read as a sensible charter for government – to say that Congress may punish a judge for insisting on participating in a proceeding despite the seeming compromise of independent judgment created by that judge’s prior conduct but may not punish that judge for engaging in such conduct in the first place. The considerable inconveniences caused by mandatory recusal, especially in the highest Court (where no provision exists for another judge to fill the temporarily vacated position), may surely be rendered less likely by preventive legislation. It would be absurd to say that Congress may not attempt to prevent in advance the very thing it is agreed Congress may punish after the fact.

As for the *content* of the ethical code that Congress may properly enact to regulate the non-judicial conduct of Supreme Court Justices, filling in the details is beyond the scope of this submission. Suffice it to say that the primary constraint imposed by the separation of powers is that Congress not interfere with the decision-making process followed by those Justices by taking such steps as directing those Justices, or indeed any Art. III judges, to render a particular decision or to apply a particular rule of decision in the disposition of a specific case. See *United States v. Klein*, 80 U.S. 128, 146-47 (1871), although even that constraint leaves Congress free to lay down the law applicable to an identifiable set of cases then pending in the federal courts. See *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

Fourth, I see no constitutional obstacle to enactment of a fully enforceable federal statute not only creating far greater transparency than the Supreme Court seems to have been willing to impose on itself but also requiring considerably more modest interactions between Justices and those who, whether to curry favor or simply to enjoy the privileges of wealth and position, wine and dine the Justices under conspicuously lavish circumstances unlikely to be enjoyed by most lower court judges or indeed by most individuals whether in public or in private life.

In particular, the remarkable *Statement of Ethics Principles and Practices* signed individually by all nine Justices on April 23, 2023 – the first time that I can recall the nine doing so in such solidarity since the great desegregation opinion in *Cooper v. Aaron*, 358 U.S. 1 (1958) – would make it difficult for any of the Justices at this point to object to an Act of Congress straightforwardly imposing on the Justices “the financial disclosure requirements and limitations on gifts, outside earned income, outside employment, and honoraria” including “among other things, the Justices’ non-governmental income, investments, gifts, and reimbursements from third parties,” that the Justices claim to have imposed on themselves, drawing their model, purportedly, from the ethical rules and regulations imposed by the Judicial Conference on all other Article III judges.

Having said that they have “voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations” ever since 1991, none of the Justices can complain that a skeptical public, through its representatives in Congress, has decided to make those regulations, and preferably even stricter ones modeled on the Ethics in Government Act of 1978, compulsory rather than optional – to insure both the reality and the appearance that impartial justice is being meted out by the highest court in the land and that cases are being decided in accord with the rule of law. And the striking fact that all nine of the sitting Justices signed the statement issued by the Chief Justice this April 23 rebuts any suggestion that Congress’s enactment of a mandatory code of ethical behavior would be a response to any particular ideological wing of the Court. This is not to deny that ideology might play a role in how many members of the public have reacted to the Court’s recent behavior, just as it might play a role in that behavior itself. But the ethics of judicial independence makes no ideological distinctions. Nobody of any sophistication doubts that individual judges, including Supreme Court Justices, do not merely “call balls and strikes” but bring with them to the bench and are influenced by their personal views of law and life. But that is entirely different from molding those views to please particularly influential benefactors, either corruptly or with the best of intentions.

Accordingly, Congress has undoubted constitutional authority under the Necessary & Proper Clause of Art. I, §8, Cl.18, coupled with the vesting of the “judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” Art. III, §1, to enact binding regulations governing the extra-judicial conduct of *all* Art. III courts including the U.S. Supreme Court.

Fifth, the *means* of implementing that authority must respect the Constitution’s organization and division of legislative, judicial, and executive powers. See, e.g., *INS v. Chadha*, 462 U.S. 919, 940-43 (1983) (holding that the constitutionality of a one-House veto of a suspension of deportation was a justiciable rather than a political question). My reservations about the two bills that I understand are on the table before this Committee at present – one, a very brief measure sponsored by Senators King and Murkowski and the other, a rather more elaborate measure sponsored by Senator Whitehouse and Representative Johnson – arise principally from the means those bills would employ to achieve the binding regulations they aim to put in place.

The Supreme Court has repeatedly upheld the constitutionality of the Rules Enabling Act of 1934 as frequently amended: It is the framework statute under which the Court is entrusted with power to propose federal rules of procedure and evidence that become law after a stated time unless rejected by Act of Congress. That statute had initially employed a one-House veto until it was amended in 1988 to conform with the decision in *INS v. Chadha*. As so amended, the statute, 28 U.S.C. §2071, empowers the “Supreme Court and all courts established by Act of Congress [to] prescribe rules for the conduct of their business,” by enabling the Supreme Court, after appropriate public notice and opportunity for comment, to “issue a code of conduct for the justices of the Supreme Court.”

Both the Whitehouse-Johnson bill and the King-Murkowski bill are drafted as proposed amendments to 28 U.S.C. §2071, which might seem innocuous enough. After all, that is the section under which the Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence have been promulgated. But those rules, which prescribe the processes by which federal justice is to be administered by the courts created by Congress, were promulgated within a broadly understood framework and within guidelines implicitly dictated by the purposes of the fair and efficient administration of justice. No similar guidelines constrain what the Supreme Court is delegated the authority to do by the proposed bills. The absence of such guidelines could well disturb the constitutional sensibility of those worried about open-ended delegations of authority lacking in meaningful substantive guidance from Congress and in that respect presenting substantial questions about the limits on Congress's power to delegate its lawmaking powers.

Given that this is a delegation to fashion rules not of judicial proceedings but of the non-judicial conduct of the Justices that would bind those Justices and the Court itself, more troublesome than the unconstrained character of that delegation is what appears to me to be a stark violation of the separation of powers in the form of coopting and indeed commanding the Article III branch to perform a quintessentially legislative task belonging to the Article I branch.

I am not insensitive to the delicacy of the political choices Congress would be required to make in order to decide what limits to impose on how the Justices conduct themselves with respect to accepting favors from individuals and groups with business before the Court or with interests in the outcome of that business and on how transparent Justices must be in the way they lead their lives outside the Supreme Court itself and outside the performance of its judicial tasks. I have no illusions about the willingness of Congress to make those choices and be held accountable for them. But I'm afraid that those are choices that the Constitution simply does not permit Congress to foist on a coordinate branch, much less the Article III Branch of the Federal Government. This is one buck Congress cannot pass.

Just as the principles of what some call the *vertical* separation of powers inherent in federalism and embodied in the Tenth Amendment prevent Congress from commandeering state legislatures to perform quintessential lawmaking tasks, see *New York v. United States*, 505 U.S. 144 (1992); *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), and prevent Congress from commandeering state subdivisions to perform inherently executive tasks like enforcing federal laws, see *Printz v. United States*, 521 U.S. 898 (1997), with the possible exception of imposing "purely ministerial reporting requirements" to ensure transparency and public awareness, see *Printz*, at 935-37 (O'Connor, J., concurring), so too it would seem to follow that the *horizontal* separation of powers inherent in our Constitution's three-branch structure for the Federal Government prevents Congress from invading the province of the independent Third Branch by commandeering Art. III judges and courts to promulgate a federal regime of ethical behavior in their relationship with the world at large.

To be sure, the anticcommandeering doctrine in its application to state-federal relations rests in part on contested views of the founding history peculiar to the transition from a confederation of sovereign states to a Union in which Congress no longer needs to depend upon the actions of state governments to perform and fund its core national functions, see *New York v. United States*, supra, at 163-66, but the more fundamental basis of that doctrine depends not on that history but on considerations of public accountability built into the constitutional design. See *id.*, at 168 ("where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished").

Just as Congress cannot command an Article III court to reopen a final judgment and revise it to Congress's specifications, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and cannot tell

an Article III court how to decide a case then pending before it, see *United States v. Klein*, supra, so too— indeed, a fortiori — Congress cannot command an Article III court to perform a quintessentially lawmaking function like promulgating a code of ethical practices. It might as well pass the buck to SCOTUS to enact a national regulation of firearms that complies with the Second Amendment or a federal campaign finance regulation that meets the requirements of the First Amendment.

It is by no means certain that the Supreme Court would strike down Acts of Congress modeled on the pair of bills now under consideration by this Committee on the basis of an analogue to the currently reigning anticommandeering doctrine. I realize that doing so might strike some Justices as a bridge too far in light of the Court's currently precarious situation vis-à-vis the public. But at minimum one must conclude that a substantial constitutional cloud would overhang any congressional legislation that seeks to escape Congress's direct accountability for the choices of ethical rules to impose on Supreme Court Justices in their extrajudicial roles by employing the device of directing the Court to make those choices and to bind itself to them.

Indeed, even if it were assured that the Court would hesitate to strike down the proposed exercise of an essentially commandeering power, Congress would be under an obligation, given the Oath of every Member to abide by the Constitution, to refrain from going down that constitutionally dubious path when a far more straightforward and constitutionally unquestionable path is open to it – namely, the path of specifying, as it has already done for the lower federal courts, a set of obligations with respect to how the Justices are to conduct themselves in their social and economic lives outside the Marble Palace.

Yours truly,



Laurence H. Tribe

Carl M. Loeb University Professor of Constitutional Law *Emeritus*
Harvard University*

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5 U.S.C. § 13104

(a) Annual and termination reports.--Each report filed pursuant to section 13103(d) and (e) of this title shall include a full and complete statement with respect to the following:

....

(2) Gifts and reimbursements.--

(A) Gifts.--The identity of the source, a brief description, and the value of all gifts aggregating more than the minimal value as established by section 7342(a)(5) of this title, or \$250, whichever is greater, received from any source other than a relative of the reporting individual during the preceding calendar year, **except that any food, lodging, or entertainment received as personal hospitality of an individual need not be reported**, and any gift with a fair market value of \$100 or less, as adjusted at the same time and by the same percentage as the minimal value is adjusted, need not be aggregated for purposes of this subparagraph.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTSHONORABLE ROSLYNN R. MAUSKOPF
Director

WASHINGTON, D.C. 20544

April 29, 2022

Honorable Sheldon Whitehouse
Chair
Subcommittee on Federal Courts, Oversight,
Agency Action, and Federal Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Whitehouse:

I am writing on behalf of the Chief Judges of the U.S. Courts of Appeals and the Chairs of the Committee on Codes of Conduct and the Committee on Financial Disclosure in response to your letter dated August 30, 2021, relating to the exclusion of “personal hospitality” from the disclosure requirements under the Ethics in Government Act. The judiciary appreciates the opportunity to hear your perspective on these issues and I apologize for the delay in responding.

Our answers to your numbered questions are provided below. Many of your inquiries fall under the jurisdiction of the Committee on Financial Disclosure, which deals directly with financial disclosure reporting. The Committee on Codes of Conduct, on the other hand, primarily provides ethics advice to judges. Please be aware that these answers are dependent on the interplay between the judiciary’s gift regulations and its financial disclosure reporting requirements. The gift regulations may prohibit the acceptance of a gift under many of the circumstances described, and therefore the financial disclosure reporting requirements would only become relevant in those situations in which gifts were permitted in the first instance.

1. *General Scope of Personal Hospitality. Is hospitality to a judge from any person subject to exemption from any reporting so long as the person has invited the judge to receive the hospitality at any property the person owns?*

The Ethics in Government Act requires that a financial disclosure filer must report information relating to gifts of more than minimal value (currently \$415) “received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of an individual need not be reported.” 5 U.S.C. App. 4 § 102(a)(2)(A). “Personal hospitality of any individual” means “hospitality *extended for a nonbusiness purpose* by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family.” 5 U.S.C. App. 4 § 109(14) (emphasis added). It is not

Honorable Sheldon Whitehouse
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correct to state that a judge need not report hospitality from “any person” as long as the judge receives the hospitality at any property that the person owns. At a minimum, the exclusion from reporting applies only if the hospitality was extended for a *nonbusiness purpose*, and there may be other limitations on the exception as well. *See infra*.

2. *Personal Hospitality at Commercial Properties.*
 - a. *Is a judicial officer permitted to decline to disclose “personal hospitality” received at a commercial property, such as a commercial resort which ordinarily charges visitors for hospitality?*
 - b. *For example, if the owner of a commercial resort has invited the judge to the resort, which guests ordinarily pay to visit, may the judge treat the hospitality as “personal”?*

I have requested that the Committee on Financial Disclosure provide guidance on whether “personal hospitality” may encompass hospitality extended at a commercial property such as a resort. Judicial Conference regulations provide that “[a]ny food, lodging, or entertainment received as ‘personal hospitality of any individual’ (as defined in Guide, Vol. 2D, Ch. 1, § 170) need not be reported.” *Guide to Judiciary Policy*, Vol. 2D, Ch. 3, § 330.30(b). Section 170 of those regulations defines “personal hospitality of any individual” as it is defined in the statute – that is, as “[h]ospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or his family.” *Guide to Judiciary Policy*, Vol. 2D, Ch. 1, § 170 (incorporating language of 5 U.S.C. App. 4 § 109(14)). I have asked the Committee on Financial Disclosure to provide guidance on whether “property or facilities owned by that individual or his family” could include commercial property. The Committee will begin addressing this issue at its next semiannual meeting and will likely consider executive and legislative branch guidance on the scope of the exclusion.¹

3. *“Personal Hospitality” from Persons Not Known to the Judge. If the person invites a judge to a commercial property the person owns, and has no preexisting personal relationship with the judge, is hospitality received by that judge at the commercial property nevertheless exempt from disclosure as “personal hospitality”?*

As noted, I have requested that the Committee on Financial Disclosure provide guidance on whether hospitality furnished at a commercial property owned by an individual is “personal

¹ *See, e.g.*, U.S. Senate Select Comm. on Ethics, Financial Disclosure Instructions for Calendar Year 2021 at 24 (Mar. 2022) (permitting exclusion from reporting for gifts of personal hospitality “as defined in the Senate Ethics Manual (2003, ed.), p. 37”); Senate Ethics Man. 37 (2003) (“As a general rule, to qualify for the exemption, the residence or other property should not be property which is rented out to others by the individual providing the hospitality. . . . The personal hospitality exemption does not apply to hospitality by individuals in restaurants, nightclubs, or in any other commercial establishment.”); *id.* (private plane travel is not “personal hospitality” where it is “a substitute for commercial transportation”); *id.* (free lodging at a “guest house in Aspen” would not be personal hospitality because “the guest house is a commercial establishment”).

Honorable Sheldon Whitehouse

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hospitality.” If it is not, then the judge must report the hospitality. If it is, then the judge may still need to report the hospitality if it was furnished for a business purpose. That inquiry would depend on the facts, but it is possible that the hospitality in such an instance would not be within the scope of the exclusion for personal hospitality.

4. *Solicitation of Personal Hospitality. May judges directly or indirectly solicit invitations from owners of commercial properties, and then claim exemption from disclosure on grounds that the owner invited the judge to a property the person owns? Would the solicitation of such an invitation to a commercial property be reportable?*

The judiciary’s gift regulations state that a “judicial officer or employee is not permitted to solicit a gift from any person who is seeking official action from or doing business with the court...or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer’s or employee’s official duties.” *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.30. We are not aware of any obligation to report the solicitation of a gift of hospitality. The statute requires that a judge report gifts “received from any source,” except that hospitality “received as” personal hospitality need not be reported. *See* 5 U.S.C. App. 4 § 102(a)(2)(A). If such a gift were received, however, this would implicate the question of whether hospitality at commercial properties may constitute personal hospitality, a question we will study further.

Note also that judges are subject to the statutory restriction on gifts, as well as the gift regulations promulgated by the Judicial Conference, and may not solicit or accept anything of value from a person seeking official action from or doing business with the judge’s court or whose interests may be substantially affected by the performance or nonperformance of the judge’s official duties. *See* 5 U.S.C. § 7353(a); *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.30. A judge may therefore be unable to solicit or accept a gift in the first place, even aside from whether the gift must be reported.

5. *Solicitation of Personal Hospitality from Persons Not Known to the Judge. May judges directly or indirectly solicit invitations from owners of commercial properties if there is no preexisting personal relationship with the judge, and then claim exemption from disclosure as “personal hospitality” on grounds that the owner invited the judge to a property the person owns?*

We are aware of no obligation to report solicitations of hospitality. As noted above, a gift from an individual not previously known to the judge might not be “personal hospitality,” depending on the facts, because such hospitality might not be extended for a nonbusiness purpose. But a judge might not be able to solicit such a gift at all, depending on the context.

6. *Third-Party Reimbursement. If a judge solicits or receives an invitation from an owner of a commercial property, and then claims exemption from disclosure on grounds that the owner has invited the judge to a property the person owns, what are the responsibilities of the judge where a third party reimburses the*

Honorable Sheldon Whitehouse
Page 4

commercial property for the cost of the hospitality extended to the judge? Is the third party's reimbursement of the commercial property for hospitality provided to the judge reportable as a gift to the judge, even though the judge was invited to a property the person owns?

Regarding the reporting of gifts given for which the offeror has been reimbursed by a third party, "each financial disclosure report must contain the identity of the source [of the gift], a brief description, and the value of all gifts" that meet the threshold for reporting and for which no exclusions apply. *Guide to Judiciary Policy*, Vol. 2D, Ch. 3, § 330.10. Irrespective of whether "personal hospitality" includes hospitality furnished at a commercial property, "personal hospitality" must be "extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family." 5 U.S.C. App. 4 § 109(14). If a third party reimburses the host for the costs, then the hospitality may not have been extended for a nonbusiness purpose, nor by the "individual" owner such that it would fall outside the scope of the exemption. I have asked the Committee on Financial Disclosure to also provide guidance on this topic.

7. *Acceptance and Disclosure of Gifts from Those Seeking Official Action from or Doing Business with the Court. Does the judicial branch's prohibition on the acceptance of gifts from persons who are seeking official action from or doing business with the court extend to gifts in the form of invitations to property the person owns? Does it extend to corporations or organizations owned or controlled by the person that has business before the court, or vice versa? For example, if an individual is not personally seeking official action or doing business before the court but owns a company with a case pending before the court, or if a person who is seeking official action extends hospitality to the judicial officer at property the person owns through a corporation, do the Judicial Conference's rules permit the judge to accept hospitality from the person at property the person or their company owns without disclosing it?*

The judiciary's gift regulations prohibit the acceptance of gifts not only from those seeking official action from the judge's court or doing business with the judge's court, but also from anyone else whose interests might be affected substantially by the performance or nonperformance of the judge's official duties, unless the gift is permitted under one of the enumerated exceptions. *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.35; *see also* Code of Conduct for United States Judges, Canon 4D(4) ("A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations."). If an individual was not seeking official action from the judge's court and was not doing business with the judge's court, but owned a company that was, it would seem likely that the individual's interests would be substantially affected by the judge's actions.

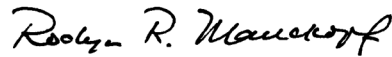
Honorable Sheldon Whitehouse

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The regulations further provide that “no gift may be accepted...if a reasonable person would believe it was offered in return for being influenced in the performance of an official act..., nor may a judicial officer or employee accept gifts from the same or different sources on a basis so frequent that a reasonable person would believe that the public office is being used for private gain. A judicial officer or employee should decline a gift permitted by these regulations if acceptance would cause the officer or employee to violate any applicable provision of the Codes of Conduct.” *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.45. Thus, a judge may well not be permitted to accept a gift even if acceptance is otherwise permitted under the regulations.

Thank you again for your letter. We hope that this response provides you with additional insight on the statutes and regulations on which the judiciary relies relating to these issues. If we may be of additional assistance to you, please do not hesitate to contact the Office of Legislative Affairs at 202-502-1700.

Sincerely,



Roslynn R. Mausekopf
Director

cc: Honorable John Kennedy
Honorable Henry C. “Hank” Johnson, Jr.
Honorable Darrell Issa
Honorable Jennifer W. Elrod
Honorable David L. Bunning
Honorable David J. Barron
Honorable Debra Ann Livingston
Honorable Michael A. Chagares
Honorable Roger L. Gregory
Honorable Priscilla Richman
Honorable Jeffrey S. Sutton
Honorable Diane S. Sykes
Honorable Lavenski R. Smith
Honorable Mary H. Murguia
Honorable Timothy M. Tymkovich
Honorable William H. Pryor Jr.
Honorable Sri Srinivasan
Honorable Kimberly A. Moore



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE ROSLYNN R. MAUSKOPF
Director

WASHINGTON, D.C. 20544

March 23, 2023

Honorable Sheldon Whitehouse
Chair
Subcommittee on Federal Courts, Oversight,
Agency Action, and Federal Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing in response to your letter dated February 21, 2023, and to provide an update on the actions taken by the Judicial Conference of the United States Committee on Financial Disclosure to clarify its regulations on “personal hospitality.” The Committee’s revisions to its regulations went into effect on March 14, 2023.

As noted in my April 29, 2022 letter to you, I asked the Committee on Financial Disclosure to provide guidance on “whether ‘personal hospitality’ may encompass hospitality extended at a commercial property such as a resort” and whether hospitality for which a “third party reimburses the host for the costs” would fall outside the scope of the reporting exemption. Over the past several months, the Committee has considered this matter. The Committee addressed these questions most recently at its meeting in January 2023 and revised the guidance, which clarifies that “the reporting exemption does not include . . . gifts paid for by any individual or entity other than the individual providing the hospitality, or for which the individual providing the hospitality receives reimbursement or a tax deduction related to furnishing the hospitality; or gifts extended at a commercial property, *e.g.*, a resort or restaurant”

The following definition of “personal hospitality of any individual” now appears in the Judicial Conference regulations:

Hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his or her family or on property or facilities owned by that individual or his or her family.

Honorable Sheldon Whitehouse
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Notes:

- (1) The personal hospitality gift reporting exemption applies only to food, lodging, or entertainment and is intended to cover such gifts of a personal, non-business nature. Therefore, the reporting exemption does not include:
 - gifts other than food, lodging or entertainment, such as transportation that substitutes for commercial transportation;
 - gifts extended for a business purpose;
 - gifts extended at property or facilities owned by an entity, rather than by an individual or an individual's family, even if the entity is owned wholly or in part by an individual or an individual's family;
 - gifts paid for by any individual or entity other than the individual providing the hospitality, or for which the individual providing the hospitality receives reimbursement or a tax deduction related to furnishing the hospitality; or
 - gifts extended at a commercial property, e.g., a resort or restaurant, or at a property that is regularly rented out to others for a business purpose.
- (2) A judicial officer or employee is not permitted to solicit or accept anything of value from a person seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judge's official duties, but a judicial officer or employee may accept a gift authorized by the Judicial Conference's regulations. **See:** [5 U.S.C. § 7353](#); [Guide, Vol. 2C, Ch.6](#).

Guide to Judiciary Policy, Vol. 2D, Ch. 1, § 170.

In your February 21, 2023, letter, you urged the Committee on Financial Disclosure to clarify that the “personal” nature of “personal hospitality” is not determined by the invitation being delivered personally, but by the personal nature of the judge’s relationship with the host.” The Committee’s guidance makes this clear.

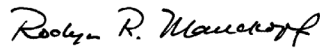
In addition, you asked for copies of “unpublished opinions that may be relevant to these questions about the personal hospitality exemption.” The Committee on Codes of Conduct does not have jurisdiction to issue public or private advisory opinions interpreting the “personal hospitality” exemption in the Ethics in Government Act. Rather, its jurisdiction is limited to issuing advisory opinions regarding the codes of conduct that have been adopted by the Judicial Conference, Titles III (relating to gifts to federal employees) and VI (relating to limitations on outside earned income, honoraria, and outside employment) of the Ethics Reform Act of 1989,

Honorable Sheldon Whitehouse
Page 3

and the regulations promulgated by the Judicial Conference under those titles of the Ethics Reform Act. All relevant ethics guidance is already incorporated into the Committee's large body of published advisory opinions, *see* [Published Advisory Opinions | United States Courts \(uscourts.gov\)](https://uscourts.gov). This is consistent with the Committee's jurisdiction to publish advisory opinions on issues of broad application that reflect the Committee's confidential advice. Furthermore, the Judicial Conference Regulations on Gifts explicitly provide that "Judicial officers and employees subject to the Ethics in Government Act of 1978 and the instructions of the Financial Disclosure Committee of the Judicial Conference of the United States must comply with the Act and the instructions in disclosing gifts." *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.50.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact us through the Office of Legislative Affairs at 202-502-1700.

Sincerely,



Roslynn R. Mauskopf
Director

cc: Honorable John Kennedy
Honorable Henry C. "Hank" Johnson, Jr
Honorable Darrell Issa



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE ROSLYNN R. MAUSKOPF
Director

WASHINGTON, D.C. 20544

April 18, 2023

Honorable Sheldon Whitehouse
Chair
Subcommittee on Federal Courts, Oversight,
Agency Action, and Federal Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing in response to your letter dated April 10, 2023. The Ethics in Government Act of 1978, as amended, is administered by the Judicial Conference of the United States for judicial officers and judicial employees. 5 U.S.C. § 13102. The Conference has delegated this authority to its Committee on Financial Disclosure, as authorized by the Act. The Judicial Conference Committee on Financial Disclosure is the committee responsible for responding to inquiries regarding financial disclosure matters from judges. The Committee members and staff are available to all filers for guidance. We respectfully decline to provide information about the identity of any filers who have sought guidance. As you can appreciate, doing so could discourage filers from seeking assistance.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact us through the Office of Legislative Affairs at 202-502-1700.

Sincerely,

A handwritten signature in cursive script that reads "Roslynn R. Mauskopf".

Roslynn R. Mauskopf
Director

cc: Honorable John Kennedy
Honorable Henry C. "Hank" Johnson, Jr.
Honorable Darrell Issa

5/2/23, 4:00 PM

Friendship of Justice and Magnate Puts Focus on Ethics - The New York Times

The New York Times | <https://www.nytimes.com/2011/06/19/us/politics/19thomas.html>

Friendship of Justice and Magnate Puts Focus on Ethics

By Mike McIntire

June 18, 2011

PIN POINT, Ga. — Clarence Thomas was here promoting his memoir a few years ago when he bumped into Algernon Varn, whose grandfather once ran a seafood cannery that employed Justice Thomas's mother as a crab picker.

Mr. Varn lived at the old cannery site, a collection of crumbling buildings on a salt marsh just down the road from a sign heralding this remote coastal community outside Savannah as Justice Thomas's birthplace. The justice asked about plans for the property, and Mr. Varn said he hoped it could be preserved.

"And Clarence said, 'Well, I've got a friend I'm going to put you in touch with,' " Mr. Varn recalled, adding that he was later told by others not to identify the friend.

The publicity-shy friend turned out to be Harlan Crow, a Dallas real estate magnate and a major contributor to conservative causes. Mr. Crow stepped in to finance the multimillion-dollar purchase and restoration of the cannery, featuring a museum about the culture and history of Pin Point that has become a pet project of Justice Thomas's.

The project throws a spotlight on an unusual, and ethically sensitive, friendship that appears to be markedly different from those of other justices on the nation's highest court.

The two men met in the mid-1990s, a few years after Justice Thomas joined the court. Since then, Mr. Crow has done many favors for the justice and his wife, Virginia, helping finance a Savannah library project dedicated to Justice Thomas, presenting him with a Bible that belonged to Frederick Douglass and reportedly providing \$500,000 for Ms. Thomas to start a Tea Party-related group. They have also spent time together at gatherings of prominent Republicans and businesspeople at Mr. Crow's Adirondacks estate and his camp in East Texas.

In several instances, news reports of Mr. Crow's largess provoked controversy and questions, adding fuel to a rising debate about Supreme Court ethics. But Mr. Crow's financing of the museum, his largest such act of generosity, previously unreported, raises the sharpest questions yet — both about Justice Thomas's extrajudicial activities and about the extent to which the justices should remain exempt from the code of conduct for federal judges.

Although the Supreme Court is not bound by the code, justices have said they adhere to it. Legal ethicists differed on whether Justice Thomas's dealings with Mr. Crow pose a problem under the code. But they agreed that one facet of the relationship was both unusual and important in weighing any ethical implications: Justice Thomas's role in Mr. Crow's donation for the museum.

The code says judges "should not personally participate" in raising money for charitable endeavors, out of concern that donors might feel pressured to give or entitled to favorable treatment from the judge. In addition, judges are not even supposed to know who donates to projects honoring them.

While the nonprofit Pin Point museum is not intended to honor Justice Thomas, people involved in the project said his role in the community's history would inevitably be part of it, and he participated in a documentary film that is to accompany the exhibits.

Deborah L. Rhode, a Stanford University law professor who has called for stricter ethics rules for Supreme Court justices, said Justice Thomas "should not be directly involved in fund-raising activities, no matter how worthy they are or whether he's being centrally honored by the museum."

On the other hand, the restriction on fund-raising is primarily meant to deter judges from using their position to pressure donors, as opposed to relying on "a rich friend" like Mr. Crow, said Ronald D. Rotunda, who teaches legal ethics at Chapman University in California.

"I don't think I could say it's unethical," he said. "It's just a very peculiar situation."

Justice Thomas, through a Supreme Court spokeswoman, declined to respond to a detailed set of questions submitted by The New York Times. Mr. Crow also would not comment.

Supreme Court ethics have been under increasing scrutiny, largely because of the activities of Justice Thomas and Ms. Thomas, whose group, Liberty Central, opposed President Obama's health care overhaul — an issue likely to wind up before the court. Mr. Crow's donation to Liberty Central was reported by Politico.

In January, the liberal advocacy organization Common Cause asked the Justice Department to investigate whether Justices Thomas and Antonin Scalia should have recused themselves from last year's Citizens United campaign finance case because they had attended a political retreat organized by the billionaire Koch brothers, who support groups that stood to benefit from the court's decision.

<https://www.nytimes.com/2011/06/19/us/politics/19thomas.html>

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Friendship of Justice and Magnate Puts Focus on Ethics - The New York Times

A month later, more than 100 law professors asked Congress to extend to Supreme Court justices the ethics code that applies to other federal judges, and a bill addressing the issue was introduced.

It is not unusual for justices to accept gifts or take part in outside activities, some with political overtones.

Justice Stephen G. Breyer has attended Renaissance Weekend, a retreat for politicians, artists and media personalities that is a favorite of Democrats, including former President Bill Clinton. Justice Ruth Bader Ginsburg participated in a symposium sponsored by the National Organization for Women's Legal Defense and Education Fund, and a philanthropic foundation once tried to give her a \$100,000 achievement award. She instructed that the money be given to charity.



Algernon Varn, whose grandfather once ran a seafood cannery where Justice Clarence Thomas's mother worked, on the site of the old cannery. Mr. Varn said Justice Thomas put him in touch with a buyer to restore the property and build a museum. Stephen Morton for The New York Times

But in the case of Justice Thomas and his dealings with Mr. Crow, the ethical complications appear more complex.

Conservative Ties

Mr. Crow, 61, manages the real estate and investment businesses founded by his late father, Trammell Crow, once the largest landlord in the United States. The Crow family portfolio is worth hundreds of millions of dollars and includes investments in hotels, medical facilities, public equities and hedge funds.

A friend of the Bush family, Mr. Crow is a trustee of the George Bush Presidential Library Foundation and has donated close to \$5 million to Republican campaigns and conservative groups. Among his contributions were \$100,000 to Swift Boat Veterans for Truth, the group formed to attack the Vietnam War record of Senator John Kerry, the 2004 Democratic presidential candidate, and \$500,000 to an organization that ran advertisements urging the confirmation of President George W. Bush's nominees to the Supreme Court.

Mr. Crow has not personally been a party to Supreme Court litigation, but his companies have been involved in federal court cases, including four that went to the appellate level. And he has served on the boards of two conservative organizations involved in filing supporting briefs in cases before the Supreme Court. One of them, the American Enterprise Institute, with Mr. Crow as a trustee, gave Justice Thomas a bust of Lincoln valued at \$15,000 and praised his jurisprudence at an awards gala in 2001.

The institute's Project on Fair Representation later filed briefs in several cases, and in 2006 the project brought a lawsuit challenging federal voting rights laws, a case in which Justice Thomas filed a lone dissent, embracing the project's arguments. The project director, an institute fellow named Edward Blum, said the institute supported his research but did not finance the brief filings or the Texas suit, which was litigated pro bono by a former clerk of Justice Thomas's.

"When it came time to file a lawsuit," he said, "A.E.I. had no role in doing that."

Coming Up With a Plan

In addition to his interest in politics and policy, Mr. Crow is well known for his keen devotion to history.

A backyard garden at his \$24 million Dallas residence is dominated by old statues of dictators he has collected from fallen regimes, including Lenin and Stalin. His private library is packed with 8,000 rare books and artifacts, including a Senate roll call sheet from Justice Thomas's confirmation and a "thank you" letter from the justice, according to local news reports.

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There are a number of reasons Justice Thomas might be thankful to Mr. Crow. In addition to giving him the Douglass Bible, valued 10 years ago at \$19,000, Mr. Crow has hosted the justice aboard his private jet and his 161-foot yacht, at the exclusive Bohemian Grove retreat in California and at his grand Adirondacks summer estate called Topridge, a 105-acre spread that once belonged to Marjorie Merriweather Post, the cereal heiress.

Christopher Shaw, a folk singer who said he had been invited several times to perform at Topridge, recalled seeing Justice Thomas and his family "on one or two occasions." They were among about two dozen guests who included other prominent Republicans — last summer, the younger Mr. Bush stopped by.

"There would be guys puffing on cigars," Mr. Shaw said. "Clarence just kind of melted in with everyone else. We got introduced at dinner. He sat at Harlan's table."

Mr. Crow's \$175,000 donation to the library in Savannah in 2001 started out anonymous, but it was eventually made public amid opposition to the project by some local black leaders who did not like Justice Thomas's politics. Similarly, Mr. Crow sought to keep his role in the museum quiet.

At first glance the Pin Point Heritage Museum, scheduled to open this fall, would seem an unlikely catalyst for an ethical quandary. That Pin Point's history is worthy of preservation is not in dispute.

Part of the Gullah/Geechee Cultural Heritage Corridor designated by Congress, it is representative of tight-knit Southern coastal settlements that trace their roots to freed slaves and were often based around fishing. In Pin Point, the Varn crab and oyster cannery, founded in the 1920s, was a primary source of jobs until it closed in 1985.

Mr. Varn and his wife, Sharon, said they had long hoped the property could be saved from commercial development but had little success coming up with a plan. That changed after their chance encounter with Justice Thomas, who was visiting his childhood home with a television news crew.

Justice Thomas, 62, was born and raised near the cannery overlooking the Moon River, where it was not uncommon for babies to rock in bassinets made of crab baskets while their mothers shucked oysters. He sympathized with the Varns' wishes and said he had a friend who could help, Mr. Varn said.

The Varns eventually sold their property in April 2008. During a recent interview at their home near the cannery, they made it clear that they were "not supposed to say" who the buyer was, and a news release issued last November by a Savannah public relations firm said the museum was being "privately funded by an anonymous donor."

But the paper trail leads back to Mr. Crow, and in interviews at the project site, people working on it acknowledged that he was financing it. Property records show a company called HKJRS/Pinpoint bought the land for \$1.5 million, and incorporation records say the company is controlled by a Dallas-based partnership run by Mr. Crow.

Project documents reviewed by The Times show a preliminary construction budget of \$1.3 million, but it is unclear if that includes expenses related to the content and design of the museum.

Justice Thomas remains closely involved with the project. Emily Owens, a museum spokeswoman who works for Mr. Crow's company, said the justice "played a big part" in creating a video documentary that will be part of the museum experience. He hosted a design team from Dallas for a four-hour meeting at his Supreme Court offices in February.

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Friendship of Justice and Magnate Puts Focus on Ethics - The New York Times



Harlan Crow, a Dallas real estate magnate, met Justice Thomas a few years after he joined the Supreme Court. Brian Harkin

And he has had a role in picking people to help with the museum. Barbara Fertig, a history professor at Armstrong Atlantic State University in Savannah, said that she was asked to meet with Justice Thomas last spring and that “by the end of the meeting, he said he would like me to work on this project.”

She said she had “never been particularly curious” about why Mr. Crow is financing it, adding that costly preservation projects are often possible only because of philanthropy motivated by friendships. Justice Thomas and Mr. Crow would seem to fall into that category, Ms. Fertig said.

“I’ve been in the company of the two of them together,” she said, “and they certainly really are friends.”

The Code of Conduct

That friendship is important to determining whether Justice Thomas’s interactions with Mr. Crow conflict with the code, said Raymond J. McKoski, a retired state judge in Illinois who wrote a law review article on charitable fund-raising by judges. If Justice Thomas did not “misuse the prestige of office” in getting Mr. Crow to take on the project, it should not be a concern, he said.

“Some of it depends on the conversations that took place,” Mr. McKoski said. “Who brought up the idea? How willing was Mr. Crow to do it? What exact questions were asked by Justice Thomas?”

Beyond the admonition against fund-raising, the code generally discourages judges from partaking in any off-the-bench behavior that could create even the perception of partiality. It acknowledges the value in judges’ being engaged with their communities, lecturing on the law and doing charitable work, but draws a line where those activities might cause a reasonable person to worry that a judge is

<https://www.nytimes.com/2011/06/19/us/politics/19thomas.html>

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5/2/23, 4:00 PM

Friendship of Justice and Magnate Puts Focus on Ethics - The New York Times

indebted to or influenced by someone.

"The code of conduct is quite clear that judges are not supposed to be soliciting money for their pet projects or charities, period," said Arn Pearson, a lawyer with Common Cause. "If any other federal judge was doing it, he could face disciplinary action."

The justices are not bound by the federal judiciary's conduct code, because it is enforced by a committee of judges who rank below the justices. Even so, Justices Breyer and Anthony M. Kennedy said in testimony before Congress in April that the justices followed the code.

Beyond the code, the justices must comply with laws applying to all federal officials that prohibit conflicts of interest and require disclosure of gifts. Justice Thomas's gift acceptances drew attention in 2004, when The Los Angeles Times reported that he had accumulated gifts totaling \$42,200 in the previous six years — far more than any of the other justices.

Since 2004, Justice Thomas has never reported another gift. He has continued to disclose travel costs paid by schools and organizations he has visited for speeches and teaching, but he has not reported that any travel was provided by Mr. Crow.

Travel records for Mr. Crow's planes and yacht, however, suggest that Justice Thomas may have used them in recent years.

In April 2008, not long after Mr. Crow bought the Pin Point property, one of his private planes flew from Washington to Savannah, where his yacht, the Michaela Rose, was docked.

That same week, an item appeared in a South Carolina lawyers' publication noting that Justice Thomas was arriving aboard the Michaela Rose in Charleston, a couple of hours north of Savannah, where the Crow family owns luxury vacation properties. The author was a prominent lawyer who said she knew of the visit because of a family connection to Mr. Crow.

Justice Thomas reported no gifts of travel that month in his 2008 disclosure. And there are other instances in which Justice Thomas's travels correspond to flights taken by Mr. Crow's planes.

On Jan. 4, 2010, when Justice Thomas was in Savannah for the dedication of a building in his honor, Mr. Crow's plane flew from Washington to Savannah and returned to Washington the next day. Justice Thomas reported in his financial disclosure that his travel had been paid for by the Savannah College of Art and Design, which owned the building.

In his 2009 financial disclosure, Justice Thomas reported that Southern Methodist University in Dallas — Trammell Crow's alma mater — had provided his travel for a speech there on Sept. 30. Flight records show that Mr. Crow's plane flew from Washington to Dallas that day.

Among the questions The Times submitted to Justice Thomas was whether he was on any of those flights, and if so, whether the colleges reimbursed him or Mr. Crow. The colleges declined to comment.

One item not required to be reported in Justice Thomas's financial disclosures is the millions of dollars Mr. Crow is spending on the museum. That is because the money is not being given to the justice as a gift.

For Algernon and Sharon Varn, who said they were thrilled to see a cherished piece of local history being restored, the museum is a gift to the community. While it is about more than Justice Thomas, they said, he deserves credit for putting them together with someone who had the money and the interest to make the project a reality.

"He was instrumental in getting the process started, because he wanted it preserved to show that no matter where you came from, you can go where you want," Mr. Varn said. "He had a meager existence, and yet look where he is today. It's a great American story."

Supreme Court of the United States
Washington, D. C. 20543

THE LEGAL OFFICE

July 12, 2021

Senator Sheldon Whitehouse
United States Senate
Washington, DC 20510

Senator Lindsey O. Graham
United States Senate
Washington, DC 20510

Dear Senator Whitehouse and Senator Graham:

Thank you for your letter of February 4 regarding financial disclosure requirements for the Justices. The Court appreciates the opportunity to hear your perspectives on these and other issues facing the Judiciary and the rest of the government. Because your queries concern the Court's ethics policies and practices, the Clerk of the Court has asked me to respond.

Before turning to the specific questions included in your letter, it is important to clarify a key point concerning financial disclosure rules. Specifically, the Ethics in Government Act of 1978 directs the Justices and other federal judges to make financial disclosures, and it grants to the Judicial Conference the authority to issue implementing regulations for the Judiciary. *See* 5 U.S.C. App. §§ 101(d), 101(f)(11), 109(10), 111(3); Guide to Judiciary Policy, vol. 2, Pt. D, ch. I, §§ 120, 170. The Justices follow the financial disclosure regulations issued by the Judicial Conference's Committee on Financial Disclosure. As a result, the Justices file exactly the same types of reports that other federal judges do, and those reports are made available to the public in the same way that reports from other federal judges are.

With this important point in mind, I can provide the following responses to the questions posed in your letter.

1. *What plans, if any, does the Court have to adopt a code of ethics, or to bring its gift, travel, and hospitality restrictions and disclosure policies in line with those of the Executive Branch and Congress? If it has no such plans, what justifies the Court having a lower disclosure standard than the other branches of government?*

Just as the Justices follow the same financial disclosure rules that are applicable to other federal judges, so too do they comply with the same restrictions on gifts and outside activities that are applicable to the rest of the federal judiciary. The Judicial Conference – the judicial branch's policy-making body consisting of circuit and district judges from around the country – has developed comprehensive policies on those matters tailored to the unique characteristics of

the judicial branch. While the Judicial Conference Regulations on Gifts and the Judicial Conference Regulations on Outside Earned Income, Honoraria, and Outside Employment are not by their own terms applicable to the Supreme Court, the Justices have complied with them. Under the regulations, the Justices may not accept gifts from those who seek official action from or do business with the Court, with only limited exceptions. Judicial ethics principles also provide that recusal is appropriate when a Justice has a financial interest in a party before the Court.

The Justices also rely upon the Code of Conduct for United States Judges in evaluating ethical issues more broadly. As the Chief Justice explained in his 2011 Year-End Report on the Federal Judiciary, the Justices view this code as “a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.” But because the Code of Conduct is phrased in general terms and does not address all questions that the Justices may face, they may also consult a variety of other sources in evaluating ethics issues, including the Constitution, federal statutes, judicial opinions, legislative and executive branch guidance, the Justices’ historical practices, treatises, scholarly articles, state court guidance, and disciplinary decisions, and they may seek advice from the Court’s Legal Office, the Judicial Conference Committee on Codes of Conduct, or their colleagues.

2. *Does the Court (or do the individual Justices) maintain records of emoluments in the nature of gifts, travel, hospitality, and reimbursements received by members of the Court? Do such records include the dollar value and descriptions of the emoluments?*

The Justices individually maintain records of gifts, reimbursements, and other financial information needed to prepare annual financial disclosure reports. In accordance with the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342, the Justices also make disclosures relating to gifts and decorations from foreign governments. The Court collects that information from the Justices each year, and provides relevant information to the Director of the Administrative Office of the United States Courts for inclusion in a single report relating to the federal judiciary. Disclosure rules under the Foreign Gifts and Decorations Act call for the description and value of items to be listed.

3. *What steps does the Court take to identify or prevent the Justices’ receipt of gifts, travel, or hospitality from those who may have business before the Court?*

The rules noted above are well known at the Court. The Justices and their chambers staff take care to ensure that any items received are in full compliance with those rules.

4. *For purposes of the Justices’ disclosures, how does the Court define the term “personal hospitality” that appears in the Ethics in Government Act? See 5a U.S.C. § 102(a)(2)(A) (exempting from disclosure any gifts in the form of “food, lodging, or entertainment received as personal hospitality”).*

The term “personal hospitality of any individual” is defined by statute as “hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the

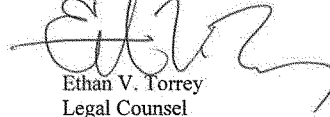
personal residence of that individual or his family or on property or facilities owned by that individual or his family.” See 5 U.S.C. App. § 109(14). See also Guide to Judiciary Policy, vol. 2, Pt. D, ch. 1, § 170 (defining “personal hospitality of any individual” as “[h]ospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or his family”). The Justices may also look to executive and legislative branch interpretations of financial disclosure rules in individual cases.

5. *What plans, if any, does the Court have to make the Justices’ financial disclosure reports more accessible to the public?*

As noted above, the Justices’ financial disclosure reports are available to the public in the same way that those of other federal judges are. They are also routinely posted on a variety of internet sites shortly after they become available for public review.

Thank you again for your letter. I hope and trust that the information provided here sheds additional light on the many statutes, rules, and regulations applicable to and relied upon by the Justices on these issues.

Very truly yours,



Ethan V. Torrey
Legal Counsel

SHELDON WHITEHOUSE
RHODE ISLAND

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August 30, 2021

VIA U.S. MAIL AND ELETRONIC MAIL

Hon. Roslynn R. Mauskopf
Director
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One Columbus Circle, NE
Washington, D.C. 20544

Hon. Ralph R. Erickson
Chair, Committee on Codes
of Conduct
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655 First Avenue North
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Hon. Sidney R. Thomas
Chief Judge
U.S. Court of Appeals for the
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Chief Judge
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Chief Judge
U.S. Court of Appeals for the
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Hon. Jeffrey R. Howard
Chief Judge
U.S. Court of Appeals for the
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U.S. Court of Appeals for the
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Hon. William H. Pryor, Jr.
Chief Judge
U.S. Court of Appeals for the
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Elbert P. Tuttle U.S. Court of
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Hon. Debra Ann Livingston Chief Judge U.S. Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse 40 Foley Square New York, NY 10007	Hon. Diane S. Sykes Chief Judge U.S. Court of Appeals for the Seventh Circuit U.S. Courthouse 219 South Dearborn Street Room 2722 Chicago, IL 60604	Hon. Srikanth Srinivasan Chief Judge U.S. Court of Appeals for the District of Columbia Circuit E. Barrett Prettyman U.S. Courthouse 333 Constitution Ave., NW Washington, D.C. 20001
Hon. D. Brooks Smith Chief Judge U.S. Court of Appeals for the Third Circuit U.S. Courthouse 601 Market Street Philadelphia, PA 19106	Hon. Lavenski R. Smith Chief Judge U.S. Court of Appeals for the Eighth Circuit Thomas F. Eagleton U.S. Courthouse 111 South Tenth Street Suite 24.327 St. Louis, MO 63102	Hon. Kimberly Ann Moore Chief Judge U.S. Court of Appeals for the Federal Circuit Howard T. Markey National Courts Building 717 Madison Place, NW Washington, D.C. 20439

Dear Judge Mauskopf, Judge Erickson, and Chief Judges of the United States Circuit Courts of Appeal,

The Ethics in Government Act of 1978 requires senior government officials—including the President and Vice President, officers and high-level employees of the executive branch, Members of Congress, and judicial officers—to disclose outside income, gifts, and reimbursements annually. The Judicial Conference Committee on Codes of Conduct financial disclosure and gift acceptance regulations¹ seem significantly less stringent than the executive and legislative branch rules, particularly the judiciary’s interpretation of the Ethics in Government Act’s “personal hospitality” exception. The Senate, for instance, defines “personal hospitality” to encompass food, lodging, and entertainment provided by an individual only “at that person’s residence,” whereas the Judicial Conference appears to allow a broader range of venues.

To help us assess what disclosures by judicial officers are required by the judicial branch’s “personal hospitality” disclosure standards and federal law, I request responses to the following questions. Because each chief judge has oversight responsibilities within his or her circuit, I am interested in their responses to these questions for each Circuit, in addition to the views of the Administrative Office and the Codes of Conduct Committee. All these questions presume that the judge is not paying for the hospitality, but is receiving it as a gift or emolument.

¹ See 2 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY ch. 6 (2019).

1. General Scope of Personal Hospitality. Is hospitality to a judge from any person subject to exemption from any reporting so long as the person has invited the judge to receive the hospitality at any property the person owns?
2. Personal Hospitality at Commercial Properties.
 - a. Is a judicial officer permitted to decline to disclose “personal hospitality” received at a commercial property, such as a commercial resort which ordinarily charges visitors for hospitality?
 - b. For example, if the owner of a commercial resort has invited the judge to the resort, which guests ordinarily pay to visit, may the judge treat that hospitality as “personal”?
3. “Personal Hospitality” from Persons Not Known to the Judge. If the person invites a judge to a commercial property the person owns, and has no preexisting personal relationship with a judge, is hospitality received by that judge at the commercial property nevertheless exempt from disclosure as “personal hospitality”?
4. Solicitation of Personal Hospitality. May judges directly or indirectly solicit invitations from owners of commercial properties, and then claim exemption from disclosure on grounds that the owner invited the judge to a property the person owns? Would the solicitation of such an invitation to a commercial property be reportable?
5. Solicitation of Personal Hospitality from Persons Not Known to the Judge. May judges directly or indirectly solicit invitations from owners of commercial properties if there is no preexisting personal relationship with the judge, and then claim exemption from disclosure as “personal hospitality” on grounds that the owner invited the judge to a property the person owns?
6. Third-Party Reimbursement. If a judge solicits or receives an invitation from an owner of a commercial property, and then claims exemption from disclosure on grounds that the owner has invited a judge to a property the person owns, what are the responsibilities of the judge where a third party reimburses the commercial property for the cost of the hospitality extended to the judge? Is the third party’s reimbursement of the commercial property for hospitality provided to the judge reportable as a gift to the judge, even though the judge was invited to a property the person owns?
7. Acceptance and Disclosure of Gifts from Those Seeking Official Action from or Doing Business with the Court. Does the judicial branch’s prohibition on the acceptance of gifts from persons who are seeking official action from or doing business with the court extend to gifts in the form of invitations to property the person owns? Does it extend to corporations or organizations owned or controlled by the person that has business before the court, or vice versa? For example, if an individual is not personally seeking official action or doing business before the court but owns a company with a case pending before the court, or if a person who is seeking official action extends hospitality to the judicial officer at property the person owns through a corporation, do the Judicial Conference’s

rules permit the judge to accept hospitality from the person at property the person or their company owns without disclosing it?

Your timely responses will help us understand in a practical way your interpretation of the “personal hospitality” exemption from disclosure as applied in your circuits. Thank you for your attention to this request.

Sincerely,



SHELDON WHITEHOUSE
Chair, Senate Judiciary Subcommittee on Federal
Courts, Oversight, Agency Action, and Federal
Rights

Congress of the United States
Washington, DC 20510

April 18, 2022

VIA U.S. MAIL AND ELECTRONIC MAIL

<p>Hon. Roslynn R. Mauskopf Director Administrative Office of the United States Courts One Columbus Circle, NE Washington, D.C. 20544</p>	<p>Hon. Jennifer Walker Elrod Chair, Committee on Codes of Conduct U.S. Court of Appeals for the Fifth Circuit Bob Casey U.S. Courthouse 515 Rusk Ave., Rm. 12014 Houston, TX 77002</p>	<p>Hon. Jeffrey R. Howard Chief Judge U.S. Court of Appeals for the First Circuit John Joseph Moakley U.S. Courthouse 1 Courthouse Way, Ste. 2500 Boston, MA 02210</p>
<p>Hon. Debra Ann Livingston Chief Judge U.S. Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse 40 Foley Square New York, NY 10007</p>	<p>Hon. Michael Chagares Chief Judge U.S. Court of Appeals for the Third Circuit James A. Byrne U.S. Courthouse 601 Market Street Philadelphia, PA 19106</p>	<p>Hon. Roger L. Gregory Chief Judge U.S. Court of Appeals for the Fourth Circuit Lewis F. Powell, Jr. U.S. Courthouse 1100 E. Main Street, Ste. 501 Richmond, VA 23219</p>
<p>Hon. Priscilla R. Owen Chief Judge U.S. Court of Appeals for the Fifth Circuit John Minor Wisdom U.S. Court of Appeals Building 600 Camp Street, Rm. 100 New Orleans, LA 70130</p>	<p>Hon. Jeffrey S. Sutton Chief Judge U.S. Court of Appeals for the Sixth Circuit Potter Stewart U.S. Courthouse 100 E. Fifth Street, Rm. 540 Cincinnati, OH 45202</p>	<p>Hon. Diane S. Sykes Chief Judge U.S. Court of Appeals for the Seventh Circuit Everett McKinley Dirksen U.S. Courthouse 219 S. Dearborn Street Chicago, IL 60604</p>

Hon. Lavenski R. Smith Chief Judge U.S. Court of Appeals for the Eighth Circuit Thomas F. Eagleton U.S. Courthouse 111 S. Tenth Street, Ste. 24.327 St. Louis, MO 63102	Hon. Mary H. Murguia Chief Judge U.S. Court of Appeals for the Ninth Circuit James R. Browning U.S. Courthouse 95 Seventh Street San Francisco, CA 94103	Hon. Timothy M. Tymkovich Chief Judge U.S. Court of Appeals for the Tenth Circuit Byron White U.S. Courthouse 1823 Stout Street Denver, CO 80257
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Hon. William H. Pryor, Jr. Chief Judge U.S. Court of Appeals for the Eleventh Circuit Elbert P. Tuttle U.S. Court of Appeals Building 56 NW Forsyth Street Atlanta, GA 30303	Hon. Srikanth Srinivasan Chief Judge U.S. Court of Appeals for the District of Columbia Circuit E. Barrett Prettyman U.S. Courthouse 333 Constitution Ave., NW Washington, D.C. 20001	Hon. Kimberly Ann Moore Chief Judge U.S. Court of Appeals for the Federal Circuit Howard T. Markey National Courts Building 717 Madison Place, NW Washington, D.C. 20439
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Dear Judge Mauskopf, Judge Elrod, and Chief Judges of the United States Circuit Courts of Appeals:


I write to follow up on my August 30, 2021, letters to each of you requesting information regarding the judiciary’s interpretation of the Ethics in Government Act’s “personal hospitality exception.” After more than seven months, neither the Administrative Office, the Code of Conduct Committee, nor any Circuit’s chief judge has responded. I hope this unanimous failure to respond does not signal a lack of concern for judicial ethics issues, much less a coordinated effort to ignore a congressional request.


Representative Hank Johnson, the Chairman of the Courts subcommittee in the House, joins me in renewing this request. The Twenty-First Century Courts Act, which we recently introduced, seeks to address issues related to judicial travel and personal hospitality, and additional information from the judiciary is crucial to ensuring our bill addresses the full scope of the problem.

We therefore repeat the previous request for responses to the specific questions in the enclosed letter. Please respond no later than May 2, 2022. After much delay, we look forward to your timely attention to this request.

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Sincerely,


SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on
Federal Courts, Oversight, Agency Action,
and Federal Rights


HENRY C. "HANK" JOHNSON, JR.
Chairman, House Judiciary Subcommittee
on Courts, Intellectual Property, and the
Internet

Enclosure

SHELDON WHITEHOUSE
RHODE ISLAND

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April 27, 2023

The Honorable Roslynn R. Mauskopf
Director
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Mauskopf:

I write to follow up on my prior letter, dated April 21, 2023, requesting additional information about the procedures and rules related to the Committee on Financial Disclosure and Judicial Conference's consideration of potential disclosure violations under the Ethics in Government Act of 1978. That letter also urged the Committee and Judicial Conference to act with due dispatch in considering possible violations in recent years by Justice Thomas. As you may know, the undisclosed gifts, travel, and transactions that form the basis of the matter currently pending before the Committee are not the only financial disclosure omissions in Justice Thomas's history.

Nor is this the first time that the Judicial Conference has been asked to consider whether to refer Justice Thomas's financial disclosure omissions to the Attorney General under the Ethics in Government Act.

In 2011, the nonprofit group Common Cause uncovered via IRS filings that Justice Thomas had failed to disclose several years of income that his wife had received from the Heritage Foundation and Liberty Central.¹ On January 21, 2011, Common Cause reported these omissions to the Judicial Conference in a letter to one of your predecessors, Judge and then-Director James Duff.² That letter noted that the Ethics in Government Act directs the Judicial Conference to report to the Attorney General the name of any federal judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information to be reported."³ The letter then requested "that the Judicial Conference make such a determination in the case of Justice Thomas, and if reasonable cause is found, to refer the matter to the Attorney General."⁴

¹ Common Cause, Press Release, *What else haven't they told us?* (Jan. 21, 2011), available at https://web.archive.org/web/20111123131308/http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkL_NK1MQ1wG&b=4773613&ct=9042443.

² Letter from Bob Edgar & Arn H. Pearson to Hon. James C. Duff (Jan. 21, 2011), available at <https://www.commoncause.org/resource/letter-to-james-duff-on-virginia-thomas-income/> [hereinafter January Common Cause Letter].

³ *Id.*

⁴ *Id.*

The following Monday, it was reported that Justice Thomas had amended several of his prior reports to include previously undisclosed spousal income, which he said had been “inadvertently omitted due to a misunderstanding of the filing instructions.”⁵ Although Justice Thomas’s amendments were not disclosed until Monday, January 24, 2011,⁶ a review of his letters to the Committee on Financial Disclosure reveal that he had in fact requested such amendments on January 21⁷—the same day that Common Cause sent its letter to the Judicial Conference. However, there is no indication that Common Cause provided Justice Thomas advance notice of its letter, other than a press release from earlier the same day;⁸ nor did the letter mention or allude to knowledge of Justice Thomas’s amendments.⁹ The letter also did not reference the other sources of spousal income that Justice Thomas had not disclosed but that he requested to be included in his amendments.¹⁰

Later that year, on June 18, 2011, in a precursor to the most recent reporting by ProPublica, the New York Times reported that Harlan Crow had:

[D]one many favors for [Justice Thomas] and his wife, Virginia, helping finance a Savannah library project dedicated to Justice Thomas, presenting him with a Bible that belonged to Frederick Douglass and reportedly providing \$500,000 for Ms. Thomas to start a Tea Party-related group. They have also spent time together at gatherings of prominent Republicans and businesspeople at Mr. Crow’s Adirondacks estate and his camp in East Texas.¹¹

The Times further reported that, “In addition to giving him the Douglass Bible, valued 10 years ago at \$19,000, Mr. Crow has hosted the justice aboard his private jet and his 161-foot yacht, at the exclusive Bohemian Grove retreat in California and at his grand Adirondacks summer estate called Topridge.”¹² Justice Thomas did not amend his financial disclosure reports to account for these gifts, nor did he or Mr. Crow respond to the Times’s requests for comments about these gifts.¹³

Following this reporting, Common Cause and another nonprofit organization, Alliance For Justice, again wrote to the Judicial Conference urging it to refer Justice Thomas to the Attorney General for Justice Thomas’s nondisclosure of his spouse’s income.¹⁴ Two weeks later, the

⁵ Jennifer Epstein, *Thomas revises disclosure forms*, Politico (Jan. 24, 2011),

<https://www.politico.com/story/2011/01/thomas-revises-disclosure-forms-048086>.

⁶ See *id.* (“Supreme Court Justice Clarence Thomas has amended 13 years’ worth of disclosure reports to include details of wife Virginia Thomas’s sources of income, documents released on Monday show.”).

⁷ Hon. Clarence Thomas Letter and Self Initiated Amendments to Committee on Financial Disclosure (Jan. 21, 2011), available at <https://big.assets.huffingtonpost.com/amendments.pdf> [hereinafter Thomas Letter].

⁸ See Common Cause, *What else haven’t they told us?*, *supra* note 1.

⁹ See January Common Cause Letter, *supra* note 2.

¹⁰ See *id.*

¹¹ Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. Times (June 18, 2011),

<https://www.nytimes.com/2011/06/19/us/politics/19thomas.html>.

¹² *Id.*

¹³ *Id.*

¹⁴ Letter from Bob Edgar & Nan Aron to Hon. James Duff (Sept. 13, 2011), available at <https://web.archive.org/web/20130415123051/https://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=11216445>.

Judicial Conference replied that it was referring the matter—presumably including the matter of free private yacht and jet trips—to the Committee on Financial Disclosure.¹⁵

On September 29, 2011, several members of the House of Representatives sent a letter to the Judicial Conference also requesting that the Conference refer both the matter of Justice Thomas’s spousal income omissions and his failure to disclose “use of a private yacht and airplane owned by Harlan Crow . . . as a gift or travel reimbursement on his federal disclosure forms as required by the Ethics in Government Act of 1978.”¹⁶ Common Cause, Alliance for Justice, and 53 members of the House of Representatives sent additional letters to the Judicial Conference and Chief Justice Roberts reiterating these requests.¹⁷ These letters came after Common Cause and Alliance for Justice revealed on October 5, 2011, that Justice Thomas had for years correctly filled out the spousal income sections of his financial disclosure forms,¹⁸ despite his claims of “misunderstanding . . . the filing instructions.”¹⁹

To my knowledge, despite receiving multiple requests for the Judicial Conference to investigate these omissions related to spousal income and gifts from Mr. Crow, the Judicial Conference has never revealed to the public how it ultimately resolved these matters—including whether it or the Committee on Financial Disclosure ever undertook an investigation or referred the matters to the Department of Justice. In 2011, the Committee on Financial Disclosure submitted two reports to the Judicial Conference as part of the biannual Reports of the Proceedings of the Judicial Conference. Neither report referenced any consideration of these or any related matters.²⁰ Nor did the Committee’s next report in March 2012.²¹

The only indication that the Committee or the Conference ever considered these matters is the following passage from the Committee’s September 11, 2012, report to the Judicial Conference:

DISCHARGE OF STATUTORY DUTY UNDER 5 U.S.C. APP. § 104(B)

A Judicial Conference member sought to have the Conference discuss the issue of how the Conference discharges its statutory duty, under 5 U.S.C. app. § 104(b), to determine whether an individual has willfully failed to file a financial disclosure report or has willfully falsified or failed to include required information in such a

¹⁵ See Common Cause, Press Release, *Citing new evidence, Common Cause and Alliance for Justice urge formal investigation of Justice Thomas’ disclosure failures*, Common Dreams (Oct. 5, 2011), <https://www.commondreams.org/newswire/2011/10/05/citing-new-evidence-common-cause-and-alliance-justice-urge-formal-investigation>.

¹⁶ Letter from Rep. Louise Slaughter et al. to Hon. James C. Duff (Sept. 29, 2011), available at <https://www.law360.com/articles/275091/attachments/0>.

¹⁷ Common Cause, “Supreme Conflict,” <https://www.commoncause.org/resource/supreme-conflict/>; Letter from Rep. Louise M. Slaughter et al. to Hon. John Roberts (Nov. 18, 2011), available at https://lawprofessors.typepad.com/files/jud_conf_follow-up_letter_final_11.18.113.pdf.

¹⁸ Stephanie Mencimer, *Chart of the Day: Clarence Thomas’ Non-Disclosure Form*, Mother Jones (Oct. 5, 2011), <https://www.motherjones.com/politics/2011/10/clarence-thomass-non-disclosure-form/>.

¹⁹ Thomas Letter, *supra* note 7.

²⁰ *Report of the Proceedings of the Judicial Conference of the United States* at 16, March 15 2011, available at <https://www.uscourts.gov/sites/default/files/2011-03.pdf>; *Report of the Proceedings of the Judicial Conference of the United States* at 24, September 13, 2011, available at <https://www.uscourts.gov/sites/default/files/2011-09.pdf>.

²¹ *Report of the Proceedings of the Judicial Conference of the United States* at 16, March 13, 2012, available at <https://www.uscourts.gov/sites/default/files/2012-03.pdf>.

report. On the Conference floor, the member moved to disapprove the most recent report of the Committee on Financial Disclosure and require the Committee to file amended reports that provide information about Committee actions taken pursuant to the authority delegated to it by the Conference to carry out duties under 5 U.S.C. app. § 104(b). The Judicial Conference decided to postpone consideration of the motion so that the Committee may first consider the matter and report back to the Conference.²²

This passage seems to coincide with the precise issues raised by Justice Thomas's omissions and requests for the Judicial Conference to exercise its power of referral under the Ethics in Government Act. However, despite the promise that the Committee would "consider the matter and report back to the Conference,"²³ no such report was apparently ever issued.²⁴ Thus, it remains unclear the nature of the precise issue regarding the referenced statutory duties, the perceived inadequacy of "the most recent report of the Committee on Financial Disclosure," and how or whether the Committee and Judicial Conference ultimately resolved the issue.

In light of these outstanding questions, I respectfully request the following information and answers to the following questions.

1. Please provide any reports, either of the Committee on Financial Disclosure or the Judicial Conference, related to the matter referenced in the Committee on Financial Disclosure's report to the Judicial Conference as part of the September 11, 2012, Report on the Proceedings of the Judicial Conference.
2. If those reports do not exist, or are otherwise not wholly responsive to the outstanding questions discussed above, please provide the following information.
 - a. What was the issue related to the Conference's duties under 5 U.S.C. § 13106(b) that the Judicial Conference member referenced in the September 11 report sought to discuss?
 - b. What was the issue with the Committee on Financial Disclosure's "most recent report" that caused the Judicial Conference member to seek disapproval of such report?
 - c. What "information about Committee actions taken pursuant to the authority delegated to it by the Conference to carry out duties under" 5 U.S.C. § 1306(b)

²² *Report of the Proceedings of the Judicial Conference of the United States* at 18, September 11, 2012, available at <https://www.uscourts.gov/sites/default/files/2012-09.pdf>.

²³ *Id.*

²⁴ See, e.g., *Report of the Proceedings of the Judicial Conference of the United States* at 15-16, March 12, 2013, available at <https://www.uscourts.gov/sites/default/files/2013-03.pdf>; *Report of the Proceedings of the Judicial Conference of the United States* at 21, September 17, 2013, available at <https://www.uscourts.gov/sites/default/files/2013-09.pdf>; *Report of the Proceedings of the Judicial Conference of the United States* at 17, March 11, 2014, available at <https://www.uscourts.gov/sites/default/files/2014-03.pdf>; *Report of the Proceedings of the Judicial Conference of the United States* at 16-17, September 16, 2014, available at https://www.uscourts.gov/sites/default/files/2014-09_0.pdf.

did the Judicial Conference member seek to include in “amended reports” by the Committee?

- d. Did the Committee “consider the matter” referenced in the report and “report back to the Conference?” If so, please summarize that consideration and report, and provide any documentation of such consideration and report. Did the Judicial Conference ever consider such report?
3. How did the Judicial Conference and Committee on Financial Disclosure resolve the requests it received throughout 2011 related to Justice Thomas’s various disclosure omissions?

Thank you for your timely consideration of these matters.

Sincerely,



SHELDON WHITEHOUSE
Chair, Senate Judiciary Subcommittee on
Federal Courts, Oversight, Agency Action,
and Federal Rights



February 4, 2021

The Honorable John G. Roberts
Chief Justice
Supreme Court of the United States
One First St. NE
Washington, D.C. 20543-0001

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First St. NE
Washington, D.C. 20543-0001

Dear Mr. Chief Justice and Mr. Harris:

The Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989, requires senior government officials—including the President and Vice President, officers and high-level employees of the Executive Branch, Members of Congress, and judicial officers—to annually disclose outside income, gifts, and reimbursements. The Executive branch and both chambers of Congress have issued implementing regulations and/or rules that require disclosures beyond what the statute requires.¹ For example, executive and legislative branch disclosure rules require descriptions (and, in Congress’s case, documentation) of reimbursed expenditures; narrowly construe the Ethics in Government Act’s “personal hospitality” exception; restrict officials’ receipt of certain gifts and travel; and require prompt online publication of, and easy public access to, financial disclosures.

The Judicial Conference Committee on Codes of Conduct has also issued financial disclosure regulations, but these are significantly less stringent than the executive and legislative branch rules. Even those requirements, however, do not apply to the Justices of the Supreme Court. As a result, the Justices of our highest court are subject to the lowest standards of transparency of any senior officials across the federal government.

¹ See, e.g., 5 C.F.R. 2634 (Executive Branch Financial Disclosure, Qualified Trusts, And Certificates of Divestiture), <https://ecfr.federalregister.gov/current/title-5/chapter-XVI/subchapter-B/part-2634>; U.S. House of Representatives, Committee on Standards of Official Conduct, House Ethics Manual, 110th Congress, 2nd Session (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf; U.S. Senate, Select Committee on Ethics, Senate Ethics Manual, 108th Congress, 1st Session (2003), <https://www.ethics.senate.gov/downloads/pdf/manual.pdf>.

We believe a legislative solution may be in order to bring the judiciary's financial disclosure requirements in line with other branches of government if the Court does not address the issue itself. Please be good enough to provide answers to the following inquiries:

1. What plans, if any, does the Court have to adopt a code of ethics, or to bring its gift, travel, and hospitality restrictions and disclosure policies in line with those of the Executive Branch and Congress? If it has no such plans, what justifies the Court having a lower disclosure standard than the other branches of government?
2. Does the Court (or do the individual Justices) maintain records of emoluments in the nature of gifts, travel, hospitality, and reimbursements received by members of the Court? Do such records include the dollar value and descriptions of the emoluments?
3. What steps does the Court take to identify or prevent the Justices' receipt of gifts, travel, or hospitality from those who may have business before the Court?
4. For purposes of the Justices' disclosures, how does the Court define the term "personal hospitality" that appears in the Ethics in Government Act? See 5a U.S.C. §102(a)(2)(A) (exempting from disclosure any gifts in the form of "food, lodging, or entertainment received as personal hospitality").
5. What plans, if any, does the Court have to make the Justices' financial disclosure reports more accessible to the public?

Thank you for your consideration of our views and your attention to this matter.

Sincerely,



Sheldon Whitehouse
United States Senator



Lindsey O. Graham
United States Senator



March 31, 2023

The Honorable Chris Van Hollen
 Chair
 Subcommittee on Financial Services
 and General Government
 Senate Committee on Appropriations
 United States Senate
 Washington, D.C. 20510

The Honorable Bill Hagerty
 Ranking Member
 Subcommittee on Financial Services
 and General Government
 Senate Committee on Appropriations
 United States Senate
 Washington, D.C. 20510

Dear Chair Van Hollen and Ranking Member Hagerty:

We write to request your support for including in the Fiscal Year 2024 Financial Services and General Government Appropriations bill language directing the Supreme Court of the United States to adopt more stringent and transparent ethics rules, as well as meaningful procedures to enforce those rules.

Fairness and impartiality are the core of the Constitution's promise of an independent judiciary. The power of the federal judiciary comes from the public's confidence that judges will rule honestly and with due respect to all those who enter the courtroom. When the public no longer trusts the courts to live up to these ideals, it undermines the pursuit of justice and disrupts the Constitution's delicate balance of power. Nowhere in the federal judiciary is vigilance against even the appearance of impropriety more important than at the highest court in the land.

For these reasons, the public's plummeting confidence in the Supreme Court, and the Court's unwillingness to address some of the roots of this distrust, are deeply worrying. Over the past two years, the public's trust in the Court has decreased to historic lows.¹ Despite these trends, the Supreme Court has consistently refused to adopt much-needed ethics reforms to address the allegations of misconduct that have no doubt contributed to the public's waning confidence.

Two incidents from the last year alone demonstrate the pressing need for major ethics reforms at the Supreme Court. In one instance, a Supreme Court justice—possibly in violation of federal law—declined to recuse himself from cases implicating his spouse's political activities.² In

¹ Chris Cillizza, *Trust in the Supreme Court is at a record low*, CNN (Sept. 29, 2022), <https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll/index.html>; Alison Durkee, *Trust in Supreme Court Drops to New Low, Poll Finds as Ethics Bill Moves Forward in House*, Forbes (May 12, 2022), <https://www.forbes.com/sites/alisondurkee/2022/05/12/trust-in-supreme-court-drops-to-new-low-poll-finds-as-ethics-bill-moves-forward-in-house/?sh=649376d247b7>; Pew Rsch. Ctr., *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/>.

² Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022), <https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases>; Marcia Coyle, *Ethics Scholars Question Justice Thomas' Participation in Arizona Election Order*, Law.com (Nov. 14, 2022), <https://www.law.com/nationallawjournal/2022/11/14/ethics-scholars-question-justice-thomas-participation-in-arizona-election-order/>.

another, allegations emerged of a 20-year, \$30 million private lobbying campaign led by wealthy activists. These activists offered justices gifts to “embolden” the justices to write increasingly partisan opinions, and may have induced the leak of the Court’s decision in a 2014 case.³

The Supreme Court has responded to most of these serious allegations by ignoring them entirely. When the Court has addressed some of these allegations, it has incorrectly dismissed them as uncorroborated and refused to investigate further.⁴ More generally, justices and Court officials have said that ethics reforms are unnecessary because the justices “consult” the code of conduct that binds all other federal judges.⁵ These assurances do nothing to rectify misconduct that contravenes that code and that the Court has not investigated, much less addressed publicly.

Ethics reform at the Supreme Court has consistently enjoyed strong bipartisan support among legal academics,⁶ the American Bar Association,⁷ members of Congress,⁸ federal judges,⁹ and the

³ Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. Times (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>; Peter S. Canellos & Josh Gerstein, *Operation Higher Court: Inside the religious right’s efforts to wine and dine Supreme Court justices*, Politico (July 8, 2022), <https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739>; Jo Becker & Julie Tate, *A Charity Tied to the Supreme Court Offers Donors Access to the Justices*, N.Y. Times (Dec. 30, 2022), <https://www.nytimes.com/2022/12/30/us/politics/supreme-court-historical-society-donors-justices.html>.

⁴ See, e.g., Letter from Ethan Torrey, Legal Counsel, to Sen. Sheldon Whitehouse & Rep. Henry “Hank” Johnson (Nov. 28, 2022), available at <https://int.nyt.com/data/documenttools/letter-from-scotus-counsel/e3dd2fb4eda3dd0/full.pdf>.

⁵ See, e.g., 2011 Year-End Report on the Federal Judiciary, at 4-5, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>; Rich Gardella, *Why Don’t Supreme Court Justices Have an Ethics Code*, NBC News (Apr. 11, 2017), <https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236>; Robert Barnes & Ann E. Marimow, *Supreme Court justices discussed, but did not agree on, code of conduct*, Wash. Post (Feb. 9, 2023), <https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code/>; Letter from Ethan Torrey, Legal Counsel, to Sen. Sheldon Whitehouse & Henry “Hank” Johnson (Nov. 7, 2022), available at https://www.whitehouse.senate.gov/imo/media/doc/2022_11_7%20-%20Letter%20to%20Chairman%20Whitehouse%20and%20Chairman%20Johnson.pdf.

⁶ Letter from Legal Ethics Scholars to Hon. John Roberts (Feb. 3, 2022), available at https://www.scribd.com/document/556480364/Scholars-Letter-on-SCOTUS-Ethics-Code#:~:from_view=author; Presidential Commission on the Supreme Court of the United States, *Final Report*, Dec. 2021, at 217, 221, available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

⁷ Am. Bar Assoc., *Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, (Feb. 27, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-23-wl/scotus-ethics-0223wl/.

⁸ See, e.g., Judiciary ROOM Act of 2018, H.R. 6755 (115th Cong.); Courthouse Ethics and Transparency Act, S. 3059 (117th Cong.); Sen. Chuck Grassley, Press Release, *Grassley, Sensenbrenner See Need For Inspector General For the Judiciary*, (Jan. 31, 2007), <https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary>; Letter from Sens. Sheldon Whitehouse & Lindsey O. Graham to Hon. John G. Roberts & Scott S. Harris (Feb. 4, 2021), available at <https://www.whitehouse.senate.gov/imo/media/doc/2.4.2021%20Whitehouse-Graham%20SCOTUS%20travel%20%20gift%20disclosure%20letter.pdf>; Letter from Sens. Sheldon Whitehouse & John Kennedy to Hon. Merrick Garland & Hon. Donald W. Washington (June 4, 2021), https://www.whitehouse.senate.gov/imo/media/doc/210604_DOJ%20letter%20-%20Marshals%20Records%20Request.pdf.

⁹ Nate Raymond, *Most judges in survey support U.S. Supreme Court having ethics code*, Reuters (June 22, 2022), <https://www.reuters.com/legal/government/most-judges-survey-support-us-supreme-court-having-ethics-code-2022-06-22/>.

public.¹⁰ Much-needed, good-governance reform at the Court would help root out misconduct and restore the public’s faith that the justices will live up to their oath to “administer justice without respect to persons,” to do “equal right to the poor and to the rich,” and to “faithfully and impartially discharge and perform all the duties incumbent” upon them as Justices of the Supreme Court of the United States.¹¹

The Supreme Court has the tools and authority it needs to develop and implement these changes, including adopting a code of conduct, creating fairer and more transparent recusal rules, and setting up procedures—based on longstanding procedures in the lower courts—to receive and investigate complaints of judicial misconduct. The only obstacle keeping the Court from adopting these reforms is the Court’s own unwillingness to see them through.

In the absence of such willingness, Congress has broad authority to compel the Supreme Court to institute these reforms, which would join other requirements already legislatively mandated.¹² And Congress’s appropriations power is one tool for achieving these changes. During recent “interbranch disputes” between Congress and “a recalcitrant Executive Branch,” some courts have encouraged Congress to “withhold appropriations,” which can act as a “powerful incentive” for action within the executive branch.¹³ Nothing in the Constitution mandates that the judiciary be treated any differently when Congress is faced with judicial recalcitrance.¹⁴

Accordingly, we respectfully urge you to include the following language in the FY 2024 Financial Services and General Government Appropriations bill:

“Of these funds, \$10 million cannot be obligated unless the Chief Justice notifies the Committee on Appropriations of both Houses of Congress that the Supreme Court has put into effect a public code of ethics for justices of the Court, including policies addressing, at a minimum, circumstances requiring disqualifications and recusals, the receipt and disposition of requests related to disqualifications and recusals, and the publication of such dispositions and the reasons therefor; and

¹⁰ Sabrina Jacobs, *Voters Are Split on Their Perception of the Supreme Court, but Support a Code of Ethics for Justices*, Data for Progress (Apr. 19, 2022), <https://www.dataforprogress.org/blog/2022/4/19/voters-are-split-on-their-perception-of-the-supreme-court-but-support-a-code-of-ethics-for-justices>; C-SPAN & Pierpont Consulting & Analytics, LLC, *New C-SPAN/Pierpont Survey: Public Attitudes About the U.S. Supreme Court*, (Mar. 15, 2022), <https://static.c-span.org/files/pressCenter/NEW+C-SPAN+Pierpont+Supreme+Court+Survey.pdf>; Fix the Court, *New Poll: Greater Transparency at SCOTUS May Be the Only Thing the Left and Right Agree On*, (June 12, 2018), <https://fixthecourt.com/2018/06/stateofscotus/>.

¹¹ Supreme Court of the United States, *Oaths of Office*, <https://www.supremecourt.gov/about/oath/oathsoffice.aspx>.

¹² See *An Ethical Judiciary: Transparency and Accountability for 21st Century Courts: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Amanda Frost).

¹³ *Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 519, 528-529 (D.C. Cir. 2020) vacated en banc, 968 F.3d 755 (D.C. Cir. 2020); *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 781, 792 (D.C. Cir. 2020) (en banc).

¹⁴ Gordon Bernant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 45 Mercer L. Rev. 835, 845-846 (1995) (“There are no well-accepted arguments that the judicial branch should have the same near total independence to govern itself that individual judges must have in deciding a case or controversy. . . . Settled constitutional practice demonstrates that branch independence is consistent with Congress’s exercise of its authorization, appropriation, and oversight powers, as well as its authority to regulate judicial rule-making authority, internal disciplinary procedures, and general administrative operations.”).

procedures, modeled after the procedures set forth in chapter 16 of title 28, United States Code, for receiving and investigating complaints alleging violations of such public code of ethics or other misconduct by justices of the Court.”

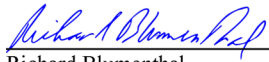
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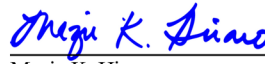
Sheldon Whitehouse
United States Senator



Cory A. Booker
United States Senator



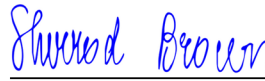
Richard Blumenthal
United States Senator



Mazie K. Hirono
United States Senator



Peter Welch
United States Senator



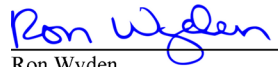
Sherrod Brown
United States Senator

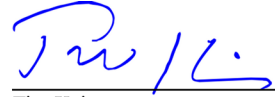


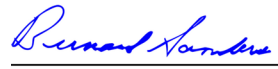
Mark R. Warner
United States Senator

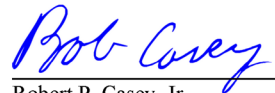


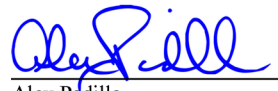
Michael F. Bennet
United States Senator



Ron Wyden
United States Senator

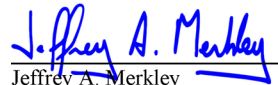

Tim Kaine
United States Senator


Bernard Sanders
United States Senator


Robert P. Casey, Jr.
United States Senator


Alex Padilla
United States Senator


Elizabeth Warren
United States Senator


Jeffrey A. Merkley
United States Senator

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<https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9>

OPINION THE WEEKEND INTERVIEW [Follow](#)

Justice Samuel Alito: ‘This Made Us Targets of Assassination’

The author of the Dobbs abortion ruling answers attacks on the court’s ‘legitimacy.’ He says he thinks he knows who leaked the draft and is certain about the motive.

By James Taranto [Follow](#) and David B. Rivkin Jr.

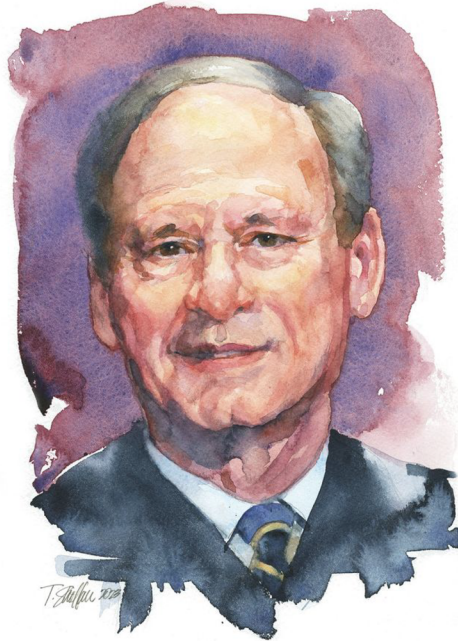
April 28, 2023 2:06 pm ET

Washington

Justice Samuel Alito was supposed to speak to law students at George Mason University in Arlington, Va., but when they showed up, he wasn’t there. “That Alito was speaking via closed circuit from a room at the Supreme Court seven miles away, rather than in person, was a sign these are not normal times,” the Washington Post reported. The Post didn’t explain what made the “times” abnormal.

It wasn’t a lingering fear of Covid-19. In a mid-April interview in his chambers, Justice Alito fills us in on the May 12, 2022, event: “Our police conferred with the George Mason Police and the Arlington Police and they said, ‘It’s not a good idea. He shouldn’t come here. . . . The security problems will be severe.’ So I ended up giving the speech by Zoom,” he says. “Still, there were so many protesters and they were so loud that you could hear them.”

By now a noisy mob of law students may sound like any other school day, but last May also was a tumultuous time for the court. The preceding week, someone had leaked a draft of Justice Alito’s opinion in *Dobbs v. Jackson Women’s Health Organization*, a landmark abortion case that wouldn’t be decided until late June. The last question at the George Mason event, the Post reported, was about how the justices were getting along in the wake of that unprecedented breach of confidentiality. At the time, Justice Alito said little in response beyond “we’re doing our work.”



Samuel Alito PHOTO: TERRY SHOFFNER

He now says that the leak “created an atmosphere of suspicion and distrust. We worked through it, and last year we got our work done. This year, I think, we’re trying to get back to normal operations as much as we can. . . . But it was damaging.” Chief Justice John Roberts directed the marshal of the Supreme Court to investigate the leak. In January she issued her findings: “Investigators have been unable to determine at this time, using a preponderance of the evidence standard, the identity of the person(s) who disclosed the draft majority opinion.”

Justice Alito says the marshal “did a good job with the resources that were available to her” and agrees that the evidence was insufficient for a public accusation. “I personally have a pretty good idea who is responsible, but that’s different from the level of proof that is needed to name somebody,” he says. He’s certain about the motive: “It was a part of an effort to prevent the *Dobbs* draft . . . from becoming the decision of the court. And that’s how it was

used for those six weeks by people on the outside—as part of the campaign to try to intimidate the court.”

That campaign included unlawful assemblies outside justices’ homes, and that wasn’t the worst of it. “Those of us who were thought to be in the majority, thought to have approved my draft opinion, were really targets of assassination,” Justice Alito says. “It was rational for people to believe that they might be able to stop the decision in *Dobbs* by killing one of us.” On June 8, an armed man was arrested outside the home of Justice Brett Kavanaugh; the suspect was later charged with attempted assassination and has pleaded not guilty.

A few pundits on the left speculated that the leaker might have been a conservative attempting to lock in the five-justice majority and overturn the constitutional right to abortion. “That’s infuriating to me,” Justice Alito says of the theory. “Look, this made us targets of assassination. Would I do that to myself? Would the five of us have done that to ourselves? It’s quite implausible.”

He adds that “I don’t feel physically unsafe, because we now have a lot of protection.” He is “driven around in basically a tank, and I’m not really supposed to go anywhere by myself without the tank and my members of the police force.” Deputy U.S. marshals guard the justices’ homes 24/7. (The U.S. Marshals Service, a bureau of the Justice Department, is distinct from the marshal of the court, who reports to the justices and oversees the Supreme Court Police.)

A federal law called Section 1507 makes it a crime to picket or parade “in or near” a federal judge’s residence “with the intent of influencing” him “in the discharge of his duty.” During a hearing last month, Attorney General Merrick Garland told Sen. Mike Lee (R., Utah) that the marshals have “full authority to arrest” violators of Section 1507. But according to training slides obtained by Sen. Katie Britt (R., Ala.), deputies on the justices’ residential details are told to enforce the law only as “a last resort to prevent physical harm to the Justices and/or their families.”

Although the Supreme Court has held that the Constitution allows for reasonable restrictions on the time, place and manner of speech, the training slides indicate that the Justice Department believes it is unconstitutional to enforce Section 1507 absent “criminal threats and intimidation.” Regular protests outside the justices’ homes continue.

In some ways this is an old story. Each side of the abortion debate has featured a vigorous protest culture since at least the 1970s, when the court decided *Roe v. Wade*. The last time it

reconsidered *Roe*, the three-justice plurality opinion in *Planned Parenthood v. Casey* (1992) asserted that it would “subvert the Court’s legitimacy” to overturn a precedent while “under fire,” meaning subjected to public criticism. The losing side has even resorted to violence before: Antiabortion extremists assassinated four abortion doctors between 1993 and 2009.

But as the court has grown more conservative in recent years, the left has stepped up the attacks on the court’s “legitimacy,” including character assassination of individual justices, with little objection from mainstream Democrats and plenty of help from the media.

Justice Alito says “this type of concerted attack on the court and on individual justices” is “new during my lifetime. . . . We are being hammered daily, and I think quite unfairly in a lot of instances. And nobody, practically nobody, is defending us. The idea has always been that judges are not supposed to respond to criticisms, but if the courts are being unfairly attacked, the organized bar will come to their defense.” Instead, “if anything, they’ve participated to some degree in these attacks.”

Judges are in a double bind: If they don’t respond, the attacks stand. If they do, they diminish the mystique on which judicial authority depends. Justice Alito demurs when we ask about “ethics” accusations against Justice Clarence Thomas from partisan media: “I’ll stay away from that.” But he does address a less-recent drama: “After Justice Kavanaugh was accused of being a rapist during his Senate confirmation hearings, he made an impassioned speech, made an impassioned scene, and he was criticized because it was supposedly not judicious, not the proper behavior for a judge to speak in those terms. I don’t know—if somebody calls you a rapist?”

Those who throw the mud then disparage the justices for being dirty. “We’re being bombarded with this,” Justice Alito says, “and then those who are attacking us say, ‘Look how unpopular they are. Look how low their approval rating has sunk.’ Well, yeah, what do you expect when you’re—day in and day out, ‘They’re illegitimate. They’re engaging in all sorts of unethical conduct. They’re doing this, they’re doing that?’”

It “undermines confidence in the government,” Justice Alito says. “It’s one thing to say the court is wrong; it’s another thing to say it’s an illegitimate institution. You could say the same thing about Congress and the president. . . . When you say that they’re illegitimate, any of the three branches of government, you’re really striking at something that’s essential to self-government.”

Some of the attacks are more technical, such as those involving the “shadow docket.” That term, coined by a law professor less than a decade ago, refers to applications for emergency orders and summary decisions, which the justices handle quickly and without full briefing. Such matters often provoke disagreement within the court, such as a 2022 Alabama congressional redistricting case in which Justice Elena Kagan, joined by two colleagues, complained of “the scanty review this Court gives matters on its shadow docket.”

Justice Alito finds these applications a nuisance. “They’re very disruptive. But what are we supposed to do? They are brought to us. The last administration brought a lot of them to us because a lot of its programs were enjoined. This administration is doing the same thing right now. The solicitor general has said that she’s likely to file an application here to stay the Fifth Circuit’s order in the case involving the—*mifepri*stone? However you pronounce the word.” It’s *mifepri*stone, an abortion drug that a lower court had said the Food and Drug Administration erred in approving.

It’s April 13 when Justice Alito tells us: “I have to prepare for a sitting next week. The next two weeks we have arguments. I have to prepare for all of those cases. But when this comes in, I’m going to have to put all that aside and deal with it.” On April 14 the application reached Justice Alito in his capacity as circuit justice for the Fifth Circuit. He issued a temporary stay immediately and extended it on April 19. On April 21 the full court granted the stay, so that *mifepri*stone will remain on the market pending further litigation.

Justice Alito filed a written dissent from the order granting the stay. He cited past complaints about the shadow docket from Justices Kagan, Sonia Sotomayor and Amy Coney Barrett. “I did not agree with these criticisms at the time,” he wrote, “but if they were warranted in the cases in which they were made, they are emphatically true here.”

The court’s attackers clearly seek to poison the well, but to what end? They sometimes proclaim unrealistic goals such as pressuring a disfavored justice to retire or removing him from office through impeachment. Sometimes they speak of packing or “expanding” the court—enacting legislation to create new seats that would immediately be filled by a Democratic president and Senate.

That might become possible if the Democrats have a good election in 2024, although Franklin D. Roosevelt failed in 1937 with enormous majorities, and Joe Biden, with narrow ones in 2021, punted the idea to a committee. It also would open the door to retaliatory packing by a future Republican president and Congress. Justice Alito finds the whole notion appalling: “To change the size of the court just because you want to change the result in cases—that would

destroy it. You want to talk about our legitimacy? That would destroy the perception that we're anything other than a political body."

The threat to politicize the court can tempt justices to rule defensively—to take account of political ramifications and thereby politicize their own institution. The plurality explicitly did that in *Casey*, and some sitting justices have been accused of it in recent years. Justice Alito isn't one of them.

"This is not a situation in which the right thing to do is different from the expedient thing to do, at least in the long term," he says. The public "will have reason to question our legitimacy if they see that what we are doing is not following the Constitution and the laws, but we've got our finger to the wind"—he lofts a digit—"and we're issuing decisions that nobody really believes represent our sincere thinking about the law, but are structured in a way to curry favor, avoid controversy or something like that."

Justice Antonin Scalia said something similar in his dissent in *Casey*: "The notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening."

The careers of Justices Scalia and Alito, whose high-court service overlapped by slightly more than a decade, demonstrate the increasing aggressiveness of the left's approach to the court. Scalia was confirmed 98-0 in 1986; Justice Alito's 2006 vote was 58-42, with only four Democratic ayes. The former, the first Italian-American justice, was celebrated as an ethnic pioneer; the latter's opponents belittled him with the bigoted portmanteau "Scalito," which appears on a framed bumper sticker on his bookshelf, a confirmation keepsake.

How did Scalia escape the opprobrium to which his younger colleagues and successors have been subjected? In part by dissenting often. "Nobody can say for sure," Justice Alito says, "but I'm willing to bet he would have been on the side that has been so heavily criticized in all the controversial cases. His vote would have been there, and he would have been subjected to the same kind of criticism."

There's little doubt that would have been true of *Dobbs*. "Some decisions," Justice Alito says, "and I think that *Roe* and *Casey* fell in this category, are so egregiously wrong, so clearly wrong, that that's a very strong factor in support of overruling them." Scalia was even blunter in *Casey*: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."

“When you’re in dissent,” Justice Alito observes, “well, his ideas were amusing and interesting. He spoke at a lot of law schools and he was honored at law schools, but he wasn’t a threat, because those views were not prevailing on issues that really hit home.”

Soon after Scalia’s death in 2016, one of those law schools even took his name—Antonin Scalia Law School at George Mason University. That’s where Justice Alito was unable to set foot six years later because “the security problems will be severe.”

Mr. Taranto is the Journal’s editorial features editor. Mr. Rivkin practices appellate and constitutional law in Washington. He served at the Justice Department and the White House Counsel’s Office in the Reagan and George H.W. Bush administrations.

Appeared in the April 29, 2023, print edition as “This Made Us Targets of Assassination”.