

**ENSURING AN IMPARTIAL JUDICIARY:
SUPREME COURT ETHICS, RECUSAL,
AND TRANSPARENCY ACT OF 2023**

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT,
AGENCY ACTION, AND FEDERAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

—————
JUNE 14, 2023
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Serial No. J-118-23
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Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PUBLISHING OFFICE

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**ENSURING AN IMPARTIAL JUDICIARY:
SUPREME COURT ETHICS, RECUSAL,
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WEDNESDAY, JUNE 14, 2023

UNITED STATES SENATE,
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT,
AGENCY ACTION, AND FEDERAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice at 2:02 p.m., in Room 226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chair of the Subcommittee, presiding.

Present: Senators Whitehouse [presiding], Blumenthal, Hirono, Padilla, and Welch.

Also present: Chair Durbin.

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

Chair WHITEHOUSE. Good afternoon, everyone. There is a good deal of complicated scheduling going on in the Senate, which is particularly busy right now. So, we may or may not be joined by Ranking Member Kennedy, as he has other obligations. But I've been cleared by his team to proceed with the hearing. If he can make it here, I'll give him the chance to make an opening statement at a convenient juncture. But in the meantime, the witnesses are ready, and I'm cleared to proceed, and so we will go forward.

Two weeks ago, in a speech to the American Law Institute, Chief Justice Roberts said he wanted to assure people he was committed to making certain that the Supreme Court would adhere to the highest standards of conduct. More important, the Chief Justice acknowledged the Court has more to do, that Justices are continuing to look at things they can do to give practical effect to that ethics commitment, and that he's confident that there are ways to do that, ways to do more.

The Chief Justice is right that there are plenty of ways the Court could fix its ethics problems. Bogus personal hospitality, obvious conflicts of interests, phony front-group amici, these are all areas ripe for repair. As Chairman of this Subcommittee, I've pointed out these problems and offered up solutions more times than I can count. But still, we wait for the Court to do something, anything, to show that it takes its ethics seriously.

The American people are tired of waiting. A new poll released the same day as the Chief Justice's remarks shows that almost 60

percent of Americans disprove of the way—disapprove of the way the Supreme Court is doing its job, and that Americans are more likely to think that the Justices' honesty and ethical standards were low or very low. For an institution that depends on the public's faith to carry out its functions, that is unsettling territory.

If the Supreme Court isn't going to do anything to restore the public's trust, then it's up to us in Congress. Today, we're going to talk about real solutions to real ethics problems, the Supreme Court Ethics, Recusal, and Transparency Act. This Committee has covered at past hearings how the bill would address problems like Justice Thomas' failure to disclose gifts and travel from a billionaire Republican donor. We've also discussed how my bill would create a transparent process for enforcing ethics rules at the Court.

Today's hearing will focus on how this bill would address recusals and conflicts of interest. From the very first days of this Republic, Congress has regulated judicial conflicts of interest to help preserve the judiciary's integrity. Recusal and conflicts laws on the books expressly apply to the Supreme Court. It's time for Congress to step back in to fortify the administration of these laws.

Case in point, for more than a year now, Justice Thomas has refused to recuse from cases involving January 6 or the 2020 Election. In the first instance, Justice Thomas voted to stop the January 6 Committee from getting access to White House communications that may have included Justice Thomas' wife's texts to the White House chief of staff about overturning the 2020 Election. The lawfulness of that failure to recuse depends on a fact. What did Justice Thomas know about his wife's insurrection activities, and when did he know it?

After more than a year, Justice Thomas has still never been obliged to answer that question. We don't know the answer to that essential fact. In no other court would such an essential question of fact go unanswered.

Questions of recusal and conflict of interest are intertwined.

So, we need to know more about front groups that helped appoint Trump's Justices and then appear as litigants before those same Justices. And recent reporting shows ties among right wing operative Leonard Leo, billionaire mega-donor Harlan Crow, and Justice Thomas—again often implicated in the filing of amicus briefs without links disclosed. To these concerns and others, the response of the Court has been secrecy and silence.

My bill would end the practice of Supreme Court Justices judging their own conflicts of interest, require better disclosure and transparency so the public knows when a Justice has a connection to a party or amicus before the Court, and require judges to explain their recusal decisions for everyone to see. As we hear from today's witnesses about why these reforms are needed, we should all keep in mind a maxim so old that it is in Latin: *nemo iudex in sua causa*, "No one should be a judge in their own case."

With that, without Senator Kennedy here, I won't yield to him for his opening remarks. But the Chairman of the Senate Judiciary Committee, Senator Durbin, is here, and I would invite him to make any opening remarks he should care to deliver. Thank you for being here, Mr. Chairman.

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

Chair DURBIN. Thanks to you as Chairman of the Court Subcommittee, Senator Whitehouse, for holding this important hearing today. I want to thank the witnesses for their participation as well. This is the third hearing we've had this year on the topic of judicial ethics. We're serious about finding real solutions to the ethical shortcomings of the Supreme Court.

It was February 2012, 2012, when I first sent a letter to Chief Justice Roberts calling for the Court to step up and adopt an enforceable code of ethical conduct. I've been pushing for this reform for more than a decade. It is long overdue. We need to restore public confidence and trust in our Supreme Court. That cannot be done when they operate in the dark and in secrecy.

Today's hearing will discuss recusal, transparency. We've seen interesting movement on this issue in the Supreme Court with at least one Justice, Justice Elena Kagan. She's now providing public explanations for her recusal decision. She gets it. She understands that when the American people understand her thought process, it lends credibility to her final result. And the same thing's true for the rest of the Court.

The obvious question is, Will another Justice follow suit, Justice Kagan? Will Chief Justice Roberts step in to ensure other Justices do so for transparency's sake? I've said before, and it bears repeating, the problem of ethics and disclosure in the Supreme Court can be cured before the end of the day by one person.

Chief Justice Roberts of the Roberts Court, as it will go down in history, has the authority and the opportunity to step in and get this done now rather than let this problem linger and even get worse with the conduct of some of the Justices. He can do it, and he should. This Committee will continue to pursue this issue because it is critically important to our responsibility under the Constitution when it comes to the Supreme Court.

Now, a few weeks ago, Chief Justice Roberts gave a speech where he said, and I quote, "He's committed to making certain that we as a court adhere to the highest standards of conduct." I couldn't believe it. I thought he spoke up. Maybe he's finally going to do something about this. Well, he should do something, and he should do it now. Take the steps before the Supreme Court takes its summer recess to carry out the commitment he made in that speech.

Let's not have another summer of Justices jetting off for luxury junkets under an inadequate set of ethics rules. I've said it before. It's worth repeating. The highest court in the land shouldn't have the lowest ethical standards. If the Court won't act, Congress must. Thank you, Chairman.

Chair WHITEHOUSE. Thank you very much, Chairman Durbin. I will now introduce the witnesses and turn to them each after the introductions for 5-minute opening statements. If your written testimony is longer than that, it will be made a matter of record. But I'd urge you to confine yourself to the 5-minute time window so that we can proceed to the questioning part of the hearing.

First, Donald Sherman is the senior vice president and general counsel at Citizens for Responsibility & Ethics in Washington. Mr.

Sherman oversees CREW's legal efforts to improve transparency and accountability within the Federal Government, including through ethics reform. Mr. Sherman previously served as counsel for the House Ethics Committee and has held several roles in Congress and the executive branch, including chief oversight counsel on the House Committee on Oversight and Government Reform, senior counsel on the Senate Homeland Security and Government Affairs Committee, and chief of staff and senior counsel for oversight and investigations in the Department of Housing and Urban Development's Office of General Counsel.

Professor Jennifer Mascott is an assistant professor of law at the Antonin Scalia Law School of George Mason University and the co-director of the C. Boyden Gray Center for the Study of the Administrative State. Professor Mascott writes and teaches in the areas of constitutional law, administrative law, and the separation of powers and Federal courts. Professor Mascott previously served as an Associate Deputy Attorney General in the U.S. Justice Department and as Deputy Assistant Attorney General within the Department's Office of Legal Counsel during the Trump administration. Professor Mascott also clerked for Justice Clarence Thomas, and before that, then-Judge Brett Kavanaugh.

Professor James Sample is a professor of law at the Maurice A. Deane School of Law at Hofstra University. Professor Sample is an expert on the law of judicial recusal, judicial elections, and the intersection of campaign finance and judicial ethics. He's the co-author of a leading text on judicial ethics and has written numerous articles on the history of and issues related to judicial recusal. Professor Sample previously served as an attorney in the Democracy Program at the Brennan Center for Justice at New York University School of Law. He also clerked for Judge Sidney Thomas on the U.S. Court of Appeals for the Ninth Circuit. We welcome all of you. Mr. Sherman, you may proceed.

STATEMENT OF DONALD K. SHERMAN, EXECUTIVE VICE PRESIDENT AND CHIEF COUNSEL, CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON, WASHINGTON, DC

Mr. SHERMAN, Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee, thank you for the opportunity to testify before you today about the Supreme Court Ethics, Recusal, and Transparency Act and the urgent need for a clear, transparent, and binding recusal regime for the Supreme Court. I am here representing Citizens for Responsibility & Ethics in Washington, a nonpartisan, nonprofit organization devoted to ensuring the integrity of our government institutions.

Today, there is a crisis of confidence in our Federal judiciary. This crisis is the result of a number of overlapping failures, but chief among them is the judiciary's apparent inability to abide by the rules of ethical conduct their high office demands. As The Wall Street Journal reported in 2021, over a 9-year period, more than 130 Federal judges presided over 650 cases in which they had a material financial interest in one of the parties.

More recently, the public has learned of unreported gifts accepted by Justice Clarence Thomas from a billionaire political benefactor and of a decades-long campaign by wealthy activists to pur-

chase unparalleled access to the Supreme Court. Sadly, these scandals were entirely preventable. For decades, liberal and conservative Justices alike have tested the limits of this lax ethical regime, while activists and advocates, regardless of ideology, have exploited every gap they can find.

Like many Americans, I have long regarded the Federal judiciary with great reverence and even awe. I recall fondly every fleeting interaction I have had with the High Court, from attending my first oral argument to visiting chambers and touring the highest court in the land. Even after years of ethics problems facing the judiciary, many organizations, including my own, were hesitant to sound the alarm because we often litigate in the Federal courts.

That reluctance combined with the benign neglect of many in Congress have also contributed to the current crisis. Unfortunately, our collective reverence for the Court has resulted in giving undue deference to the nine Justices for their ethical compliance. The Wall Street Journal's reporting and recent revelations of ethical issues impacting Justices across the ideological spectrum have made the case for reform undeniable.

The SCERT Act takes a number of actions to respond to this crisis, each of which will promote the independence of and rebuild public confidence in the judiciary. In particular, the SCERT Act would reshape the Supreme Court's recusal regime in a constitutionally appropriate manner, adding transparency and accountability to an opaque and broken system.

The SCERT Act's enhanced recusal provisions would create a more robust process for identifying and deciding recusals to ensure the Justices' independence in their work on behalf of the public. After all, they are Government employees. This is my third time testifying before Congress about judicial ethics. And I want to proactively address some of the questions that I have heard before and expect to hear today.

First, the need for ethics reform at the Supreme Court is not a partisan issue. I've been an ethics lawyer for more than a decade. But you don't need to be an expert to appreciate what's wrong with judges ruling on cases where they have conflicts of interest or with making their own recusal decisions.

Second, I have also been Black in America my entire life. I am absolutely certain that Justice Thomas has faced racism in his. I am also absolutely certain that bolstering ethics rules that will apply to every Justice, regardless of ideology, is not racist. The idea that these necessary reforms are political or retaliatory is equally absurd. While we cannot dismiss Justice Thomas' egregious ethical problems, it is also true that former Justices Ginsburg, Breyer, and others have heard cases where they likely should have recused.

Even more troubling, every single one of the current Justices has rebuffed basic oversight and reform, arguing that we should just trust them to make their own recusal decisions despite years of scandal at the Court. So, while it is regrettable that some politicians have directed incendiary rhetoric at Justices they oppose, one cannot acknowledge the ethical blunders by both liberal and conservative Justices in recent years and credibly defend this untenable status quo.

In closing, despite having the power of judicial review and enjoying life tenure, Federal judges have substantially fewer ethical checks than their counterparts in the legislative and executive branches. And the highest court in the land has the lowest standards regarding conflicts and recusals. It is now abundantly clear that the Justices cannot or will not effectively regulate themselves.

Your favorite liberal icon and your favorite conservative hero on the Court need binding ethics rules that include a transparent and independent recusal process. The SCERT Act does just that. Thank you for the opportunity to testify on this important topic. I look forward to your questions.

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

Chair WHITEHOUSE. Thank you very much, Mr. Sherman. We now turn to Professor Mascott.

STATEMENT OF JENNIFER MASCOTT, ASSISTANT PROFESSOR OF LAW, AND CO-EXECUTIVE DIRECTOR, THE C. BOYDEN GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA

Professor MASCOTT. Chairman Whitehouse, Ranking Member Kennedy, Members of the Subcommittee, thank you for having me here to testify today. I'm Jennifer Mascott, a professor at Scalia Law School. But I'm testifying in my individual academic capacity, and so my views obviously don't reflect the views of my academic institution.

I was last here before this Committee about 12 months ago, right after the—or right—yes, right after the leak of the *Dobbs* opinion and when we were at that point going to discuss Chairman Whitehouse's legislation. But the discussion took a little different turn. And sadly, personally, since that time, my husband unexpectedly fell ill of pancreatic cancer and passed away just a few weeks ago in February. So, I'm glad today to have the opportunity to be back before you—

Chair WHITEHOUSE. We welcome you back.

Professor MASCOTT [continuing]. After that circumstance. Thank you. So, today I've been asked to talk a little bit about any separation of powers questions that might arise in looking at regulation of procedure with the Supreme Court. Congress obviously has a very important constitutional role to play related to the Federal judiciary.

Congress is responsible, obviously, for establishing inferior Federal tribunals, and since the Judiciary Act of 1789, has taken significant action to regulate and address the procedure and subject matter jurisdiction of Federal courts, including the Supreme Court. But Congress' power in this area with the Federal judiciary is pegged to its authority to establish inferior tribunals and also its necessary and proper power to enact laws to carry into execution the vesting of Federal judicial power in the Supreme Court and other Federal tribunals.

And so, it's not an unbounded authority, necessarily, to regulate all actions of various judges and Justices. And since 1789, this body has had a practice of leaving the courts with significant discretion

in regulating procedure and also administration of their own affairs.

Two additional principles in the constitutional structure that I think are relevant to the discussion today include the concept of the Supreme Court sitting over inferior tribunals, the concept of a hierarchical system within Article III, and then also the more constrained role of the judiciary to resolve discrete cases and controversies in contrast to this body and the executive which are elected by the American people. And so, I think those principles come up and touch on several aspects of the draft legislation.

First, the legislation has some provisions in it providing for notice and comment procedures when the Supreme Court looks at its own procedural mechanisms and recusal rules and ethical codes. And so, in contrast to this body and the executive branch where the public, through the electoral process and commenting, has a much more direct role in procedures, the Supreme Court and the Federal judiciary, by the terms of the Constitution and the constitutional structure, were set aside to be impartial, as the title of this hearing reflects, and judges given tenure protection and salary protection so that they would not be too swayed by the public. And so, I think it's important to think through whether there is tension between having the public comment on ethical codes of the Supreme Court, which we want to stand apart from political considerations and mores.

In addition, the aspects of the draft bill enable individual members of the public, even apparently in cases, situations where they don't necessarily have a case before the Supreme Court, to raise individual ethics complaints and try to initiate investigation into various aspects of judicial or Supreme Court affairs or recusal decisions that also may create tension with the notion of an impartial judiciary that's set aside from the political process.

And then, finally, aspects of the bill that give lower court judges a role in overseeing or approving of various Justices' decisions, whether to recuse or how to handle their role in a particular case, also may set in tension with the constitutional structure. As a policy matter, too, I think it's good to think about whether it makes sense at this point to significantly increase regulation of the judiciary, which by many metrics I would argue is actually working quite well.

President Biden, at the start of his administration, established a commission to review and look at the Supreme Court, and in courts in general, and its structure and how it's operating. And that commission did not coalesce around a single significant change that needs to be made. Close to 40 percent—more than 35 percent of decisions or judgments each year over the past 10 years issued by the Supreme Court are unanimous.

And Congress has many tools at its disposal to regulate practice of courts through subject matter, jurisdiction, and other procedures that have a much more long-standing historical providence than some of the disclosure and recusal provisions in this particular bill. Thank you. I look forward to discussing this further and answering questions.

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

Chair WHITEHOUSE. I think you just set the Subcommittee record for the most amount of testimony in 5 minutes.

[Laughter.]

Chair WHITEHOUSE. Well done and congratulations. Professor Sample?

STATEMENT OF JAMES J. SAMPLE, PROFESSOR OF LAW, MAURICE A. DEANE SCHOOL OF LAW, HOFSTRA UNIVERSITY, HEMPSTEAD, NEW YORK

Professor SAMPLE. Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee, thank you for inviting me to testify today. In our polarized political era, the tendency is to see nearly every issue through a partisan lens. Viewing robust judicial ethics rules as partisan, however, is reductive at best and corrosive at worst. The acute problems we face are not limited to jurists of any particular ideological stripe.

As my written submission notes on the Supreme Court, legitimate concerns can and have been raised as to jurists across the ideological spectrum. As Erwin Chemerinsky powerfully wrote in *The New York Times* just 2 days ago, “Liberals and conservatives should want a Supreme Court that is above reproach.” Yes, there is variance in the severity and regularity of the problems surrounding individual judges and Justices. But fundamentally, and with extraordinarily rare exception, the problem is not the people.

Though iconic figures, Supreme Court Justices are human beings. They make mistakes. The problem, with only rare exception, is not the people, but the system. So, what is the central flaw?

Well, Section 455(a) of Chapter 28 of the United States Code states that “any Justice or judge of the United States shall disqualify himself or herself in any proceeding in which the judge’s impartiality”—and now we get to the key phrase—“might reasonably be questioned.” The standard is, by its terms, objective.

Indeed, if anything, it layers an excess of caution on top of the objectivity by emphasizing that disqualification is required whenever the judge’s impartiality might reasonably be questioned. Yet that objective standard is combined with a nettlesome tension, even a contradiction. It is applied entirely subjectively by the judge or Justice in his or her own case. It should come as no surprise that the results of such a system are inconsistent. In analogous circumstances, some Justices recuse while others do not.

Section 5 of the proposed legislation would require jurists presented with a recusal motion to either recuse or have the question referred to an impartial panel of randomly selected judges. In the case of the Supreme Court, the panel consists of the other Justices of the Supreme Court. The proposed legislation before you is not top-down congressional control of granular details in a coequal branch.

On the contrary, Section 2 of the legislation merely requires the Supreme Court to issue a code of conduct for itself within 180 days. And doing so would merely level up the Supreme Court so as to bring the highest court in the land more in line with the stronger standards applicable in all lower courts. Chairman Durbin’s opening statement made this point more eloquently and certainly more powerfully than I ever could.

Similarly, Section 3 of the legislation mandates that Justices disclose the same information concerning gifts, income, and reimbursement as required of Members of Congress and members of the executive branch. The current system, particularly because of the lack of enforcement in the Supreme Court, means that egregious failures to comply with existing Federal law recur and recur without meaningful consequence.

Consider as a rhetorical question whether it makes any sense to require less of the branch where impartiality is the touchstone than we require of the two constituent branches. I applaud the legislation before the Committee and the sustained efforts to bring us to this day. The Supreme Court Ethics, Recusal, and Transparency Act would protect litigants, promote public confidence in the judiciary, and do so without jeopardizing the Court's decisional core independence. The legislation is necessary, measured, and constitutional. Thank you.

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

Chair WHITEHOUSE. Thank you very much, Professor. For the benefit of my colleagues, the order that I have is Whitehouse, Durbin, Blumenthal, Hirono, Welch. And without objection, I would like to add to the testimony a statement for the record prepared by Professor Charles G. Geyh of the Indiana University Maurer School of Law, and a statement of the Project on Government Oversight.

[The information appears as submissions for the record.]

Chair WHITEHOUSE. Professor Sample, let me turn to you. Federal law currently contains a Provision 28, United States Code, Section 455, that governs when judges should recuse themselves from a case in which there is a conflict of interest. Can you explain generally what that law requires?

Professor SAMPLE. Yes, Mr. Chairman. Section 455 is the language that I quoted a moment ago that says that "a judge shall recuse"—and it uses the language "shall," which is mandatory language, in contrast to some of the remarks that we have—that the Committee has received from the Chief Justice and others that make the standard sound as though it is merely aspirational and subject to voluntary compliance. It says, "whenever the judge or Justice's impartiality might reasonably be questioned, the judge is required to recuse him or herself."

The practice in many lower courts and in many State courts is to have those decisions reviewed. But at the Federal Court of Appeals level, there isn't a procedure to do that. And at the Supreme Court level, there is absolutely no procedure to do that. And what happens is that we have unreviewable decisions by the individuals who are acting as the judge in, in essence, as you put it in your opening statement, their own case.

Chair WHITEHOUSE. That law applies to Supreme Court Justices?

Professor SAMPLE. Yes, it does.

Chair WHITEHOUSE. And obviously, Congress passed that law.

Professor SAMPLE. Correct.

Chair WHITEHOUSE. Has the Supreme Court ever ruled that this law, or any other recusal law, or, for that matter, the Ethics in

Government Act, was unconstitutional or that it can't apply to the Justices?

Professor SAMPLE. No, the Supreme Court has never ruled in that manner.

Chair WHITEHOUSE. Indeed, have Justices not complied with it?

Professor SAMPLE. Most of the time, they have complied with it.

Chair WHITEHOUSE. Without objection?

Professor SAMPLE. Without objection.

Chair WHITEHOUSE. Let me turn to Mr. Sherman with an example. This relates to disclosure and when conflicts of interest should be presented to the parties and the public so that an informed recusal conversation can transpire.

In 2020, the right wing flagship political organization of the Koch brothers, Americans for Prosperity, spent at least a million dollars on what it called a full-scale campaign to confirm Judge Amy Coney Barrett, including hundreds of thousands of phone calls and emails, ads, op-eds, and a website called uniteforbarrett.com.

Americans for Prosperity had run similar campaigns, spending millions for all the Trump Justices. At the same time, there was a case pending before the Supreme Court that was brought by the virtual alter ego of Americans for Prosperity. This organization was called Americans for Prosperity Foundation.

For those of you who are not familiar with the state-of-the-art in dark money political influence tactics in America, the latest and greatest is to set up a 501(c)(3) and a 501(c)(4) that are effective twins that have the same donors, the same staff, the same address. They're indistinguishable. And this is the relationship between Americans for Prosperity and Americans for Prosperity Foundation. They share officers, directors, an address, and virtually, certainly donors.

Although, because of dark money protections, they don't disclose. What sort of disclosures should have been made to the parties in the Americans for Prosperity Foundation case about that relationship in order for people to make a determination as to whether there was a conflict of interest in one corporate entity appearing before the Court of a twinned corporate entity that had spent millions of dollars to get those Justices onto the Court who were hearing the case?

Mr. SHERMAN. Under existing law?

Chair WHITEHOUSE. In terms of what the proper course of justice would suggest. Let's put it that way.

Mr. SHERMAN. Certainly. I think, given the scenario that you described, it certainly—it raises concerns about the opacity of the arrangement and whether this organization is using its funds to influence the Justice. And disclosure would be advisable, but obviously isn't required under existing law, but would be under the SCERT Act.

Chair WHITEHOUSE. Yes. Here's another one. An amicus showed up under the fictitious name, the Honest Elections Project. That fictitious name organization bears a relationship of virtual corporate identity to the Judicial Crisis Network, which, like Americans for Prosperity, spent millions of dollars in dark money to push for the confirmations of the Trump nominees.

And they're coordinated by an individual named Leonard Leo, who has been deeply involved in the selection of at least four of the Supreme Court Justices. There was no disclosure made of any of those relationships in the Honest Elections Project amicus brief. Why is that wrong?

Mr. SHERMAN. Again, I think the public is certainly entitled to information about who is mounting privately funded campaigns to influence both who sits on the Court and then what decisions they make when they're on it. But under existing law, they're not required to do so. But certainly, under the SCERT Act, there would be more disclosure required of amici.

Chair WHITEHOUSE. Chairman Durbin.

Chair DURBIN. Thanks, Senator. Mr. Sherman, when I heard them describe your background, it involves some work on Capitol Hill, did it not, with the House Ethics Committee?

Mr. SHERMAN. Correct.

Chair DURBIN. So, let me give you a hypothetical and see if you can help me get to a conclusion. Let's assume that, like the Supreme Court Justices, our congressional recess starts somewhere in August.

And a really good friend of mine of many years decides that he wants to pay for my wife and myself to first fly on his charter plane to a distant destination and then spend a week or two on a very palatial yacht of his, and then he'll return me home after I've had my vacation. What kind of responsibility do I have as a Member of Congress to disclose any of that?

Mr. SHERMAN. Well, I think the first requirement you would have is to call the Committee to seek approval to accept the travel in the first place. But then you would have to disclose the travel itself, if you were approved, the travel itself, the amount of the travel, and the source, and who funded aspects of the travel.

Chair DURBIN. When you say disclosed, do you mean publicly disclosed?

Mr. SHERMAN. Correct.

Chair DURBIN. So, let me ask you if you know what rule would apply to a district court judge, a Federal court judge who had the same opportunity?

Mr. SHERMAN. In the Federal courts, my understanding is that there is less disclosure requirement with respect to privately funded travel. And at the Supreme Court, one, the personal hospitality exception would cover a lot of this, depending on the nature of the friendship, and it wouldn't have to be disclosed at all.

Chair DURBIN. So, there'd be no disclosure in the district court level or the circuit court judges?

Mr. SHERMAN. I believe there would be at that level.

Chair DURBIN. There would be disclosure?

Mr. SHERMAN. Yes.

Chair DURBIN. And they have a code of ethics as well?

Mr. SHERMAN. Yes. They have a pretty lengthy binding code of ethics. The Supreme Court does not, though they say that they sometimes reference the former.

Chair DURBIN. So, Justice Thomas, when he did not disclose at the Supreme Court level, was he in violation of any law that you think applies?

Mr. SHERMAN. Yes. So, with respect to Justice Thomas, while personal hospitality need not be disclosed, there is a requirement, if you're staying in somebody's home, for example, you share a meal in their home. But the payment of his actual travel to the location on the private jet, his travel on the boats, especially because that travel, as we understand it, was funded by a private company and not actually the hospitality of Mr. Crow, needed to be disclosed and was a violation of Federal law.

Chair DURBIN. Professor Sample, I'm trying to wrestle with the argument we hear from the other side, that this separation of powers gives Congress little or no authority over this Court created by the Constitution as opposed to the inferior courts. And yet when you made reference to 28 U.S.C. 455, this was one of the Federal statutes enacted by Congress to apply to the Supreme Court, which apparently the Court at least nominally follows. Is that correct?

Professor SAMPLE. Correct.

Chair DURBIN. Can you rationalize that thinking that Congress has no authority over the Court, and yet the Court follows what Congress says it should?

Professor SAMPLE. I think, Senator, it's clear that Congress does have authority to regulate the Supreme Court. Indeed, separation of powers doesn't mean that one branch of government is entirely independent of the others. Congress regulates many aspects of the Supreme Court, including the size of the Court, the salary of the Justices, its budget, the quorum requirements.

As far back as the Judiciary Act of 1789, Congress has been in the business of making manifest the Article III promise that there will be a Supreme Court. But without Article I legislation that this Congress can pass, that Article III promise would be a parchment promise at best.

Chair DURBIN. I'm sure I'm not saying this as they would, but those on the other side argue that Congress has authority when it comes to those elements you've just mentioned, but doesn't have the authority to impact the decision-making of the Court. They draw that line. Do you recognize that same distinction?

Professor SAMPLE. I think at the prior hearing, Professor Amanda Frost did a nice job, in my view, and her written testimony does a nice job laying out that the key core of the judicial process is the power to decide cases and controversies.

And so, a decision that intrudes on the core decisional independence in the case of *Smith v. Jones*, if Congress were to say that Smith has to win and Jones has to lose, that's a real problem. That's an intrusion into the core of the judicial power. The legislation that you and your colleagues have proposed does not intrude into that core decisional independence in any way.

Chair DURBIN. Thank you. Senator Hirono.

Senator HIRONO. What would we do without our staff to tell us what's what? Well, welcome, everybody. I think this is a very important issue because when we talk about the need for the public to hold the court, especially the Supreme Court, in high regard, you know, in spite of the fact that there's very little we can do if the Supreme Court is doing things that we don't agree with. But why, you know, I'm just curious, especially maybe for Professor Sample,

why is it important that the public hold the Supreme Court in high regard?

Professor SAMPLE. It's a very good question, Senator. And I think that the answer is that democracy is fragile. It depends on faith, trust, and goodwill, and it depends on confidence. You know, famously, the Court lacks the power of the purse, and it lacks the power of the sword. It depends on people believing in its legitimacy for its rulings to be respected and followed in a manner that is consistent with civilized society.

Senator HIRONO. Would you agree, Mr. Sherman?

Mr. SHERMAN. I would. I would also say that the courts exist so that there is a neutral arbiter to resolve disputes between individuals and institutions. And if people don't have faith that the courts are a neutral arbiter, then they won't avail themselves of the courts, which is also a problem for democracy.

Senator HIRONO. I think availing themselves of the courts if they do not have confidence in the objectivity and fairness of the courts, I think that is a real concern. Now, I think we made it play that the Congress does have the power and the authority to shape the size, determine the size of the Supreme Court. It holds the power of the purse over the Supreme Court. It can require Justices to ride circuit, for example. So, I would like to ask all three of you, does Congress have the power to enact the SCERT Act? Mr. Sherman?

Mr. SHERMAN. Yes.

Senator HIRONO. Professor—sorry, Mascott, do we have the power to enact the SCERT Act?

Professor MASCOTT. Well, without getting into all of the details of the Act, I think the questions that I raised in my earlier statement about the particular bill here are where or who is involved in enforcing some of the rules and requirements that are put into place. So, for example, putting lower court judges—

Senator HIRONO. Excuse me. We do have the power. There may be some concerns about how things will be implemented or how, you know, those kinds of concerns, but my question is simple. Do we have the power to enact the SCERT Act? I would say probably yes. Professor Sample?

Professor SAMPLE. Yes.

Senator HIRONO. Okay. One of the things that you testified to, Mr. Sherman, really caught my attention when you referred to The Wall Street Journal's 2021 Report, wherein 130 Federal judges presided over more than 650 cases in which they had a material financial interest. I'd like to know how did this come to light that this kind of conflict existed in these instances?

Mr. SHERMAN. Well, as I understand it, The Wall Street Journal spent a lot of time mining through an archaic system of financial disclosures and identifying specific holdings that judges had and the cases that were involved. In many cases the judges claimed that they didn't know. This was one of the reasons why Congress last year passed legislation to update and automate that process.

Senator HIRONO. So, are you saying that not having read that article, that out of these instances, that there was not a lot of recusal from these judges as they made decisions regarding these cases in which they had a conflict?

Mr. SHERMAN. Correct.

Senator HIRONO. So, Professor Sample, do you think that the SCERT Act will remedy this kind of circumstance where the judges are not paying enough attention to where they have financial conflicts, which is probably the simplest conflict to ascertain and thereby leading to their recusal?

Professor SAMPLE. I think that the SCERT Act will do a large part of the work to at least mitigate that problem. We may still have remnants of the problem, but the SCERT Act would do yeoman's work to prevent that kind of a scenario, requiring judges to recuse themselves or, if they decline to do so, to have those decisions reviewed by their peers.

The Wall Street Journal did a tremendous job in reporting that piece and I think it shows one of the fundamental flaws, which is that we are combining a system in which the judges are already going to be the judges in their own case. And that is only really a case if they've done the legwork in advance to determine via fact finding that there might actually be a direct pecuniary interest on their part. And that's a real problem.

Senator HIRONO. Mr. Chairman, if I may. I think the pecuniary interest is really the most objective way that you can define a conflict. But I would say there are also relational conflicts, and so there may not be a pecuniary interest. But if you're married to somebody who's taking a position that is being challenged in court, that is a relational conflict.

And I just want to mention I am very familiar with a case that involved the State of Hawaii. And a major Act that was being challenged, it was called the Land Reform Act. It went all the way, 10 years, all the way to the U.S. Supreme Court. And Justice Marshall recused himself because he was married to a person who was born in Hawaii. That is a relational perceived conflict. Thank you, Mr. Chairman.

Chair DURBIN. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. You know, whenever these issues of ethics are discussed, I can't help but thinking back to my days as a law clerk for Justice Harry Blackmun who refused to have dinner with people who might conceivably at some point in the future have a case before the Supreme Court. Even if he was going to pay for dinner, he refused to sit down with someone privately who might have a case before the Supreme Court.

And we made fun of him a little bit, I have to admit, as law clerks do behind the back sometimes of their Justices. But even if he were somewhat more lax, I think the standards overall have been reduced for the conduct of Supreme Court Justices. At the time, Justice Douglas was regarded as an outlier because he wrote books. He wrote books. Supreme Court Justices don't write books. Of course, every Supreme Court Justice now writes books.

So, I think that we're dealing here with a cultural change that has really contributed to diminishing respect for the Supreme Court. And, you know, to answer a little bit more, the question that Chairman Durbin asked of Mr. Sample—Professor Sample, you know, the Supreme Court has a mystique. You may regard it as a mystique, not justified, in fact. But it is a credibility, a trust, confidence that is so necessary for a Court composed of nine people,

unelected, presiding for life, and able to strike down the will of a democratically elected Congress.

It's extraordinary in a democracy. And so, I am really just baffled by Chief Justice Roberts because he should know better. And this controversy could be diffused if he were willing to lead. And obviously, we've asked him to lead again and again and again. But the failure to take the reins here, which could easily supplant these kinds of measures if he were to voluntarily impose some code of ethics and there would be enforcement questions, but at least there would be a code of ethics and the Judicial Conference or someone could enforce it.

You know, I don't want to be unfair to any particular Justice because I recognize that these questions can be asked of any or all of them. But thinking to Justice Thomas' presiding over questions relating to January 6th in light of his spouse's text messages to then-White House Counsel—White House Chief of Staff Mark Meadows regarding theories of fraud in the 2020 election and strategies to overturn the election. And his insistence on refusing to recuse himself on matters related to January 6th seems to me to flout Section 455 statutory requirements.

That's a statute that exists. No one should be above the law. We all agree. So, I think that's a reason for the diminishing public confidence in our Supreme Court at this historic time and a historic low. And I have just about, unfortunately, just about exhausted my time.

But let me ask you, Ms. Mascott, without asking you to comment on Justice Thomas, isn't there some way for this body, in the absence of leadership from the Supreme Court itself, to insist that some standards be imposed? I understand fully your argument about separation of powers, but where no decisional outcome, where no substantive issue is determined, isn't there a way for us to act?

Professor MASCOTT. Well, I mean, certainly, I think through this hearing and through the policies that have been put in place regulating the lower courts, this body has made clear standards that it thinks should apply to recusal.

And it sounds as though, I think, from the Chief's statement that he provided prior to the last hearing, that the Supreme Court Justices are aware of concerns and are going to continue to be careful, as they have been, in trying to police and make their own, you know, decisions and be faithful to make sure they're recusing in cases where they have involvement. I mean, another very real procedure that we haven't discussed a lot today, but I think has appropriate constraints and obviously political costs for this body, which is why it's not more used but, I mean, the Constitution, of course, does have for wrongdoing an investigation, always has the impeachment authority.

And so, I guess some of the concerns I think coming into play here are when this body decides to not use that more serious structure. Whether there are concerns in a body of nine decisionmakers, as you all say, with too readily insisting that one of those decisionmakers recuse and not participate in exercising the judicial power, when we don't have evidence of wrongdoing and we don't have reason to believe that the process is actually not working.

Senator BLUMENTHAL. My time is expired. Maybe we'll have a second round.

Chair WHITEHOUSE. Senator Padilla has arrived. And by vaunted Senate principles of seniority, he is next, followed by Senator Welch.

Senator PADILLA. Thank you, Mr. Chair. As has been discussed at this hearing—and I apologize for arriving late, you know how it is, multiple votes and multiple committees—it's clear that the current law governing recusal gives judges and Justices a lot of discretion when making recusal decisions.

And there have been numerous instances of judges abusing this discretion from district court and circuit court judges failing to recuse themselves from cases in which they have a financial interest, to Justice Thomas failing to recuse himself from cases concerning January 6th despite his wife's documented engagement with the organizers of the insurrection.

So, the legislation we're discussing today would begin to fill those gaps by laying out specific instances in which a judge or Justice must recuse themselves, including instances where a party has given a gift or made a financial contribution to a campaign supporting a Justice's confirmation. Mr. Sherman, I'll ask you, why are these specific recusal provisions necessary, and are there any other specific provisions that Congress should consider?

Mr. SHERMAN. Well, I think they're necessary because as the last several years have demonstrated, you know, again, activists and advocates who want to influence the Court will exploit every loophole possible, which is quite easy when there is no binding code of conduct for the Supreme Court to abide by.

I think the SCERT Act would address a lot of these concerns by not only providing transparency, additional transparency, with respect to the Justices' financial entanglements and creating a duty to know across the Federal judiciary, but it would also provide transparency with respect to amici who are seeking to influence the Court, and then ultimately, as you said, provide an independent and transparent process to adjudicate recusals, which I think is where the public has really grown frustrated and quite concerned about Justices and judges ruling on cases in which they have a financial interest or conflict of—or other conflict of interest.

Senator PADILLA. Thank you. And there's certainly skeptics out there who have expressed concern at the more stringent judicial recusal requirements that we seek to put in place, along with public explanations for recusal decisions, would actually invite gamesmanship at the Supreme Court because there's only nine Justices.

Again, the legislation we're talking about would reduce, I believe, would reduce opportunities for such gamesmanship by providing clear cut guidelines for when a conflict of interest requires recusal, taking the guesswork out of the process. Now, Federal judges want to hold themselves to a high ethical standard. They claim that they hold themselves to a high ethical standard.

Our legislation would make it easier for them to do that and for the public to see that. Question for Professor Sample, can you explain how clear guidelines for when recusal is called for would lead to greater consistency and transparency in recusal decisions?

Professor SAMPLE. Yes, Senator. I think most prominently, eliminating the judge as judge in his or her own case is an important preliminary step. And at the Supreme Court level, while, yes, in theory there is a gamesmanship concern, I think it's worth noting that the Justices regularly decide cases on issues of major national import all the time, and they often disagree vehemently and still maintain a good working relationship.

So, I don't think that the individual Justices out there would be looking to game the system by recusing their fellow Justices or voting, unless those recusals were truly warranted. And I think if they are truly warranted, then the entire Nation is served by those recusals. We've had situations, I mean, we went over a year with only eight Justices on the Bench because Congress refused to give Merrick Garland a hearing. The Court managed to function with only eight Justices for more than a year. I think they can manage to function with only eight Justices in one particular case.

Senator PADILLA. Excellent point. And I'm glad that in the reporting from this hearing, it will be—that quote will be attributed to you and not a Member of the Committee. Thank you very much. Thank you, Mr. Chair.

Chair WHITEHOUSE. The patient Senator Welch.

Senator WELCH. Thank you very much. In response to a question I think Senator Durbin asked, Professor Mascott, you use the term impeachment? Are you serious? What are you talking about? We should be impeaching judges? What did you mean by that?

Professor MASCOTT. Oh, no. What I was saying is that the Constitution, like it does in many instances, has very challenging, finely grained procedures—

Senator WELCH. No, I understand that, but we're talking about a very concrete situation about a failure to report—the reports of a Justice having been the beneficiary of very expensive travel arrangements. So, I just don't know where that word came from and what you're suggesting.

Professor MASCOTT. Well, I guess what I'm suggesting is that there were questions being raised about congressional regulation and investigation of alleged wrongdoing or concerns. And so, what I was saying, which I would say if we were talking about executive branch—

Senator WELCH. All right. I'm going to, because we don't have that much time. But here's what it sounds like you're saying to me. We don't have the power legislatively to require ethical disclosure, but we do have the power to impeach. Isn't that a little overkill?

Professor MASCOTT. Specifically, what I said in my opening statement is that the particular aspects of the bill that I think create the most constitutional tension are the ones that allow members of the public and members of lower courts—

Senator WELCH. Okay. All right.

Professor MASCOTT [continuing]. To adjudicate decisions by Supreme Court Justices.

Senator WELCH. You're talking constitutional intention, how about public credibility? I'm of the view that constitutional protections are one thing, norms are another. And if there's not credibility among the public for the institutions that are here to serve it, Congress, Supreme Court, the Presidency, then things fall apart.

Professor MASCOTT. I share with you concerns about, and I think across the board, Federal institutions are——

Senator WELCH. So, are you saying——

Professor MASCOTT [continuing]. Struggling with credibility. And unfortunately, I think Congress' approval rating is lower——

Senator WELCH [continuing]. Do you think that the nine——

Professor MASCOTT. I'm sorry?

Senator WELCH. Do you think that the nine people who occupy the highest judicial positions in the country can maintain credibility with the people they serve? And by the way, they're public servants, too. They're not above the service requirement. Do you think they can maintain credibility with the public, or even deserve to, if they won't disclose when they are the beneficiary of extraordinarily generous and completely out-of-reach vacations that only they can get by virtue of the position they hold?

Professor MASCOTT. I mean, in contrast to a lot of my, you know——

Senator WELCH. That's it.

Professor MASCOTT [continuing]. Colleagues, academic and otherwise, I actually think all nine Justices admirably are trying to apply the rule of law in every case according to the constitutional theory——

Senator WELCH. In one case, they didn't do it, if these press reports are to be believed, and no one's challenged them.

Professor MASCOTT. Well no, I don't—no one has made an accusation, actually. I don't think that the disclosure requirements or anything about them has been related to any decision in a case. So, I think that's another point of connection that should be highlighted.

Senator WELCH. So, if you've got an—if you've got, you know, thousands of dollars in vacation benefits, but you weren't pending before the Court, you don't think that's going to raise public questions?

Professor MASCOTT. There was no—there was no—well——

Senator WELCH. All right. I think I see where you're coming from. I guess I'll respectfully disagree. I am extremely worried about what's happening on the Supreme Court and what's happening with the failure of the Chief Justice to do what would relieve us of this public spectacle. I'm worried because the Supreme Court has to be a credible institution in our democracy. And I'm worried about how that's eroded with the unwillingness of that Court to subject itself to the same ethical requirements that 850 other Federal judges adhere to.

I'm worried about what has happened with the credibility of the Court because of the spectacle of Supreme Court hearings here and the unwillingness at one point of allowing a duly elected President from having his nominee considered. And on this question of separation of powers, I'm worried about judicial abuse of legislative power by refusing to uphold a bipartisan campaign finance law sponsored by John McCain, among others, Russ Feingold, that was intended to restore credibility to the election process. Those are my concerns.

Congress has a role to play. The Court has a role to play with its ethics, and the Court has a role to play with respecting the

right of the majority to legislate decisions on behalf of the public interest. I yield back.

Chair WHITEHOUSE. Thank you. I'm going to ask an extra question of Professor Sample and an extra question of Professor Sherman. With respect to Professor Sample, the new Statement on Ethics, Principles, and Practices that the Justices put forward posits a duty to sit. Explain to me why it is preferable to have a conflicted Justice sit on a case than to have the conflicted Justice recused?

Professor SAMPLE. Senator, I think the Statement on the duty to sit is respectfully overstated, which is to say that we have lots of empirical evidence, and we were referencing some of that empirical evidence earlier. A recent Bloomberg study indicated that Justices recused from approximately 3 percent of the cases. So, the duty to sit is not trumping basic recusal requirements in those cases.

We've explored the fact that we went more than a year with only eight Justices on the Court, and the very same individuals who are now championing this extraordinarily robust version of the duty to sit didn't seem to have a problem with the Court sitting with only eight Justices. I do not think that the duty to sit argument holds water when measured against the importance and the fundamental due process interest in an impartial judiciary.

Chair WHITEHOUSE. And Mr. Sherman, let me offer you another hypothetical that appears to be actually the fact right now. We have a Justice on the Supreme Court who has written a book from which that Justice receives royalties that go directly to the benefit of that Justice. A firm is helping that Justice sell that book as agent and PR operation. It appears to be the only book that that firm supports in that way.

And that firm, CRC Advisors, is run by the same Leonard Leo who was responsible for orchestrating so-called Federalist Society lists, which the Federalist Society has disavowed, for running the ad campaigns behind the confirmations of the three Trump appointees and whose network of front groups persistently files briefs before the Supreme Court without disclosing any of those links.

Setting aside all those links not being disclosed, what are the problems with the ability of somebody in that position to drive royalties into a Justice's pocket while organizing massive purchases, perhaps even bulk purchases, who knows? And why should there be—why should there not be disclosure of these contractual relationships when cases come up in terms of looking at recusal?

Mr. SHERMAN. There absolutely should be disclosure in the situation that you described with respect to amici or parties who are—effectively have the ability to funnel money to a Justice. And again, without casting aspersions on the nature—or the motivation of the relationship, the nature of it demands disclosure, and it also demands an independent recusal process.

And, you know, I think if the SCERT Act is passed, one of the things that will happen if the Justices have to sit in judgment of each other is that there will be a chilling effect on the kind of conduct that we have seen over the last few years. Because the Justices, not only do they not want to sit in judgment of each other, they don't want to force the other—their colleagues to sit in judgment of them.

The reason why right now the Court is operating with *carte blanche* is because every Justice has the individual decision to decide on their—whether they should recuse or not, and they don't have to disclose it at all. And if I may, I would just add one thing about the duty to sit, which I also found incredibly problematic and frankly, arrogant.

I would say that if the Justices were serious about this duty to sit, then they would, of their own accord, enact significant prophylactic measures to eliminate conflicts before they arise. That could take the form of many different things, including banning the ownership or sale of stocks by themselves or their families. It could manifest itself in prophylactically deciding to ban certain types of travel.

Again, the duty to sit is important. But if the Justices were serious about their duty to sit, then they would take significant measures to avoid conflicts in the first place. What the Court is saying in this two—or, three-word statement is that they feel empowered to sit despite a conflict, rather than a duty, given their roles, to eliminate conflicts in the first place.

Chair WHITEHOUSE. Thank you very much. This has been a very helpful hearing. I'm very grateful to all of the witnesses for attending. I appreciate it very much.

In closing, I'd note that in terms of, you know, peers sitting in judgment of one another, that's what we do in the Senate. That's what the Senate Ethics Committee does. It requires peers who serve on the Senate Ethics Committee to sit in judgment of other Senators who have gotten in trouble.

And one of the ways in which you make that real is by having talented staff and staff attorneys who go through the process of finding out what the facts are so that a proper decision can be made by the peers against or as to each other's conduct. And in the case of the Supreme Court, not only do you not have the peer review, if you will, you don't even have the most elementary fact finding.

There is not a court in the country, in my estimation, where if a recusal issue was properly raised, there would be no way to determine what the facts actually were as to whether a Justice or a judge should recuse or not. It simply doesn't happen anywhere else. And the idea that the Court, setting aside being unwilling to sit in judgment of itself, is unwilling to even have facts found about itself, is so out of kilter with basic premises of due process and proper procedure and American rule of law that it's a little bit astounding to me.

And the fact that we just don't ever get a proper, honest answer about even the facts, setting aside what you then do with them, is a little bit stunning. And I'd also note, in closing, that there's a perfectly good Financial Disclosure Committee that sits within the Judicial Conference.

And if the Justices have questions about whether their conduct might violate the ethics rules, they've got an all-judicial place to go where other judges would give them advice and let them know, "Whoops. No, you shouldn't do that." "No, you should probably have disclosed that." So, when we're evaluating a Justice's determination to rely on what he, I believe, called "informal opinions of colleagues

and others,” that Justice was bypassing the actual judicial system through which any Federal judge can get an advance private decision about what they need to disclose.

And I think one of the reasons that so many other Federal judges are so furious about where the Supreme Court now is, is that they live within those rules. They file their questions with the Code of Conduct Committee. They file their questions with the Financial Disclosure Committee. They abide by the results that they get. They don’t have a hallway conversation with a colleague about an ethics issue and then end up taking a position that is virtually indefensible. And so there are many, many ways in which this can be resolved.

I just want to say that I, for one, and I think most of my Senate colleagues, and at least on the Democratic side so far as we’ve heard today, are going to persist at this. We simply—we are in an intolerable and indefensible situation. And if the Court itself, or the Judicial Conference acting as the overseer of the administrative aspect of the judicial branch, which this falls into, won’t act, then it leaves it to us to act.

The worst-case scenario is a Court whose credibility is in freefall because it won’t hold itself to standards that every other Federal judge knows are proper. Thank you very much. If anybody has—I don’t know if there were any questions for the record. No. Well, if there are any questions for the record, they’ve got to be in by tomorrow.

Oh, we’ve got a whole week here. In budget, we’re much tougher. You got a week. If anybody has questions for the record to ask the witnesses. If we get those questions, we will pass the questions to you. We hope that we can get rapid responses back to those questions. I appreciate very much the dialogue that we’ve had today. I appreciate very much all of you being here. And with that, hearing is concluded.

[Whereupon, at 3:16 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List
Hearing before the
Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

“Ensuring an Impartial Judiciary: Supreme Court Ethics, Recusal, and Transparency Act of
2023”

Wednesday, June 14, 2023
Dirksen Senate Office Building, Room 226
2:00 p.m.

Donald K. Sherman
Executive Vice President & Chief Counsel
Citizens for Responsibility & Ethics in Washington
Washington, DC

James J. Sample
Professor of Law
Maurice A. Deane School of Law
Hofstra University
Hempstead, NY

Jennifer Mascott
Assistant Professor of Law and Co-Executive Director of the C. Boyden Gray Center
Antonin Scalia Law School
Arlington, VA

“Ensuring an Impartial Judiciary”

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal
Rights

U.S. Senate Committee on the Judiciary

June 14, 2023

Prepared Testimony of Jennifer L. Mascott

Assistant Professor of Law & Co-Executive Director of the C. Boyden Gray
Center, George Mason University’s Antonin Scalia Law School

Dear Chairman Whitehouse, Ranking Member Kennedy, and Members of the
Subcommittee,

Thank you for the invitation to testify about constitutional separation
of powers questions related to the role of Congress in regulating the federal
judiciary.¹ This statement reflects much of the prepared statement that I
provided to the subcommittee in May 2022 just prior to the leak of the *Dobbs*
opinion, as a focus on that deep breach of Supreme Court confidentiality
overtook the discussion of Chairman Whitehouse’s proposed legislation in the
May 2022 subcommittee hearing.

My areas of academic expertise include constitutional law, separation
of powers, federal courts, and legal interpretation. Previously I served as an
Associate Deputy Attorney General and a Deputy Assistant Attorney General
in the Office of Legal Counsel at the Department of Justice. I am a Public
Member of the Administrative Conference of the United States and Vice
Chair of the American Bar Association’s Subcommittee on Constitutional
Law and Separation of Powers.

My testimony will focus on the constitutional and statutory roles of
Congress and the federal courts in structuring, authorizing, and carrying out

¹ This analysis represents my personal scholarly views as an academic and does
not reflect any official position on behalf of my state government employer, the Scalia
Law School of George Mason University.

the exercise of judicial power under Article III of the U.S. Constitution.² The Article III judiciary has a critical role to play in the resolution of concrete cases and controversies through the application of the rule of law.³ Congress has a constitutional role in regulating and establishing the jurisdiction and structure of federal courts through its Article I authority to establish inferior federal tribunals and to make “necessary and proper” Laws for “carrying into execution” the judicial power.⁴ That role is more constrained with respect to the federal “supreme Court,” whose existence the Constitution explicitly specified and mandated.⁵

A number of legal scholars have observed that Congress’s regulation of the federal judiciary must have a necessary and proper relationship to the exercise of federal judicial power as Congress’s power to legislate regarding Article III courts derives from its authority to establish tribunals to carry out the discrete judicial power to resolve cases and controversies.⁶ In contrast to other Article I, Section 8 congressional powers like the authority to regulate interstate and foreign commerce that Congress has the discretion to carry out as it sees fit, scholars have indicated that the discretionary aspects of the exercise of judicial power are to be left by Congress to the judiciary.⁷ As a

² See U.S. Const. art. III, section 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.”).

³ See U.S. Const. art. III, section 2.

⁴ See U.S. Const. art. I, section 8 (vesting in Congress the powers to “constitute Tribunals inferior to the supreme Court” and to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

⁵ Compare U.S. Const. art. III, section 1 (“shall be vested in one supreme Court”), with *id.* (“may from time to time ordain and establish”).

⁶ See, e.g., Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 839-46 (2008) (suggesting that there may be a certain core constitutional minimum of supervisory authority that courts must maintain over their operations that Congress would lack the authority to regulate even if it had the political will to do so); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 Const. Commentary 191 (2001); David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. Rev. 75 (1999).

⁷ See David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. Rev. 75, 101-02 (1999). Moreover, as a matter of historical practice, dating back to the first federal Congress the House and Senate authorized federal courts to devise their own procedural rules subject to significant discretion. See, e.g., Rules Enabling Act of 1934; Judiciary Act of 1789, section 17 (“And be it

coequal branch of government, the federal judiciary is not subordinate to Congress and independently maintains its constitutionally vested judicial authority.⁸

Evident from the constitutional text, that discrete role within the federal structure is significantly distinct from the role of the executive and legislative branches charged with formulating and carrying out federal policy requirements. Given this constrained and constitutionally limited role, the Article III judiciary is the one federal branch whose members are not directly selected by an electoral process. The independent operation of the judiciary and the protection of its members through life tenure and salary protection mean that the judiciary properly exists independent of a number of the public accountability and transparency requirements that the Constitution and federal statutes apply to Congress and the executive.

For example, in contrast to the U.S. House and Senate, the constitutional text does not subject the federal judiciary to mandatory disclosure requirements. Article I, section 5 of the U.S. Constitution requires Congress to keep and publish a journal of its proceedings and to publicly record votes upon the request of one-fifth of its members that are present. The Article III judiciary is not subject to similar requirements, given the absence of any role of the public in the continuing selection of already-appointed members of the federal judiciary who are charged with the apolitical resolution of cases and controversies. Federal courts are not charged with the creation of new legislation and policy binding the American public, so the Constitution does not impose public records requirements on the judiciary like those imposed on Congress.

The absence of constitutional reporting mandates for the federal judiciary from the constitutional text does not itself prohibit the statutory creation of such requirements. But the imposition of any legislative

further enacted, That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”).

⁸ *See, e.g.*, U.S. Const. art. III, section 1 (“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.”).

reporting, ethics, and recusal requirements must properly and necessarily relate to the carrying out of judicial power.⁹

The current draft of the Supreme Court Ethics, Recusal, and Transparency Act would require the Supreme Court and the Judicial Conference to provide for a public notice and comment period when modifying judicial rules of conduct.¹⁰ This requirement is unwise and inconsistent with the federal judiciary's role to adjudicate cases independent of political headwinds and considerations. In addition, the participation of the public in crafting judicial codes would be unwieldy and burdensome and ultimately hamper the functioning of the currently independent judiciary.

The draft legislation's provisions to permit individual members of the public to file ethics complaints contending that individual Supreme Court justices have violated federal law raise similar concerns.¹¹ Such a mechanism is in significant tension with the Constitution's core protection for the independent judiciary through lifetime tenure and salary protections and the constitutionally prescribed, and carefully tailored, impeachment procedures to address judicial misconduct.¹²

In addition, the proposed Act's provisions subjecting Supreme Court justices to the review and supervision of members of lower federal courts raise significant separation of powers and constitutional accountability concerns, along with the disruption they would likely pose to the operation of the federal judiciary.¹³ In his landmark work on constitutional interpretation and structure, *Intratextualism*, Yale Law Professor Akhil Amar explains the position of "inferior" federal tribunals in relation to the Supreme Court and observes that by its terms the Constitution subordinates such tribunals to a federal supreme court.¹⁴ Similar to the Constitution's reference to "inferior" federal officers, the Article I and Article III references to "inferior" federal tribunals connote bodies that are under their superior, the federal supreme tribunal. Reporting, ethics, and recusal codes that subject Supreme Court

⁹ *Cf.* U.S. Const. art. I, section 8 (Necessary and Proper Clause).

¹⁰ *See, e.g.*, proposed 28 U.S.C. § 365.

¹¹ *See, e.g.*, proposed 28 U.S.C. § 367.

¹² *Cf.* U.S. Const. art. I, section 2, clause 5; *id.* art. I, section 3, clauses 6-7; *id.* art. II, section 4 (impeachment provisions).

¹³ *See, e.g.*, proposed 28 U.S.C. § 1660.

¹⁴ *See* Akhil Reed Amar, *Intratextualism*, 112 Yale L.J. 747, 748-49, 759-60, 806-07 (1999).

justices to review by subordinate actors are outside the constitutionally permissible federal structure and in tension with the constitutional text.

Finally, as a policy matter, it is not clear why Congress should impose burdensome reporting and procedural requirements on the Supreme Court. Evidence suggests that the Article III judiciary currently is a solidly stable and well-functioning branch of federal government. The number of seats on the Supreme Court has been steady for more than 150 years, over the past 10 terms at least 35 percent of the Court’s judgments in merits cases have been unanimous,¹⁵ and the Court’s decisions are transparent in the level of detailed explanation that the Court provides in written opinions when it resolves orally argued cases. President Biden began his Administration with an effort to probe whether the Supreme Court needs significant reform, and the president’s reform commission saw no unified mandate to urge far-reaching reform, advising instead that many of the suggested structural changes to the Court that the Commission evaluated would “offer uncertain practical benefits.”¹⁶

If Congress nonetheless determines to regulate the practice and exercise of federal judicial power, enactment of legislation related to the subject matter jurisdiction of federal courts and their remedial authority would be more impactful and more consistent with historical federal practice than the generation of new reporting and recusal requirements.¹⁷ Congress could also legislate with more specificity when enacting federal law to provide even greater clarity about the federal policies it is authorizing, thereby avoiding the impetus for courts to apply the discretionary canons and interpretive tools that statutory ambiguity often purportedly triggers. Further, the tension of significantly powerful, non-electorally responsive federal courts would be alleviated if the federal government reduced its sphere of governance across the board, permitting more space for individual states and local communities to govern and operate.

¹⁵ See Statistical Analysis on Unanimity, SCOTUSblog, *available at* <https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.2.2021.pdf>.

¹⁶ See Presidential Commission on the Supreme Court of the United States, Draft Final Report at 7–8 (Dec. 2021), *available at* <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

¹⁷ Cf. Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALABAMA L. REV. 1 (2019); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

United States Senate
Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action, & Federal Rights

Ensuring an Impartial Judiciary:
Supreme Court Ethics, Recusal, and Transparency Act of 2023

June 14, 2023

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I. Introduction and Background Qualifications

Chairman Whitehouse, Ranking Member Kennedy, and members of the Subcommittee: Thank you for the invitation to testify regarding the Supreme Court Ethics, Recusal, and Transparency Act of 2023 (hereinafter “SCERT”).

I am a Professor of Civil Procedure, Constitutional Law, and Federal Courts at the Maurice A. Deane School of Law at Hofstra University, where I have taught for thirteen years following full-time practice at the Brennan Center for Justice at the N.Y.U. School of Law. I am the co-author of *Judicial Conduct & Ethics*,¹ which is the leading desk reference treatise on judicial conduct and ethics. My C.V., including a list of recent publications, is available at <https://law.hofstra.edu/directory/faculty/fulltime/sample/cv/cv.pdf>. I am the author and co-author of multiple reports in the field of judicial conduct and ethics, along with numerous articles on the subject of judicial disqualification.²

There is a systemic failure in our judicial system which, without remedy, will continue to corrode the public’s trust, and the courts’ legitimacy.³ In our polarized era, the tendency is to see nearly every issue through a partisan lens. Viewing robust judicial ethics rules in this manner is reductive at best. The acute problems are not limited to jurists of any particular ideological stripe.

¹ Charles Geyh, James Alfani & James Sample, *Judicial Conduct & Ethics* (6th ed. 2020).

² E.g., James Sample, *Making Judicial Recusal More Rigorous* (Brennan Center 2010); James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* (Brennan Center 2008); James Sample, Deborah Goldberg & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503 (2007); James Sample & David Pozen, *Making Recusal More Rigorous*, JUDGES J., Winter 2007, at 17; James Sample, *Supreme Court Recusal: From Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95 (2013); James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, N.Y.U. ANN. SURV. AM. L. 727 (2011); James Sample, *Lawyer, Candidate, Beneficiary AND Judge? Role Differentiation in Elected Judiciaries*, 2011 UNIV. CHICAGO LEGAL F., 279. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the leading contemporary U.S. Supreme Court case on the topic of judicial disqualification, Petitioners, along with their lead counsel Theodore B. Olson, asked me to play the lead role in recruiting and coordinating amicus support, resulting in a broad coalition of support including from, inter alia, the ABA, numerous former state judges and justices, big businesses along with traditional adversaries from the labor and the plaintiffs’ bar, and dozens of good governance groups from all ends of the political spectrum. In that same landmark litigation on judicial disqualification, I served as counsel of record on an amicus brief in support of Petitioners on behalf of the Brennan Center for Justice at the N.Y.U. School of Law and the Campaign Legal Center. My role in *Caperton* is summarized in *Laurence Leamer, The Price of Justice: A True Story of Greed and Corruption* (2013). In the public media, I have published articles about judicial ethics and disqualification in, inter alia, *The New York Times*, *The Wall Street Journal*, *Slate*, *Judicature*, and *Judges Journal*, and am regularly cited on recusal and related topics by publications including *The New York Times*, *The Washington Post*, *The Los Angeles Times*, *The National Law Journal*, *The Economist*, *ABC News*, *CBS News*, and *NBC News*, and myriad other local and national outlets. I have delivered scores of judicial ethics presentations nationally including, e.g., “The National Struggle to Maintain Fair and Impartial Courts,” at the Summit of Judicial Leaders in San Francisco California (2006); “Recusal Reform,” at the Judicial Independence Conference hosted by Fordham Law School and the Sandra Day O’Connor Project on the Judiciary at Georgetown University Law Center, Fordham Law (2008); “Threats to Fair and Impartial Courts,” at the Wisconsin State Bar Annual Convention (2008); “Options for an Independent Judiciary in Michigan” Conference, featuring keynote speaker Justice Sandra Day O’Connor (2010); “Judicial Ethics, Political Activity and Beyond,” at the ABA National Conference on Professional Responsibility in Memphis, Tennessee (2011); and “Judicial Ethics at the Appellate Level,” at the American Academy of Appellate Lawyers in Denver, Colorado (2023).

³ Raymond J. Lohier, Jeffery S. Sutton, Diane P. Wood & David F. Levi, *Losing Faith: Why Public Distrust in the Judiciary Matters – and What Judges Can Do About It*, BOLCH JUD. INST. AT DUKE LAW (2022) https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf.

Indeed, the illustrative instances of concern detailed in Part IV of this submission range from Justices Scalia and Gorsuch to Justices Ginsburg and Kagan. All of whom are iconic jurists. With extraordinarily rare exception, the problem is not the people. Though brilliant, Supreme Court Justices *are* human. They make mistakes. The problem is the ad hoc, uneven system. The repeated failure of justices nominated by Democratic and Republican Presidents alike, to recuse themselves in cases when – if they were lower court judges they would have to recuse – is a problematic gap that Congress can and should address. Fair, impartial courts, with rigorous processes and enforcement mechanisms benefit *all* Americans, regardless of partisan differences.

While reasonable minds can disagree on the close calls in individual cases, it is unreasonable to conclude that the Supreme Court’s systemic, repeated failure – and even its steadfast refusal – to police itself in the area of judicial ethics is anything other than a serious concern. The Supreme Court’s years of ineffectual lip service, and years of increasingly egregious, even brazen disregard for basic norms of judicial ethics, conflict with the Court’s obligation to maintain the appearance of impartiality. That is significant. Not only does the appearance of partiality affect the litigants, it is detrimental to the rule of law and public confidence in the Court.⁴ As the Supreme Court has explained, “justice must satisfy the appearance of justice.”⁵ The Eighth Circuit described it this way: “[I]t is essential to protect the judiciary’s reputation for fairness in the eyes of all citizens. This reputational interest is not a fanciful one; rather, public confidence in the judiciary is integral to preserving our justice system.”⁶

I applaud and recommend the legislation before the Committee today. There has never been a more pressing time to implement a Code of Conduct for the Supreme Court. The great experiment that is American democracy is inherently fragile. It is held together by the goodwill, trust, and faith of the American people. Supreme Court approval ratings are at historic lows.⁷ Given the Court’s unwillingness to adopt or enforce rigorous rules of ethics, recusal, and transparency, it is within the purview of Congress to legislate to protect and promote due process. SCERT does just that, and it does so without jeopardizing the Court’s decisional independence. SCERT is necessary, measured, and constitutional. This submission addresses each of those characteristics.

Robust judicial ethics rules and enforcement procedures are proper remedies. They are also consistent with measures applicable to all other state and federal judges in the country. SCERT embraces a comprehensive approach, ensuring that the highest court in the land is held to the same high standards that apply to all other federal courts. SCERT would reduce conflicts of interest and ethical concerns by updating outdated recusal laws and transparency requirements for *all* courts and by requiring the Supreme Court to finally adopt its own binding - as opposed to purely voluntary and aspirational - code of conduct. The Act would also mandate that the Supreme Court create a transparent, standardized process for receiving ethics or misconduct complaints, and it would establish procedures for resolving such complaints.

⁴ Cf. Greg Stohr, *Supreme Court Approval Rating Slides as Clarence Thomas Faces Ethical Controversies*, Bloomberg (May 24, 2023) <https://www.bloomberg.com/news/articles/2023-05-24/supreme-court-approval-slides-as-clarence-thomas-s-ethics-issues-mount#xj4y7vzkg>.

⁵ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

⁶ *Wersal v. Sexton*, 674 F.3d 1010, 1022 (8th Cir. 2012) (citing *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship”).

⁷ See Stohr, *supra* note 4.

II. Federal Law Requires Both the Appearance and Reality of Impartial Justice

Section 455(a) of Chapter 28 of the U.S. Code states the following: “Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned.”⁸ Section 455(b)(5)(iii) further states that a Judge shall also disqualify herself where she or her “spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person” “[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.”⁹

The standard in section 455 is, by its terms, objective.¹⁰ Indeed, if anything, section 455 layers an excess of caution on top of that objectivity, by emphasizing that disqualification is required whenever the judge’s impartiality “*might* reasonably be questioned.”¹¹ Yet the objective standard is combined with a nettlesome tension: it is applied subjectively by the judge or justice in his or her own case. That flaw, especially when combined with the erosion of non-partisan ethics norms, produces uneven and haphazard enforcement at best. Further, chronically opaque recusal processes undermine public confidence in the judicial system.¹²

Similarly, Canon 3C(1)(d)(ii) and (iii) of the Code of Conduct for United States Judges¹³ provides the following: A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge or the judge’s spouse, or a person related to either within the third degree of relationship, or the spouse of such person is . . . acting as a lawyer in the proceeding,” or “known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.” The Code of Conduct for United States Judges exists for the purpose of preserving and promoting both the appearance and the reality of impartial justice.

Canon 2A directs that “a judge should act at all times in a manner that ‘promotes public confidence in the integrity and impartiality of the judiciary.’”¹⁴ The Code reinforces the notion that, because judges are human beings, there is a class of cases in which the judge may incorrectly believe himself or herself to be impartial. Thus, the only way to preserve a litigant’s right to adjudication before an impartial judge is to require that a judge recuse from a case, not only when he or she consciously perceives his or her own partiality, but also when there exists a reasonable appearance of partiality.

Holding judges accountable to the standards of the Code is necessary to follow the Supreme Court’s edict that “to perform its high function in the best way, justice must satisfy the appearance

⁸ 28 U.S.C.S. § 455(a).

⁹ 28 U.S.C. § 455(b)(5)(iii).

¹⁰ 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

¹¹ §455(a) (emphasis added).

¹² See Raymond J. Lohier, Jeffrey S. Sutton, Diane P. Wood & David F. Levi, *Losing Faith: Why Public Distrust in the Judiciary Matters – and What Judges Can Do About It*, BOLCH JUD. INST. AT DUKE LAW (2022) https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf.

¹³ As the Committee is aware, the Supreme Court takes the position that justices may voluntarily consult, but are not subject to, the Code.

¹⁴ *Id.*

of justice.”¹⁵ It is for this reason that the Code states that an independent and honorable judiciary is “indispensable” to justice in our society: “[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges.” Therefore, United States judges should “maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.”¹⁶

III. The Supreme Court Ethics, Recusal, and Transparency Act of 2023

As Part IV of this memo details further, in recent years, the entire federal judiciary, including, but not limited to the Supreme Court, has been rocked by revelations of judges and justices failing to comply with various aspects of 28 U.S.C. §455, by the non-disclosure of expensive gifts, lack of transparency regarding rationales for recusals or non-recusals, coordinated judicial lobbying by ‘dark-money’ amici curiae, and routine failures to abide by the most basic rules of ethical judicial conduct. The proposed Act takes measured, reasonable steps to remedy these problems.

SCERT is not radical, nor, when considered relative to the judiciary as a whole, is it particularly innovative. Indeed, SCERT aims to rectify the radical circumstance in which one, and only one, court approaches judicial ethics rules on an entirely voluntary, self-determined, aspirational basis. SCERT represents an important, necessary step to *level up* the processes and rules for the Supreme Court so as to bring the Court in line with the rules for lower courts; in line with the baseline ethics rules for Congress; and in line with the baseline rules for the executive branch.

Notably, eight of the current nine justices served on courts in which they were all required to comply with ethics rules previously. It is hardly burdensome to extend regulations and recusal rules upwards when almost all of the current Justices complied with them previously when serving on lower courts. Is it unfortunate that such legislation is necessary? Yes. Is it especially unfortunate that such a leveling up is needed for the branch of government that, in theory, should be held to even higher ethical standards than the constituent branches? Absolutely. Fortunately, though, SCERT adroitly addresses the unfortunate needs.

A. Enforcement of Basic Ethics

Section 455 uses the mandatory word “shall,” while also providing judges and justices with standards for fact evaluation. The standards, as opposed to bright-line rules, allow judicial officers “to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.”¹⁷ Characterized optimistically, jurists are regularly forgetting the fact discovery process.¹⁸ Characterized more cynically, they have ample reason for apathy as they know they will not be held accountable. SCERT will provide jurists with a clearer view of

¹⁵ In re Murchison, 349 U.S. 133, 136 (1995) (internal quotations omitted).

¹⁶ *Id.* at 2.

¹⁷ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-94 (1976).

¹⁸ 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>.

the pathway to an ethical decision by ensuring that the factual discovery element of the existing standards is not ignored.

Section 4(b) of SCERT puts the Justices in charge of ascertaining their own personal and fiduciary financial interests, the personal financial interests of their close family, and any other interest of such persons that could be substantially affected by the outcome of a matter. Section 4(a) of the Act amends Section 455(b) to require Justices or judges to disqualify themselves from cases when they know of a party or party affiliate that has made lobbying contact with or spent substantial funds in support of the Justice or judge's nomination, confirmation, or appointment. Section 4(a) also requires disqualification when the Justice's close family or personal business has received gifts, income, or reimbursement from a party within six years of assignment to the case — offering the American public strengthened impartiality and its appearance.

B. Transparency

The public's trust in the Court is essential. The essentiality of that trust does not square with lavish, undisclosed luxuriating via the largesse of private benefactors, and particularly not when those benefactors not only have direct interests before the Court, but also have derivative interests in connecting their friends to their beneficiaries on the bench.

Federal law already requires certain disclosures and transparency,¹⁹ but vis-a-vis the Justices, those laws lack the meaningful enforcement that SCERT facilitates. The proposed law requires (1) courts to immediately notify parties when it becomes clear that a judge may be conflicted, (2) written explanations for all recusal decisions, and (3) the Federal Judicial Center to conduct biennial studies of how well the judiciary is complying with federal recusal laws. The Act would also require the Supreme Court to create a transparent and standard process for receiving ethics or misconduct complaints and establish procedures for resolving such complaints. This should all contribute to the goal of Section 455, per the Court itself,²⁰ to avoid even the appearance of impropriety.

SCERT also brings greater transparency to determining the identities and interests of those trying to influence the court. It requires amici curiae and their parties to disclose any gifts, income, or reimbursements they have recently provided to a judge in a case, while also mandating that the Administrative Office of the Courts conduct an annual audit to ensure compliance with this section. SCERT would even ensure that the Supreme Court and lower courts develop rules clarifying when an amicus curiae's connection to a judge might cause the court to strike an amicus curiae brief.

¹⁹ Ethics in Government Act of 1978, Pub. L. No. 95-521, §302(a), 92 Stat. 1824, 1861 (1978) (current version at 5 U.S.C. §13104) (requiring various federal officials to disclose, inter alia, non-governmental income, gifts, and reimbursements).

²⁰ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988); MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcj_c_canon_1/.

SCERT would thus reduce the ability of highly organized, dark-money-financed amici to lobby judges in a manner that obscures the identities and interests of those who fund them.²¹

Chairman Whitehouse himself has incisively detailed the current common practice:

[A] network of groups that receive common amicus funding and often have ties to the parties in interest . . . regularly file briefs before the Court with no disclosure of their common funding or connections to the parties. This practice of judicial lobbying through amicus influence poses ethical issues representative of today's political climate, in which dark money abounds, compromising our courts.²²

In our current, flawed system, Justices are expected to self-evaluate their biases, balance their roles as fair jurists, and do so in a manner that, whatever their own subjective view of their impartiality, also *appears* to others to be objectively reasonable.²³ It should come as no surprise that the results of such a system are uneven and inconsistent, even to the point in which, given analogous circumstances, some Justices recuse while others do not. SCERT requires jurists to either recuse themselves or have the question referred to an impartial panel of randomly selected judges. In the case of the Supreme Court, the “panel” consists of the other Justices of the Supreme Court.

The Act reduces the burden, not to mention the psychological challenges of individual Justices unilaterally judging their own cases, via a mechanism analogous to a tried and true tool by which our legal system objectifies inquiries: formal consideration by the individual justice's peers. This system would be consistent with the practices of many state supreme courts, in which state high court justices often review recusal matters involving their colleagues.²⁴ Similarly, as Professor Charles Geyh has noted, federal circuit judges regularly review the decisions of district court judges not to recuse.²⁵

²¹ See Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO & THE TRACE, (Aug. 5, 2022) <https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/>.

²² Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J. (2021)

²³ Charles G. Geyh, *Why Judicial Disqualification Matters. Again.*, 30 Rev. of Litig. 671, 708 (2011) (discussing judges' psychological ability to assess their own bias); Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on A Judicial Recusal Motion*, 18 N.Y.U. J. Legis. & Pub. Pol'y 659, 611–662 (2015); Matthew Menendez & Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, BRENNAN CTR. FOR JUST. 1, 4 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf [hereinafter *Brennan Center Report*]. https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf. ((Furthermore, when a judge is faced with a recusal motion that presents information already in the judge's ken, but about which the judge did not recuse *sua sponte*, “[the judge] is being asked to admit that she has already failed in her ethical obligation to recuse herself.”))

²⁴ See Amanda Frost, *Supreme Court Ethics Reform 10* (testimony to the S. Comm. on the Judiciary, May 2, 2023), <https://www.judiciary.senate.gov/imo/media/doc/2023-05-02%20-%20Testimony%20-%20Frost.pdf> (citing *State v. Allen*, 322 Wisc. 2d 372, 453–458 (2010) (summarizing state supreme court practices)).

²⁵ See CHARLES GARDNER GEYH, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW* 99-109 (3d ed. 2010).

IV. Select Examples Illustrative of Concerns

Ethical concerns regarding conflicts of interest permeate the history of the Court, dating back to its early origins. It is worth noting that, even in the landmark case of *Marbury v. Madison*, Justice Marshall wrote the majority opinion in a decision where both he and his brother stood to gain or lose tremendously from the outcome. Despite the historical existence of conflicts, in recent decades both the severity, regularity and accompanying controversy of conflict-of-interest circumstances have increased significantly, due in part to the flaw that the Justices themselves have the final word in evaluating their own cases, without oversight or consequence.

I recommend a resource compiled by “Fix the Court” of instances in which the current, unilateral, justice-as-arbiter-in-his-or-her-own-case system fell short of even minimal compliance.²⁶ For present purposes, I include below brief summaries of relatively recent ethical concerns. This is not to say that the wrong recusal decision was reached in each instance included below, but rather, merely to highlight the fundamental flaws of the current process. The examples below show that concerns are genuine, and not limited to justices of any one ideological bent. Indeed, fairness, impartiality, the appearance of impartiality, and confidence in the courts are fundamental, non-partisan due process interests.

A. Justice Scalia

Many called for Justice Antonin Scalia to recuse from the 2004 case of *Cheney v. United States District Court for District of Columbia* where his close friend, Vice President Dick Cheney was a party.²⁷ *Cheney* was amplified after details regarding a duck hunting trip were released to the public. The Sierra Club, an opposing party, argued that Justice Scalia’s impartiality “might reasonably be questioned,” thus satisfying the standard for recusal.²⁸ Justice Scalia’s friendship with the Vice President, coupled with the hunting trip immediately prior to the petition for certiorari, raised concerns as to the appearance of favoritism.²⁹ Justice Scalia dismissed ethical violation allegations, claiming that any alone time he could have spent with the Vice President was so short as to be rendered insignificant, and that, while he did fly on Air Force 2, he had purchased round trip tickets beforehand and had accepted the flight strictly out of convenience.³⁰ To be clear, as far back as 2013, I am on record as applauding the transparent manner in which Justice Scalia provided the American people with the reasoning behind his decision not to recuse himself in the case. That aspect of the duck-hunting saga is a model of the transparency that SCERT embraces and encourages. The saga writ large, however, nonetheless illustrates valid concerns.

B. Justice Ginsburg

Justice Ruth Bader Ginsburg faced calls by Republican members of Congress to

²⁶ *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest*, FIX THE COURT (May 11, 2023) <https://fixthecourt.com/2023/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/> (updated periodically).

²⁷ *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J., mem.).

²⁸ *Id.*

²⁹ *See id.*

³⁰ *Id.*

preemptively recuse herself from all future litigation before the Court involving abortion, because of her work with the NOW Legal Defense Fund.³¹ Just fifteen days after agreeing with an amicus brief filed by NOW, Justice Ginsburg introduced a lecture series in partnership with the fund titled “Fourth Annual RBG Distinguished Lecture Series on Women and the Law”³² and donated signed copies of her most historic decisions to charity events for the fund.³³ Justice Ginsburg was also quoted saying that certain potential appointments to the Court would not “advance” human or women’s rights.³⁴ Affiliations with cause-oriented legal groups can, in some circumstances, create a loss of public faith in the rule of law. While not necessarily an easy call as far as ethical violations go, Justice Ginsburg failure to recuse in cases related to the NOW Fund arguably crossed the line of whether her “impartiality might reasonably be questioned.”³⁵

Justice Ginsburg was also heavily criticized for commenting on then-presumptive Republican presidential nominee Donald Trump. In three separate media interviews, Justice Ginsburg referred to Trump as a “faker” and stated that she “[couldn’t] really imagine what it would be like if he became president.”³⁶ The Justice walked back her comments in a brief statement issued by the Court, admitting that she made a mistake and stating that “Justices should avoid commenting on a candidate for public office.”³⁷ Still, her comments represented yet another instance where actions taken by a Supreme Court Justice raised serious ethical concerns. It is worth noting here that the judicial code binding the lower federal courts prohibits judges from endorsing or speaking about political candidates.³⁸

C. Justice Gorsuch

Justice Neil Gorsuch, alongside two other investors operating as “Walden Group LLC,” sold a forty-acre tract of land in Colorado to the chief executive of a law firm that has had at least twenty-two cases before the Court since the transaction.³⁹ In the twelve cases in which Justice

³¹ Jimmy Moore, *Supreme Court Justice Ginsburg Under Fire for Close Ties to Women’s Advocacy Group*, TALON NEWS (Mar. 12, 2004, 9:53 AM PST), <http://www.freerepublic.com/focus/f-news/1096378/posts>.

³² Ginsburg commented on the lecture series while explaining her refusal to recuse herself on issues over which the NOW Legal Defense Fund took an interest: “I think and thought and still think it’s a lovely thing. Let the lecture speak for itself.” As one of the nation’s leading supporters of abortion rights, it is no mystery that the message would be to “protect and preserve a constitutional right to abortion.” Peter S. Canellos, *Outspoken Justices Cloud High Court’s Appearance*, BOSTON GLOBE, June 15, 2004, at A3.

³³ Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff#end>.

³⁴ Jed Babbin, *J’Recuse*, THE A.M. SPECTATOR (Sept. 26, 2005, 12:08 AM), <http://spectator.org/archives/2005/09/26/jrecuse>; see also *Second Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES, Sept. 13, 2005, available at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=all> (transcribing the colloquy between then-U.S. Senator Biden and then-Chief Justice Nominee Roberts).

³⁵ 28 U.S.C. §455.

³⁶ Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret For Criticizing Donald Trump*, THE NEW YORK TIMES, (July 14, 2016) <https://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html>.

³⁷ *Id.*

³⁸ Robert Barnes, *Ginsburg Expresses ‘Regret’ For Remarks Criticizing Trump*, THE WASH. POST (July 14, 2016), https://www.washingtonpost.com/politics/ginsburg-expresses-regret-over-remarks-criticizing-trump/2016/07/14/f536_87bc-49cc-11e6-bdb9-701687974517_story.html.

³⁹ Amy B. Wang, *Gorsuch Property Sale Renews Calls For Supreme Court Ethics Reform*, THE WASH. POST (April 25, 2023) <https://www.washingtonpost.com/politics/2023/04/25/neil-gorsuch-property-sale-law-firm-ethics/>.

Gorsuch's opinion is recorded, he sided with the firm's clients eight times and against the firm only four times.⁴⁰ The property, first listed in 2015, sold in 2017 — just nine days before Justice Gorsuch was confirmed to the Court. Justice Gorsuch did list income from Walden Group LLC on his financial disclosure forms the following year, but did not acknowledge the land sale, and in the column where he could list the identity of the buyer/purchaser of a private transaction, he left the box blank.⁴¹ While the chief executive at the firm denies ever having met or interacted with the Justice, had the situation arisen in any other court of law, recusal would likely have been warranted. But because the decision is left up to Justice Gorsuch, and more to the point, is entirely unreviewable, his subjective determination is not only final, but effectively infallible. We can do better. SCERT paves the way for that improvement.

D. Justice Kagan

Justice Elena Kagan faced several conflicts between her earlier work as Solicitor General and her work on the Court. At her confirmation hearing, Kagan stated that as a general rule, if she had personally reviewed a draft pleading or participated in discussions to formulate the government's litigation position, she would recuse in a related case, even if she had not been the formal decision maker.⁴² In direct questions regarding the Affordable Care Act, Justice Kagan assured that she did not express an opinion on the merits of the bill at any time as Solicitor General, though she did work in the Solicitor General's office while the bill was in Congress, a situation that would ordinarily warrant recusal.⁴³ Justice Kagan's answers reflect the portion of section 455 requiring disqualification "[w]here [the Justice] has served in governmental employment and in such capacity participated as counsel [or] adviser concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy."⁴⁴

The most jarring aspects of Justice Kagan's lack of recusal in the Affordable Care Act litigation are illustrated by a series of emails exchanged between her and her colleagues in the Solicitor General's Office and with her former colleague from Harvard Law School, Laurence Tribe.⁴⁵ While the White House's official posture and Justice Kagan's direct, unequivocal oral response during her Senate confirmation hearing reflect a solicitor general who was entirely walled off from any participation on the litigation strategy in defense of the Affordable Care Act, the emails reveal a more nuanced reality.

Senior Counsel Brian Hauck in the Associate Attorney General's Office (hereinafter "the AAG's Office") e-mailed Kagan's then-deputy Neal Katyal stating:

⁴⁰ *Id.*

⁴¹ Heidi Przybyla, Law Firm Head Bought Gorsuch-Owned Property, POLITICO, (April 25, 2023) <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>.

⁴² *Elena Kagan's Old Job as Solicitor General is Having an Effect on Her New One*, THE WASH. POST, published by CLEVELAND.COM (Oct. 3, 2010, 10:38 PM),

https://www.cleveland.com/nation/2010/10/elena_kagans_old_job_as_solici.html (citing Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases*, WASH. POST, Oct. 4, 2010, at A15).

⁴³ *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nominations*, THE WASH. POST (June 30, 2010), <https://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf>.

⁴⁴ 28 U.S.C. §455.

⁴⁵ James Sample, *Supreme Court Recusal: From Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 145-150 (2013).

Hi Neal – Tom wants me to put together a group to get thinking about how to defend against the inevitable challenges to the health care proposals that are pending, and hoped that OSG [Office of the Solicitor General] could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.”⁴⁶

Katyal forwards the message to Kagan, saying that he is “happy to do this if you [Kagan] are ok with it.”⁴⁷ Kagan’s response, in full to Katyal, states, “You should do it.”⁴⁸ Katyal then informed the AAG’s Office that “Elena would definitely like OSG to be involved in this set of issues” and that “we will bring Elena in as needed.”⁴⁹ Katyal copied Kagan on his advice to Associate Attorney General Thomas Perrelli that the DOJ “start assembling a response” to a draft complaint.⁵⁰ On March 21, 2010, Katyal e-mailed Kagan with his advice that she should attend a DOJ meeting with the White House’s health-care policy team with Katyal stating, “I think you should go, no?” since this is “litigation of singular importance.”⁵¹ In emails with Tribe that may have received the most media attention, Justice Kagan wrote, “I hear they have the votes, Larry!! Simply amazing.” — referring to the floor votes with respect to the health care bill’s potential (but not yet actual) passage.⁵²

Justice Kagan’s email sequence — much like Justice Gorsuch’s property sale — provides yet another instance where, had the judge involved served on a lower court, rather than the Supreme Court, the recusal outcome might have been different. Even if the end result had been the same, the process would serve as a source of some legitimacy.⁵³

E. Justice Thomas

It was recently reported that Justice Thomas has, for over two decades, repeatedly accepted luxury trips from Republican donor Harlan Crow.⁵⁴ In addition to accepting hundreds of thousands of dollars’ worth of vacations, including trips on private jets and superyachts, Justice Thomas has repeatedly failed to disclose these trips on his financial statements. That is not only

⁴⁶ E-Mail from Brian Hauck, Senior Counsel, Assoc. Att’y Gen.’s Office, to Neal Katyal, former Deputy Solicitor Gen. (Jan. 8, 2010, 10:54 AM) (<https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

⁴⁷ E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, (Jan 8, 2010, 10:57 PM) (<https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

⁴⁸ E-Mail from Elena Kagan, to Neal Katyal, former Deputy Solicitor Gen. (Jan. 8, 2010, 11:01 AM) (<https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

⁴⁹ E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan (May 17, 2010, 1:19 PM) (<https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

⁵⁰ E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Thomas Perrelli, Assoc. Attorney General, and Elena Kagan (Mar. 18, 2010, 1:37 PM) (<https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

⁵¹ E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan (May 17, 2010, 1:19 PM) (<https://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

⁵² Jake Tapper, *Then-Solicitor General Kagan on Health Care Bill Wrote ‘I Hear They Have the Votes!! Simply Amazing.’* ABC NEWS BLOGS (Nov. 16, 2011, 11:32AM), <https://abcnews.go.com/blogs/politics/2011/11/then-solicitor-general-kagan-on-health-care-bill-wrote-i-hear-they-have-the-votes-simply-amazing>.

⁵³ Jonathan H. Adler, *Mukasey on the ObamaCare ‘Recusal Nonsense,’* VOLOKH CONSPIRACY (Dec. 5, 2011, 8:51 AM), <https://volokh.com/2011/12/05/mukasey-on-the-obamacare-recusal-nonsense/>.

⁵⁴ Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023, 5:00 AM) <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

unethical, but a violation of The Ethics in Government Act of 1978.⁵⁵ While that law excludes from its purview “personal hospitality,” such as food or lodging, the personal hospitality exception does not include private jet transportation for social events and vacations.⁵⁶

This recent discovery mirrors a similar scenario from 2011 in which Justice Thomas failed to disclose his wife’s substantial income over a period of years, including income earned from an interest group she founded that was funded with half a million dollars from Harlan Crow — the repeated, outlier-level benefactor of Justice Thomas himself.⁵⁷

Justice Thomas claims that he did not disclose the gifts or his wife’s income because he assumed they amounted to standard hospitality between longtime friends and that there was a misunderstanding in the filing instructions, respectively.⁵⁸ However, the repetition of such glaring oversights, between the same actors, strains credulity. The lack of meaningful repercussions disincentivizes compliance, and the entire saga underscores the need for precisely the judicial ethics reforms that SCERT would provide.

Justice Thomas’s decision not to recuse from January 6th related matters deserves separate mention. The shock over Justice Thomas’s decision to pass judgment on such matters has stemmed from the direct involvement of his spouse, Virginia (Ginni) Thomas, in perpetuating the “stolen election” conspiracy. Ms. Thomas not only publicly empathized with January 6th rioters, she urged Arizona legislators and the White House Chief of Staff to help overturn Biden’s victory.⁵⁹ In November 2022, Justice Thomas voted to block a subpoena against the Arizona Republican Party chair for phone records that could have implicated Ms. Thomas.⁶⁰ Most notably, Justice Thomas was the lone dissenter in *Trump v. Thompson*, in which he argued in favor of Mr. Trump’s bid to withhold presidential records from the January 6th committee.⁶¹

Contextually, the text messages Ms. Thomas sent — and the centrality of the person to whom she sent them during the contentious weeks following the 2020 election — could scarcely be more telling: Writing to the White House Chief of Staff, Mark Meadows, Ms. Thomas said,

⁵⁵ *Id.*

⁵⁶ 5 U.S.C. §13104(a)(2) (“any food, lodging, or entertainment received as personal hospitality of an individual need not be reported”); §13104(a)(3) (requiring the disclosure of reimbursements that “includ[e] a travel itinerary, dates, and nature of expenses provided”).

⁵⁷ *Id.*

⁵⁸ Zoe Tillman, *Justice Thomas Ethics Review Queried by US Court Leader in 2012*, BLOOMBERG LAW (May 5, 2023, 7:46 PM) <https://news.bloomberglaw.com/us-law-week/justice-thomas-ethics-review-queried-by-us-court-leader-in-2012>.

⁵⁹ Jonathan J. Cooper and Mark Sherman, *Ginni Thomas’ emails deepen her involvement in 2020 election*, PBS (May 20, 2022, 7:22 PM) <https://www.pbs.org/newshour/politics/ginni-thomas-emails-deepen-her-involvement-in-2020-election>.

⁶⁰ *Ward v. Thompson*, 214 L. Ed. 2d 250, 143 S. Ct. 439 (2022). SCOTUSBLOG describes the Arizona matter at issue in *Ward* this way: “Thomas’ wife, Ginni Thomas, lobbied Arizona lawmakers in November 2020 to set aside the victory by then-President-elect Joe Biden and choose a “clean slate of Electors.” According to The Washington Post, which first reported on Thomas’ efforts, Ginni Thomas sent emails to two members of the Arizona legislature through an online platform “designed to make it easy to send pre-written form emails to multiple elected officials.” See Amy Howe, *Court allows Jan. 6 committee to obtain phone records of Arizona GOP chair*, SCOTUSBLOG (Nov. 14, 2022, 12:13pm), <https://www.scotusblog.com/2022/11/court-allows-jan-6-committee-to-obtain-phone-records-of-arizona-gop-chair/>.

⁶¹ *Trump v. Thompson*, 142 S. Ct. 680, 211 L. Ed. 2d 579 (2022).

“Help This Great President stand firm, Mark!!! ... You are the leader, with him, who is standing for America’s constitutional governance at the precipice. The majority knows Biden and the Left is attempting the greatest Heist of our History.”⁶² Similarly, Ms. Thomas wrote to Mr. Meadows, “Sounds like Sidney and her team are getting inundated with evidence of fraud. Make a plan. Release the Kraken and save us from the left taking America down.”⁶³

Justice Thomas contends that he had no knowledge of his wife’s involvement in the events culminating with the January 6th attacks. Even if one assumes that to be true, *prospectively* this will not remain a credible excuse in future cases regarding January 6th; the fact of Ms. Thomas’s testimony about her involvement before the January 6th committee is common knowledge.⁶⁴ More to the point, however, *might it be reasonable* to question Justice Thomas’s impartiality in adjudicating January 6th cases? *Might* it be better for him *not* to be the only person determining the answer to the prior question? *Res ipsa loquitur*.⁶⁵

F. Chief Justice Roberts

In his 2011 State of the Judiciary address, Chief Justice Roberts asserts that the Supreme Court is so fundamentally different from the lower federal courts that a code of conduct need not apply. Chief Justice Roberts claims that a Code of Conduct is unnecessary because “every Justice seeks to follow high ethical standards.”⁶⁶ If this is true, however, one would think the Justices would actually welcome a Code of Conduct to ensure, in a clear and accessible manner, that they are acting ethically, as it would alleviate any issues of close calls or questionable ethical decisions. Chief Justice Roberts reminds us that there is no higher court to review a Justice’s recusal decisions as the Supreme Court is the court of last resort and there is no replacement for a Supreme Court Justice. This “duty to sit” with all nine on the court does not, however, tell the full story. The current quorum is set at six Justices, allowing the Court to issue an opinion when up to three Justices are absent — something this Court (and almost every Court prior) has done.⁶⁷

In his recent letter to Chairman Durbin, the Chief Justice declined the invitation to testify before the Senate Judiciary Committee, stating that “testimony before the Senate Judiciary

⁶² Bob Woodward and Robert Costa, *Virginia Thomas urged White House chief to pursue unrelenting efforts to overturn the 2020 election*, THE WASH. POST (March 24, 2022) <https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/>.

⁶³ *Id.*

⁶⁴ *Ginni Thomas Tells Jan 6 Committee She Regrets Texting with Meadows about 2020 Election*, CBS NEWS (Dec. 30, 2022, 3:01 PM) <https://www.cbsnews.com/sanfrancisco/news/ginni-thomas-tells-jan-6-committee-she-regrets-texting-with-meadows-about-2020-election/>.

⁶⁵ 28 U.S.C. §455 (“Any justice . . . of the United States shall disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned” (emphasis added)).

⁶⁶ See generally CHIEF JUSTICE ROBERTS, 2011 YEAR END REPORT ON THE FEDERAL JUDICIARY I (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

⁶⁷ It is an open question as to whether Congress and/or the Court could, or should, constitutionally authorize, for example, a randomly drawn circuit court judge to sit on a one-time basis, by designation in place of a recused Supreme Court Justice. If so, the “duty to sit” argument has even less force. Certainly, such a practice would be consistent with designation practices in the lower courts, and in many state supreme courts. It is also true, however, that the Supreme Court is constitutionally unique in respects that can reasonably be argued to counsel against such a practice. In any event, SCERT does not include such a provision, and the question, while interesting as a matter of theory, is not presented by the legislation before the Committee.

Committee by the Chief Justice is exceedingly rare.”⁶⁸ He further implied that doing so would jeopardize judicial independence and the separation of powers. It is impossible to neglect that Chief Justice Roberts qualifies his statement with the words, “by a Chief Justice”; without them, his statement would be incorrect. Sitting Justices have testified before Congress in ninety-two hearings since 1960 in various matters regarding the judiciary.⁶⁹

V. SCERT Is Consistent with Congressional Authority to Regulate Judicial Ethics

Four sources of constitutional interpretation — constitutional text, history, case law, and purpose — all support the constitutional power of Congress to enact SCERT.

A. Text

Article III, Section 1 of the Constitution states, “The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁷⁰

Article I, Section 8 states, in relevant part, “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . *all* . . . Powers vested by this Constitution in the Government of the United States, *or in any Department* or Officer thereof.”⁷¹ The Constitution vests judicial power in the judicial branch, a “Department” of the United States.⁷² Combined with Article III, the Necessary and Proper Clause establishes Congress’s authority to carry the judicial power into execution.

McCulloch v. Maryland recognized the broad scope of the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.”⁷³ SCERT fits neatly within the *McCulloch* framework: First, establishing an ethical judiciary is a legitimate end.⁷⁴ Second, as Professor Amanda Frost details extensively in her May 2, 2023, submission to the Committee, this end is within the scope of Article III,⁷⁵ and “Article III ‘leaves Congress in charge of many of the details’

⁶⁸ Jordan Rubin, *John Roberts Calls Dick Durbin’s Bluff; Declines Ethics Testimony Invite*, MSNBC (April 26, 2023) <https://www.msnbc.com/deadline-white-house/deadline-legal-blog/john-roberts-senate-judiciary-committee-durbin-rcna81471>.

⁶⁹ Robert Barnes and Ann Marimow, “*Supreme Court Justices discussed, but did not agree on, code of conduct*,” THE WASH. POST, Feb. 9, 2023.

⁷⁰ U.S. CONST. art III, §1.

⁷¹ U.S. CONST. art I, §8 (emphasis added).

⁷² At the time of the framing, the judicial branch was commonly referred to as a “Department.” *E.g.* THE FEDERALIST NO. 78 (Alexander Hamilton), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited June 11, 2023) (“WE PROCEED now to an examination of the judiciary department of the proposed government”); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the Judicial Department to say what the law is”).

⁷³ *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

⁷⁴ *Offutt v. United States*, 348 U.S. 11, 14 (1954) (prohibiting judges from deciding contempt charges entangled with their personal feelings because “justice must satisfy the appearance of justice”).

⁷⁵ Amanda Frost, *Supreme Court Ethics Reform* 11-13 (testimony to the S. Comm. on the Judiciary, May 2, 2023), <https://www.judiciary.senate.gov/imo/media/doc/2023-05-02%20-%20Testimony%20-%20Frost.pdf>.

necessary to implement federal judicial power.”⁷⁶ Third, the SCERT provisions — establishing ethics and disclosure rules for all judicial officers along with a process to enforce them — are means plainly adapted to the end of implementing an ethical federal judiciary. Finally, none of those provisions are prohibited by the Constitution.⁷⁷

Textual analysis of the Constitution thus reveals that Congress has the authority to enact SCERT under the Necessary and Proper Clause in conjunction with the Vesting Clause of Article III.

B. History

Historical analysis also supports Congress’s authority to make laws that carry the judicial power into execution, including laws that regulate the Supreme Court. The First Congress, whose members included sixteen Framers,⁷⁸ enacted the Judiciary Act of 1789 which established the Supreme Court and lower courts by filling in the details left out of Article III.⁷⁹ Ever since, Congress has exercised this same authority to control the Supreme Court’s size,⁸⁰ quorum,⁸¹ location,⁸² term,⁸³ salary,⁸⁴ staff,⁸⁵ and ethics (e.g., by mandating an oath of office⁸⁶). Consider, purely hypothetically and by way of illustration, that Congress could constitutionally expand the Court from nine justices to nineteen. Comparatively, regulating justices’ ethical conduct, especially in a manner that defers to the Court as to many of the details, is but a modest measure that strengthens the Court.

Similarly, by way of a less dramatic example, there is no constitutional doubt as to the validity of the ethics legislation passed in the 20th Century: In 1948, Congress enacted the first version of 28 U.S.C. §455, which established a recusal standard that applied to “any Justice or

⁷⁶ *Id.* at 11 (citing JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES 2 (Oxford University Press, 2009)).

⁷⁷ None of the SCERT provisions limit the tenure of judicial officers, U.S. CONST. art III, § 1, reduce the salary of judicial officers, *id.*, or expand the judiciary’s jurisdiction beyond the limits of Article III, Section 2, *id.* §2; *Marbury v. Madison*, 5 U.S. 137, 175 (1803).

⁷⁸ Senators William Samuel Johnson and Roger Sherman of Connecticut, Senators Richard Basset and George Read of Delaware, Senator William Few and Representative Abraham Baldwin of Georgia, Representative Daniel Carroll of Maryland, Senator John Langdon and Representative Nicholas Gilman of New Hampshire, Senator William Paterson of New Jersey, Senator Rufus King of New York (represented Massachusetts in the Constitutional Convention), Representative Hugh Williamson of North Carolina, Senator Robert Morris and Representative George Clymer of Pennsylvania, Senator Pierce Butler of South Carolina, and Representative (and later President) James Madison Jr. of Virginia. U.S. CONST. SIGNATURES; *The First Federal Congress*, FIRST FEDERAL CONGRESS PROJECT, <https://www2.gwu.edu/~ffcp/exhibit/p1/members/> (last visited June 11, 2023).

⁷⁹ Judiciary Act of 1789, 1 Stat. 73, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/judiciary_act.asp (last visited June 11, 2023).

⁸⁰ *Id.* §1 (current version at 28 U.S.C. §1).

⁸¹ *Id.* (current version at 28 U.S.C. §1).

⁸² *Id.* (current version at 28 U.S.C. §2).

⁸³ *Id.* (current version at 28 U.S.C. §2).

⁸⁴ Compensation Act of 1789, 1st Cong., sess. 1, ch. 18, §1, LIBRARY OF CONGRESS, <https://tile.loc.gov/storage-services/service/l1/l1sl-c1/l1sl-c1.pdf> (last visited June 11, 2023) (enacted one day before the Judiciary Act of 1789) (current version at 28 U.S.C. §5).

⁸⁵ Judiciary Act of 1789, *supra* note 79, §7 (current version at 28 U.S.C. §671-77).

⁸⁶ *Id.* §8 (current version at 28 U.S.C. §453).

judge.”⁸⁷ In the Ethics in Government Act of 1978, Congress required various government officers, including the Chief Justice and Associate Justices,⁸⁸ to file an annual report⁸⁹ disclosing, *inter alia*, their non-governmental income,⁹⁰ gifts,⁹¹ and reimbursements.⁹² Finally, in the Ethics Reform Act of 1989, Congress prohibited various government officers, including “officer[s] . . . of the . . . judicial branch[.]” from accepting gifts by individuals affected by the officer’s public functions.⁹³

In light of the historical precedent of Supreme Court regulation, Congress possesses the constitutional authority to further regulate the Court with SCERT. The new disclosure requirements fall in line with the standards set in 1978,⁹⁴ just as the new recusal rules fall in line with the standards set in 1948.⁹⁵ With the new enforcement process, SCERT fills in the details necessary to establish an ethical judiciary. The accepted use of Congress’s greater power to regulate the Supreme Court’s size,⁹⁶ quorum,⁹⁷ and even jurisdiction,⁹⁸ imply Congress’s lesser power to regulate the process of recusal.

C. Case Law

Despite the textual and historical support of Congress’s authority to regulate the Supreme Court, opponents of legislation akin to SCERT contend that separation of powers concerns preclude such measures. Case law, however, reinforces the legitimacy of measures that, without jeopardizing the core functions of co-equal branches, facilitate meaningful checks and balances.

As the Court itself notes, “we have never held that the Constitution requires that the three Branches of Government ‘operate with absolute independence.’”⁹⁹ Rather, as the Court held in the Congress-to-Executive Branch context, “in determining whether [an] Act violates the separation-of-powers principle the proper inquiry requires analysis of the extent to which the Act prevents the [separate branch] from accomplishing its constitutionally assigned functions.”¹⁰⁰ The Court has developed a three-part test to determine whether a congressional act violates this separation of powers principle.

⁸⁷ Act of June 25, 1948, ch. 646, §455, 62 Stat. 869, 908 (1948) (current version at 28 U.S.C. §455).

⁸⁸ Ethics in Government Act of 1978, Pub. L. No. 95-521, §308(9), 92 Stat. 1824, 1861 (1978) (current version at 5 U.S.C. §13101(10)).

⁸⁹ *Id.* §301(c) (current version at 5 U.S.C. § 13103(d)).

⁹⁰ *Id.* §302(a)(1)(A)-(B) (current version at 5 U.S.C. § 13104(1)(A)-(B)).

⁹¹ *Id.* §302(a)(2)(A)-(B) (current version at 5 U.S.C. § 13104(2)(A)).

⁹² *Id.* §302(a)(2)(C) (current version at 5 U.S.C. § 13104(2)(B)).

⁹³ Ethics Reform Act of 1989, Pub. L. No. 101-194, sec. 303, § 7353(a), 103 Stat. 1716, 1742 (1989) (current version at 5 U.S.C. §7353(a)).

⁹⁴ Ethics in Government Act of 1978 §302(a)(1)-(2) (current version at 5 U.S.C. §13104(1)-(2)).

⁹⁵ Act of June 25, 1948 §455 (current version at 28 U.S.C. §455).

⁹⁶ Judiciary Act of 1789, *supra* note 88, §1 (current version at 28 U.S.C. §1).

⁹⁷ *Id.* (current version at 28 U.S.C. §1).

⁹⁸ U.S. CONST., art. III, sec. 2 (defining the Supreme Court’s appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make”); *Ex parte McCordle*, 74 U.S. 506 (1868).

⁹⁹ *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

¹⁰⁰ *United States v. Nixon*, 418 U.S. 683, 707 (1974).

The first element is whether Congress is attempting to increase its own powers at the expense of another branch.¹⁰¹ SCERT does not shift control over recusal decisions to Congress. The control over disqualification remains in the judiciary; SCERT simply shifts the decision-making power to Justices who are not involved in the potential conflict. Congress's prospective role, were SCERT adopted, would be, "limited to receiving reports or other information and oversight . . . functions that we have recognized generally as being incidental to the legislative function of Congress."¹⁰²

The second element is whether the Act causes the usurpation of another branch's proper functions.¹⁰³ The proper, core function of the judicial branch is deciding cases or controversies and doing so with decisional independence.¹⁰⁴ SCERT does not usurp judicial functions; it rather furthers the legitimacy, and the appearance of legitimacy, of the Court carrying out those core functions.

The final element is whether the Act impermissibly undermines or disrupts another branch by preventing it "from accomplishing its constitutionally assigned functions."¹⁰⁵ Under SCERT, the Justices of the Supreme Court retain the power to determine their own code of conduct and enforce it. Far from imposing highly specific, granular judicial ethics regulations on the Court, SCERT leaves many of the details to the Court itself. *Marbury*'s maxim that the Supreme Court has the power to say "what the law is" is well-established.¹⁰⁶ But that does not extend to the Court effectively declaring itself, unlike Congress or the Executive, to be *above* the law, and able to choose, entirely voluntarily, and without review, when it wishes to comply and when it does not.¹⁰⁷

D. Purpose

Finally, SCERT is consistent with the broader functional aims of the Constitution. In creating the Constitution, the Framers recognized a humbling truth about human nature and, ultimately, about good government:

If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹⁰⁸

In other words, men and women with the best intentions are nonetheless prone to mistake their own interest for justice. True justice arises only when the men and women of the government operate within a system, greater than any one individual, that checks their self-interested biases.

¹⁰¹ 487 U.S. at 694.

¹⁰² *Id.*

¹⁰³ *Id.* at 695.

¹⁰⁴ U.S. Cons. art III, § 2.

¹⁰⁵ *Morrison*, 487 U.S. at 695 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)).

¹⁰⁶ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁰⁷ *Id.* at 163 ("The Government of the United States has been emphatically termed a government of laws, and not of men").

¹⁰⁸ THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed51.asp (last visited June 11, 2023).

This is the rationale behind the judiciary's greatest power, that of judicial review. Because the men and women of Congress and the Executive branch are not angels, the men and women of the judiciary have the duty to review the acts of those branches to ensure their acts conform to the Constitution.¹⁰⁹ But this rationale runs in both directions. Even the best humans, be they in Congress or on the Court, are imperfect (and especially so when unilaterally judging their own cases). That is not an indictment, but rather, a reflection of the human condition. The Framers acknowledge as much in their embrace of inter-branch oversight. SCERT reflects the checks and balances, rules, and systematized procedures of good governance.

VI. Conclusion

The appearance of impropriety extant in the Supreme Court's refusal to clean up its own house with regard to judicial ethics norms increases the need for legislative reforms. This conclusion is amply supported by the Constitution, statutes, precedent, scholarship, and foundational principles aimed at promoting confidence in the courts. The Supreme Court Ethics, Recusal, and Transparency Act of 2023 is an important, and much-needed, step in the right direction.

¹⁰⁹ *Marbury*, 5 U.S. at 176-77 (recognizing that the constitutional limits on congressional power mandate judicial review that enables the government to control itself).

**TESTIMONY BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION, AND
FEDERAL RIGHTS
HEARING ON
ENSURING AN IMPARTIAL JUDICIARY: SUPREME COURT ETHICS, RECUSAL, AND
TRANSPARENCY ACT OF 2023**

JUNE 14, 2023

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

Chairman Whitehouse, Ranking Member Kennedy, and members of the Subcommittee, thank you for the opportunity to testify before you on the urgent need for improvements to the Supreme Court's recusal regime.

My name is Donald Sherman, and I am the Executive Vice President and Chief Counsel of Citizens for Responsibility and Ethics in Washington ("CREW"), a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I appear today on behalf of CREW to urge you to address the glaring problems in the Supreme Court's ethics regime by passing the Supreme Court Ethics, Recusal, and Transparency Act ("SCERT Act"). It is far past time that the highest court in our constitutional system is held to the highest ethical standards.

You are holding this hearing at a perilous time in American history. Over the past two years, the high court has experienced a series of ethical scandals that have tarnished public faith in an institution whose entire existence depends on public support.¹ As the *Wall Street Journal* reported in 2021, over a nine-year period, more than 130 federal judges presided over more than 650 cases in which they had a material financial interest in one of the parties.²

¹ Just one indicator of this concern is recent polling finding that Americans' disapproval of the Supreme Court has been rising, with 58% now having an unfavorable opinion of the high court, the highest disapproval rating since Gallup began polling the question twenty years ago. See Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historic Lows*, Gallup (Sep. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

² See James V. Grimaldi, Coulter Jones and Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had A Financial Interest*, Wall Street Journal (Sep. 28, 2021), <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial>

In just the last six months, the public learned of a decades-long campaign whereby individuals purchased unparalleled access to the Supreme Court, and may have obtained information about the Court's decision in *Burwell v. Hobby Lobby Stores Inc.* prior to it being publicly released.³ Additionally, recent reporting revealed that Justice Clarence Thomas accepted hundreds of thousands in dollars in gifts and travel from Harlan Crow, a billionaire political benefactor who has donated "millions of dollars to groups dedicated to tort reform and conservative jurisprudence."⁴

While these scandals have unearthed uniquely unethical activity, they did not occur in a vacuum. They are, rather, the latest manifestations of the ethical quagmire that is undermining the Supreme Court and the entire federal judiciary. No single justice is the reason the highest court in the land has the lowest bar for ethical compliance and accountability. This is rather the result of years of bipartisan benign neglect and absence of accountability.

For decades, liberal and conservative judges and justices have routinely and publicly tested the limits of the judiciary's absurdly weak rules, while activists and advocates, regardless of motivation or ideology, have found troubling ways to exploit every gap they can find. Justices across the ideological spectrum have repeatedly failed to recuse themselves from cases in which a reasonable person would question their ability to remain impartial.

For example, liberal icon former Justice Ruth Bader Ginsburg repeatedly heard cases from which she likely should have recused.⁵ For instance, she chose to hear various cases involving her husband's law firm—including cases involving Marty Ginsburg's client Ross Perot and Mr. Perot's company, EDS, even though Perot helped organize support for her confirmation to the D.C. Circuit and endowed a chair named after Mr.

[-interest-11632834421](#); Coulter Jones, Joe Palazzolo and James V. Grimaldi, *Federal Judges or Their Brokers Traded Stocks of Litigants During Cases*, Wall Street Journal (Oct. 15, 2021), <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192>.

³ Jodi Kantor and Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, New York Times (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>.

⁴ 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>. Taken together, Justice Thomas's ethical violations are so substantial that they caused my organization to call for his resignation. See Noah Bookbinder Letter to Justice Clarence Thomas (May 9, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/05/Clarence-Thomas-Resignation-Letter.pdf>.

⁵ See, e.g., Mark Paoletta, *The Hypocrisy of Supreme Court Ethics Journalism*, Wall Street Journal (Oct. 8, 2022), https://www.wsj.com/articles/the-hypocrisy-of-supreme-court-reporting-politico-barrett-client-law-firm-disclosure-rbg-scalia-11665175010?st=kip6f2w9tf3qcpq6reflink=article_email_share.

Ginsburg at Georgetown University Law Center.⁶ So did the recently retired Justice Stephen Breyer, who twice failed to recuse from cases in which he owned stock in one of the parties—first in *FERC v. EPSA*, despite owning shares in Johnson Controls, a party on the EPSA side (he would later sell his stock), and again in *Feng v. Komenda and Rockwell Collins, Inc.*, when he owned shares in Rockwell’s parent company, United Technologies Corp.⁷

In fact, every currently-serving Supreme Court justice has participated in a case that could at least raise questions about their partiality.⁸

For instance: Chief Justice Roberts, Justice Gorsuch and Justice Jackson appear to have participated in cases in which they owned stock in one of the parties or otherwise had a material financial interest.⁹ Justice Barrett refused to recuse from *Americans for Prosperity Foundation v. Bonta* mere months after AFPF’s sister organization spent more than \$1 million supporting her nomination and confirmation.¹⁰ Justice Sotomayor chose not to recuse from *Nicassio v. Viacom International and Penguin Random House*, despite having earned close to \$2 million in royalties from PRH since she joined the Court.¹¹ Justice Kavanaugh chose to participate in *Facebook v. Duguid*, despite his close friendship with a high-level Facebook executive who had “helped quarterback” his nomination and confirmation to the Supreme Court.¹² And Justice Kagan did not recuse from *U.S. v. Briones, Jr.*, a juvenile life-sentence case, an earlier version of which she had previously helped litigate as Solicitor General.¹³ While we do not pass judgment on whether the Justices should have recused in these specific situations, these examples highlight the need for clear rules and an independent process that guide every justice’s conduct when making recusal determinations.

⁶ See Stephen Labaton, *The Man Behind the High Court Nominee*, New York Times (June 17, 1993), <https://www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html>.

⁷ See Fix the Court, *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests* (May 11, 2023), <https://fixthecourt.com/2022/12/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Gabe Roth, *AFP spent loads of money to get a justice confirmed. Now AFP is a litigant. No one’s recusing. That’s a problem.*, Los Angeles San Francisco Daily Journal (Apr. 20, 2021), <https://www.dailyjournal.com/articles/362335-afp-spent-loads-of-money-to-get-a-justice-confirmed-now-afp-is-a-litigant-no-one-s-recusing-that-s-a-problem>.

¹¹ Fix The Court, *OT 19 Recusal Report* (Jul. 21, 2020), <https://fixthecourt.com/wp-content/uploads/2021/01/OT19-recusal-report-july-2020.pdf>.

¹² Maxwell Tani and Andrew Kirell, *Facebook Executive Joel Kaplan “Helped Quarterback” His Pal Brett Kavanaugh’s SCOTUS Nomination*, The Daily Beast (Nov. 22, 2019), <https://www.thedailybeast.com/facebook-executive-joel-kaplan-helped-quarterback-his-pal-brett-kavannahs-supreme-court-nomination>.

¹³ Scott S. Harris, Clerk of the Supreme Court, Letter to Elizabeth B. Prelogar and Melanie Lynn Bostwick (May 6, 2021) (alerting counsel of Justice Kagan’s failure to recuse), <https://fixthecourt.com/wp-content/uploads/2021/05/Letter-to-Counsel-in-No.-19-720.pdf>.

And, of course, there's Justice Thomas. As I previously told the House Committee on the Judiciary in 2022, Justice Thomas's failure to recuse himself from Supreme Court cases relating to the 2020 election, despite his spouse's active support of and communications with Trump administration officials about former President Trump's unprecedented efforts to overturn the 2020 election, was an egregious violation of the laws and norms of ethical behavior.¹⁴ This ethical failure is just one in a long series; for instance, similar ethics issues arose when Virginia Thomas reportedly received \$200,000 in consulting fees from the personal foundation of an individual who filed an amicus brief with the Supreme Court regarding President Trump's Muslim ban,¹⁵ and due to her service on the advisory board for an organization that filed an amicus brief in an affirmative action case that will be decided by the Supreme Court any day now.¹⁶

Each of these incidents, from Justice Thomas's and Justice Ginsburg's willingness to hear cases implicating their spouse's activities, to Chief Justice Roberts and Justice Breyer's failure to recuse from cases in which they had financial interests, though not on equal footing, show why the Supreme Court needs a binding code of conduct and why a transparent and impartial recusal process must be a key part of that endeavor. Justice Thomas's pattern of conduct is at an entirely different level of seriousness than that of his conservative and liberal current and former colleagues and requires different consequences—but the issues all of these justices have run into makes clear the need for significant reform in the Court's ethics regime.

Right now, the Supreme Court's recusal process, such that it exists, is opaque and guided entirely by the justices' individual sentiment. As the Court's recent "Statement on Ethical Principles and Practices" explained, "[i]ndividual Justices, rather than the Court, decide recusal issues," and, in so doing, are guided by a so-called "duty to sit" that, according to their interpretation, "precludes withdrawal from a case as a matter of convenience or simply to avoid controversy."¹⁷ As such, it

¹⁴ 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-HIC-Oral-Testimony-Draft.pdf>

¹⁵ 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>.

¹⁶ *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199 (U.S. Jan. 24, 2022).

¹⁷ Chief Justice John G. Roberts Letter to Sen. Richard Durbin (including a Statement of Ethics Principles signed by all nine Justices) (Apr. 25, 2023), https://www.washingtonpost.com/documents/70adb490-28c6-4065-b929-6e2e9ab5b9a8.pdf?itid=ik_inline_manual_4.

produces seemingly random and contradictory results, leading the public to question whether the justices are able to effectively police their own behavior.

Since the Supreme Court will not effectively regulate itself, and will not even adopt consistent processes for all justices, Congress must step in. The SCERT Act takes a number of actions to respond to this crisis—each of which will help rebuild public confidence in the judiciary. In particular, the SCERT Act would reshape the Court’s recusal regime, bringing measures of transparency and accountability into an opaque and broken system. And while Congress cannot solve this problem by itself, these necessary steps can help to ensure that the high court is held to the high ethical standard its position of power demands.

1. The Supreme Court’s broken conflicts of interest and recusal regime

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

Congress passed the governing statute for disqualification of a justice, judge, or magistrate judge, 28 U.S.C. § 455, to require all federal judges, including members of the Supreme Court, to recuse themselves from any judicial proceedings in which their impartiality might reasonably be questioned.¹⁸ In addition, by statute, a judge must recuse when they know that their spouse has “any . . . interest that could be substantially affected by the outcome of the proceeding.”¹⁹

However, under the Supreme Court’s current ethical framework, individual justices decide for themselves whether recusal is warranted under Section 455.²⁰ While Section 455 is lofty in its endeavors, there is no way to enforce it at the Supreme Court if an individual justice decides not to recuse under the statute in a given case.

Additionally, justices will often recuse from a case without offering any explanation. For example, in recent years, we’ve seen detailed recusal decisions released by Justices Kagan and Scalia, but far less from their colleagues. These nonpublic recusals reportedly occur in approximately 200 matters each year.²¹ 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 institution.

¹⁸ 28 U.S.C. § 455(a).

¹⁹ 28 U.S.C. § 455(b)(4).

²⁰ See Chief Justice John G. Roberts, *2011 Year-End Report on the Federal Judiciary* (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

²¹ 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>.

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.

Executive branch employees are already subject to similar recusal standards by virtue of the criminal conflict of interest statute, 18 U.S.C. § 208, and the executive branch's standards of ethical conduct governing impartiality issues. These standards protect the integrity of the agency's decision-making process by requiring employees who are dealing with actual and apparent conflicts of interests to consult with an agency's ethics official.²² 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.²³

In the absence of a similar process for members of the Court, justices will continue to make these decisions for themselves on a seemingly ad hoc, opaque, and unregulated basis, and the Supreme Court will likely continue to be viewed by the public as largely unaccountable and increasingly "politicized."²⁴ It is notable that unlike the executive branch where employees can be terminated or reassigned or even lower courts where judges can be replaced, Supreme Court justices not only have life tenure, but have also argued that they should avoid recusal because they have a "duty to sit."

B. The Ethics in Government Act: 5 U.S.C. App.

The recusal statute under 28 U.S.C. § 455 identifies specific circumstances, such as when a spouse has a financial interest in a subject matter in controversy or in a party to the proceeding,²⁵ where recusal is required. These conflicts, however, may never come to light in the first place because of reporting loopholes in the Ethics in Government Act ("EIGA").

The Ethics in Government Act mandates certain federal officials, including Supreme Court justices, to file annual financial disclosure forms which detail outside income and spouses' sources of income, among other disclosures.²⁶ Conflicts arising from a

²² 5 C.F.R. § 2635.502.

²³ *Id.*

²⁴ 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>.

²⁵ 28 U.S.C. § 455(b)(4).

²⁶ 5 U.S.C §§ 13101-13104.

justice's spouse's businesses, clients, or outside positions, however, are difficult to identify partly because they²⁷ are not always required to be disclosed under EIGA's current reporting regime. For example, when spousal compensation passes through a limited liability company ("LLC") or similar legal entity, there is currently no requirement to disclose the client who generated the spouse's earned income. Only the spouse's LLC or other business entity would need to be reported as the source of spousal earned income.²⁸ 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.²⁹ In the latter case, potential spousal conflicts of interest can be more easily identified.

2. The SCERT Act would bring needed transparency and accountability to the Supreme Court's recusal framework

Senator Whitehouse and Representative Hank Johnson developed and introduced the Supreme Court Ethics, Recusal, and Transparency Act to address many of the ethical problems plaguing the high court. The key element at issue in today's hearing is the SCERT Act's enhanced recusal provisions, which creates an ethical framework with concrete rules by which to order their lives and professional engagements.

The bill includes four overarching changes to the recusal and transparency rules, each of which CREW endorses.

First, it expands and clarifies elements of the recusal requirements in Section 455 in a few key ways. Specifically, it requires justices or judges to recuse themselves from cases in which a party or party affiliate has made lobbying contact with, or spent substantial funds in support of, the justice or judge's nomination, confirmation, or appointment. Moreover, it would require disqualification in cases where the justice or judge, or their spouse, minor child, or a business held by them, received gifts, income, or reimbursement from a party within six years of assignment to the case.

Second, the bill imposes a clear duty on justices and judges to be aware of their and their family's financial interests—and when such interests would be substantially affected by a case before them. This duty to know is bolstered by a duty to notify the

²⁷ 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).

²⁸ 5 U.S.C. app. § 102(e)(1)(A).

²⁹ *Id.*

parties in any circumstance where a justice or judge’s recusal may reasonably be required.

Third, it creates a judicial panel that would review a party’s certified disqualification motions and determine whether recusal is necessary. For the lower courts, the statute would create a reviewing panel composed of three lower court judges from different courts to review certified motions to disqualify. In recognition of the unique position occupied by Supreme Court Justices, the act would require that disqualification motions related to justices be referred to the entire Supreme Court, and allow the justice subject to the motion to explain their argument against recusal to their colleagues. Any decision made by a reviewing panel—and the rationale behind the decision—would be released publicly and published online.

And fourth, the bill would create new financial disclosure rules for parties to cases and *amici curiae*. As CREW has repeatedly stated, 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 justice accepts lavish gifts and other things of value from people who are affiliated with groups filing amicus briefs, obvious questions arise about whether a justice has the requisite impartiality or appearance of impartiality to participate in that case.³⁰ SCERT’s disclosure provisions are a necessary first step towards addressing these problems by requiring the public disclosure of (a) any gifts, income, or reimbursements given to a justice in the two years preceding commencement of the matter under consideration—as well as any lobbying contacts in support of a justice’s nomination, confirmation, or appointment; and (b) any person who contributed to the preparation or submission of an amicus brief, or contributed at least three percent of the gross annual revenue of the amicus curiae or more than \$100,000 in the previous calendar year (with some exceptions). Without knowing this information, it would be impossible to know when a justice might need to recuse, or to file a complaint if they do not.

Each of these changes would measurably improve the Supreme Court’s recusal regime and rebuild public faith in the Court’s integrity. Taken together, they would begin the process of transforming the way the justices approach their ethical

³⁰ See Statement of Noah Bookbinder, Hearing on Supreme Court Ethics Reform, Before the S. Comm. on the Judiciary (May 2, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/05/SIC-Clarence-Thomas-Judicial-Ethics-Testimony-050223.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-HJC-Testimony-12_8.pdf; Testimony of Donald Sherman (Apr. 27, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HJC-Oral-Testimony-Draft.pdf>.

obligations. And while there are certain elements that could go even further—for instance, CREW supports banning all justices and judges from owning or trading individual stocks and bonds, and extending the criminal conflict of interest law to cover the courts as well as the executive branch—passing the SCERT Act would be a powerful and necessary step towards bolstering the independence of and reestablishing trust in the judiciary.

I also note that the SCERT Act’s recusal regime thoughtfully balances the importance of protecting the integrity of the Supreme Court’s decision-making with the complexities of the court’s unique composition and structure. We recognize that asking a justice to recuse from a case is fundamentally different from asking a district court judge to recuse: as Chief Justice Roberts noted, “lower court judges can freely substitute for one another...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.”³¹ Justice Scalia famously declined to recuse himself from a case involving a White House energy task force headed by Vice President Cheney, whom Justice Scalia had recently accompanied on a duck-hunting trip in 2003.³² The consequences, Justice Scalia said, of a justice recusing themselves “out of an abundance of caution” would “utterly disabl[e]” the court which risks leaving the Court with divided a four-four decision.³³ It is also noteworthy that one way to avoid recusal questions is by taking significant prophylactic measures to avoid conflicts in the first place. For example, if, as CREW has advocated, the Supreme Court adopted a binding code of conduct that barred justices, their spouses, and dependent children from owning and trading individual stocks or similar assets, then the justices would not have to worry about recusal decisions based on these financial assets.³⁴

The SCERT Act’s recusal framework was carefully designed to address Justice Scalia’s concern about recusal. Crucially, the SCERT Act’s panel structure allows for Supreme Court justices to weigh the importance of having a fully constituted court rule on the matter when considering a party’s motion to disqualify. The bill’s enhanced recusal requirements do not amount to a significant expansion of what Section 455 already requires; and the enforcement of those requirements would still rest with the judicial panel. That structure more than compensates for any worry that enhanced

³¹ 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>.

³² M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, Yale L.J. (Oct. 24, 2021), <https://www.yalelawjournal.org/forum/politics-and-judicial-ethics-a-historical-perspective>.

³³ Order Denying Motion to Recuse, *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 916 (2004) (No. 03-475) (Scalia, J., mem.).

³⁴ See Testimony of Donald Sherman (Apr. 27, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HIC-Oral-Testimony-Draft.pdf>.

recusal requirements might “disable” the Court and undercut its role in our constitutional structure. It is a measured compromise between imposing a rigorous set of recusal standards and allowing the court to continue using a broken patchwork of unenforceable rules and regulations.

It is my and CREW’s strong and considered position that when questions about the Court’s impartiality are at issue, recusal needs to be the justices’ default position rather than the exception.³⁵ Whether or not Justice Scalia should have recused, the fact that he responded publicly at all and pulled back the curtain to explain his decision-making process is a novelty in and of itself that should be applauded.³⁶ But it should not be a novelty. While we were heartened to see Justice Kagan’s recent decision to offer a brief explanation of her decision in recuse in *Holland v. Florida*, other justices have not followed suit. This ad hoc process that rests on the justices’ individual prerogatives undermines the impartial and consistent administration of justice. It is time for Congress to act. In the SCERT Act, we have a measured response that builds modest ethical guardrails into a system that lacks any.

3. The SCERT Act is a constitutional exercise of Congressional authority

The SCERT Act does not raise serious separation of powers concerns. Congress’s power to subject the Supreme Court to basic ethics rules, including by imposing recusal rules, or a Code of Conduct, is supported by the Constitution’s structure and text, as well as centuries of practice.³⁷

³⁵ See Statement of Noah Bookbinder (May 2, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/05/SJC-Clarence-Thomas-Judicial-Ethics-Testimony-050223.pdf>.

³⁶ See John Crawley and Kimberly Strawbridge Robinson, *Alito, Kagan Top Justices in Supreme Court Recusal ‘Black Box’*, Bloomberg Law (Feb. 13, 2023), <https://news.bloomberglaw.com/us-law-week/alito-kagan-top-justices-in-supreme-court-recusal-black-box-1> (reporting that virtually all of the more than 750 recusals identified in a review of court orders lacked an explanation of why the justices avoided participating). See also Kaelan Deese, *Justice Kagan’s recusal could signal ‘new practice’ for Supreme Court transparency*, Washington Examiner (May 25, 2023), <https://www.washingtonexaminer.com/policy/courts/kagan-recusal-could-signal-new-practice-scotus-transparency> (citing Justice Kagan’s citation in a rejection of the case *Holland v. Florida*, in which she indicated her reasoning for not partaking in the consideration or decision of the petition, citing her status as a former government employee).

³⁷ Joanna R. Lampe, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, Cong. Rsch. Serv. (Apr. 6, 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.”).

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.³⁸ Congress has changed the size of the Supreme Court by statute on several occasions.³⁹ Congress also has the authority to raise justices' salaries, and, in extraordinary cases, remove justices via impeachment.⁴⁰ And Congress has exercised its constitutional authority to regulate Supreme Court justices' professional conduct through the nation's criminal laws: Justices may not condition any official action—for instance a vote in a case or a decision to grant *certiorari*—on the receipt of “anything of value.”⁴¹ Though they interpret and sometimes strike down the law, Supreme Court justices are not above it.

Congress's tradition of regulating the ethical conduct of Supreme Court justices stretches back to the beginning of the republic. And, as Professor Amanda Frost explained in her testimony to the full committee in May, “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.’” Congress chose these words to ensure that federal judges adjudicate cases fairly and impartially—the same goals that underlie the current ethics legislation.⁴² Many of the laws that the SCERT Act would expand have been operative on the Supreme Court for more than half a century without challenge; for instance, Section 455 has applied to Supreme Court justices as well as lower federal court judges for 75 years, the Ethics in Government Act for 45 years, and the Ethics Reform Act for 34.⁴³ All of these laws “support the sound

³⁸ 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.”).

³⁹ 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 (2005); Joanna R. Lampe, “Court Packing”: Legislative Control over the Size of the Supreme Court, Cong. Rsch. Serv. (Dec. 14, 2020), <https://crsreports.congress.gov/product/pdf/ISR/ISR10562>.

⁴⁰ 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.”).

⁴¹ 18 U.S.C. § 201.

⁴² Testimony of Prof. Amanda Frost, Hearing on Supreme Court Ethics Reform, Before the S. Comm. on the Judiciary (May 2, 2023),

<https://www.judiciary.senate.gov/imo/media/doc/2023-05-02%20-%20Testimony%20-%20Frost.pdf>. See also An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); and 28 U.S.C. § 453 (establishing the nearly identical oath used today).

⁴³ *Id.*

operation of the Court”—as do the comparatively reserved requirements in the SCERT Act.⁴⁴

CREW believes that imposing these and other ethical requirements on Supreme Court justices is constitutional, appropriate, and necessary.

Conclusion

The judiciary is built on a foundation of public trust. Without the power of the purse or the authority to enforce the laws that it interprets, its credibility is its currency. That credibility is eroding. Over the past several years the Court subjected the American people to scandal after scandal, leading the public's confidence in the judiciary to plummet. These troubling incidents were preventable, if not predictable, given the Court's lax ethics and recusal systems. The Supreme Court's judicial ethics regime, such as it is, is a mishmash of vague, inadequate rules and loose self-monitoring. Some might say that the system has failed, but the reality is even worse: it was not designed to succeed.

Supreme Court justices are afforded the immense responsibility of passing final judgment on matters of life and death, educational equity, voting access, reproductive health, separation of powers, and the rule of law. In addition, they enjoy the singular privilege of lifetime tenure. In return, it is certainly reasonable to demand that these men and women uphold the highest principles of ethics and accountability. That they are seemingly unwilling to do so speaks to arrogance on the part of the justices and negligence from the other branches despite unprecedented ethical scandals.

Congress must act quickly to help restore credibility and public trust to our judiciary. The SCERT Act, with its focus on recusal, is a critical, measured, and constitutionally appropriate step towards that goal.

An independent judiciary is the backbone of the rule of law. In the face of significant ethical failures by the justices, and continued recalcitrance to the public's calls for change, Congress has an obligation to pass legislation that protects our democracy and implements necessary judicial ethics reform. Though justices and judges interpret the law, they are not above it.

⁴⁴ *Id.*

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



Statement of Alliance for Justice

U.S. Senate Judiciary Committee

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

Ensuring an Impartial Judiciary: Supreme Court Ethics, Recusal, and Transparency Act of 2023

June 14, 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.

It is critical that not just federal judges on the district and circuit courts but also Supreme Court justices follow ethics rules and guidance advanced by the Administrative Office of the U.S. Courts and the Judicial Conference. These include provisions governing recusal and, relatedly, financial disclosures, both of which bear on the impartiality and integrity of our courts. As recent headlines concerning Justice Clarence Thomas's acceptance of lavish gifts from a billionaire who has had business before the Court show, there must be an enforceable code of conduct to ensure the highest standards of integrity at the Court. Granted, the issue is not limited to recent months. As noted in a [2022 AFJ report](#), if the Supreme Court were held to the same ethics code obeyed by lower courts, then multiple justices would be in violation. Ethical reform at the High Court [has been and continues to be](#) imperative—not just for the sake of that court but the entire judiciary, upon which the justices' behavior reflects, and our democracy.

Recusal Must Be a Requirement

A transparent recusal process is essential. When Chief Justice Roberts [refused to testify](#) before the Senate Judiciary Committee this April 2023, he attempted to allay concern over the Court's ethical morass by appending a "Statement on Ethics Principles and Practices" supported by the full Court. This attempt at deflecting Senator Durbin's and the Senate Judiciary Committee's [concerns](#) was, from its inception, disingenuous. As noted by the Congressional Research Service and highlighted in [statements from Senator Durbin](#) both before the Committee, during the hearing, and later in writing, since 1960 Supreme Court Justices have testified before Congress at least 92 times on topics directly related to

ethics and disclosure, including the role of judges, judicial security, appropriations, and judicial compensation.

The statement Chief Justice Roberts appended to his April letter included, *inter alia*, the claim that “[i]n some cases, public disclosure of the basis for recusal would be ill-advised. Examples include circumstances that might encourage strategic behavior by lawyers who may seek to prompt recusals in future cases.” Immediately thereafter, the document provided guidance for individual justices—with whom the prerogative to recuse or not resides in its entirety, the continuation of which the Chief Justice insists. It continued, “Where these concerns are not present, a Justice may provide a summary explanation of a recusal decision, e.g., ‘Justice X took no part in the consideration or decision of this petition.’” This bar could scarcely be lower: Recusing justices are asked only to provide a minimum of information.

Barely a month later, Justice Samuel Alito demonstrated his disregard for this portion of the ethics statement, [violating it flagrantly](#) in his recusal from the *Philips 66* case by declining to acknowledge the reason for his recusal. In that case, Alito’s financial interests were implicated. Other examples of recusal-related critiques include those [against Justice Sonia Sotomayor](#) for opting not to recuse herself in a matter involving a publisher for whom she had written where Justice Stephen Breyer, who had the same tie, did so. Even this criticism, however, primarily served to highlight the difference between chronic and situational potential conflicts requiring recusal. Justice Alito’s conflict in *Philips 66* was only the latest example of what has been and will remain a [long-running problem](#) for both Justice Alito and the Chief Justice as both, despite lifetime appointments and ample salaries, have chosen to retain ownership of individual stocks, a position that makes their impartiality in a wide swathe of cases impossible.

The Many Failings of the Flailing Roberts Court

While Chief Justice Roberts has paid lip service to heightening the Court’s observation of ethical norms, [most recently in May 2023](#), he has failed to do so. Justices Alito and Clarence Thomas put the lie to that promise, relying upon the latitude afforded by imprecisely and diplomatically framed statements of principle such as the April statement Alito violated just a month later. It is no surprise that [by early June](#) both Justice Thomas and Justice Alito decided to delay their financial disclosures.

Justice Thomas’s misconduct is not a matter of an ethical lapse. Thomas has chosen to flout disclosure requirements, including those in the post-Watergate Ethics in Government Act: After facing scrutiny for the luxuries he has accepted over time, perks like those given him by billionaire Harlan Crow, as well as [trips](#), [tuition](#), and real estate deals, he chose not to attempt to come into compliance but to [stop complying with the law altogether](#).

Consistent with his avoidance strategy, Thomas has also withheld information about [spouse Ginni Thomas’ income](#), including that which she secured via conservative king-maker Leonard Leo and from Harlan Crow. Moreover, he [refused to recuse himself](#) when a case in which Crow had a direct financial stake came before the Court. Justice Brett Kavanaugh, meanwhile, as the son and beneficiary of a prominent lobbyist, illustrates the need for disclosure requirements to reach [familial financial dealings](#). By contrast, Justice Elena Kagan [refused](#) friends’ gift of bagels and lox on ethical grounds. When it came time to make financial disclosures, Justice Ketanji Brown Jackson even [reported](#) a flower arrangement sent in congratulations upon her nomination and the clothing she was given as part of a photo shoot.

Under Chief Justice Roberts, the Supreme Court has become an unaccountable, partisan institution that disregards the judicial norms and practices established to protect American democracy. His Court has overturned decades of precedent on fundamental rights such as voting rights, workers' rights, women's rights, and gun safety. As a result, people are literally dying, being forced to give birth, and working in dangerous conditions across the country with no recourse.

The Roberts Court's rulings stripping Americans of their rights coincide with not only continued ethical violations by members of the Court with respect to recusal and disclosure but a rise in politicking. Recall Justice Kavanaugh's appearance with Senator Mitch McConnell, eager to take credit for his confirmation; Justice Thomas's [photograph with then-Senate candidate Herschel Walker](#); and Justice Amy Coney Barrett's [acceptance of a free trip to Kentucky](#) to speak on the politics of the Court at the McConnell Center, a double infraction.

The above actions are but a few of many taken by the ultra-conservative wing of the Supreme Court that flagrantly [violate the model rules of judicial conduct](#). These rules hold that "a judge should avoid impropriety and the appearance of impropriety in all activities." Elsewhere, the Canon states that a judge may engage only in "extrajudicial activities that are consistent with the obligations of judicial office." It is no wonder that public trust in the Supreme Court has fallen to an all-time low. Nor are the effects of these out-of-touch justices' actions limited to their court. The Roberts Court is undermining public trust in the judiciary as a whole.

Ethical Imbrolio: No End in Sight

As members of the Senate Judiciary Committee know, the Court is in an ethics crisis. The scope of the crisis is major and growing. Among other telling incidents, we recall November 19, 2022, the day the *New York Times* revealed that Justice Alito allegedly leaked the result of his 2014 *Hobby Lobby* decision to conservative activists weeks before it was issued. That ruling further codified a vision of the Constitution that protects not those at risk of discrimination but those who wish to discriminate. At the time, conservative justices were regularly meeting behind closed doors with anti-abortion "stealth missionaries" organized by Reverend Rob Schenck, former head of the nonprofit Faith and Action.

The justices are the only federal judges who are not bound by ethical rules. 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." Since the Court has not voluntarily adopted the Code or created a similar set of binding and enforceable ethical rules, Congress must act. Several pieces of legislation have recently been introduced that would bolster accountability and transparency and enhance public trust in our judiciary (see above). All these bills represent movement towards meaningful reform and would help restore public trust in our courts.

The organizations to which the roster of Thomas's benefactors that have come to light so far can be tied is nearly endless. Just last week the Court ruled in *Glacier Northwest v. International Brotherhood of Teamsters*, a case that weakened the rights of workers to strike. In this recently published piece, Alliance for Justice reviewed Thomas's history of ruling for corporations over workers. While the Roberts Court has made history with its abuse of the so-called shadow docket to erode Americans' rights, that is not to say the conservative justices are not also openly and volubly admitting ambitions to reshape the U.S.

legal landscape. Rather, [they are doing just that](#), in line with the aims of Leonard Leo's Federalist Society and the Alliance Defending Freedom, among other far-right organizations focused on the courts.

The time for trusting this Court to uphold basic precepts of transparency and accountability of its own accord has passed. The Court has and yet refuses to exercise its autonomy to ensure its members hew to basic ethical obligations as jurists. The guidance that the Chief Justice and his colleagues acknowledged in April but declined to adopt falls into the category of *res ipsa loquitur*: The statement is laden with exceptionalism and riddled with vagueness; the Court did not formalize or commit to reforms, changes, or even an intention to adopt a version of the rules obeyed by lower federal courts.

The independence and latitude the Court cites as essential to its function cannot be boundless. The leeway granted the Court on internal ethical matters has been predicated on trust in that institution to self-regulate. The Roberts Court has shown again and again that it is not deserving of that trust—not from Congress, not from the Judicial Conference, and not from the public.

Rooting out Corruption at the Court

The Supreme Court Ethics, Recusal, and Transparency Act (SCERT) would bring the Supreme Court into compliance with the ethical standards already binding on lower federal court judges, government officials, and members of Congress. SCERT would require the Supreme Court to adopt and publish a code of conduct like that binding the lower courts and create a structure for reporting and adjudicating complaints against justices based on extant processes and standards—a core component of most reform bills before the Committee. SCERT, among others, would also ensure that complaints brought against individuals prior to their nomination to the Supreme Court would be preserved rather than erased upon confirmation. Its common-sense provisions for recusal and other disclosures surrounding gifts, income, and financial benefits would do a great deal to assist in the task of restoring trust in the Supreme Court.

Congress can and should increase scrutiny of not just Justice Thomas, as details of his misdeeds continue to emerge, but, more broadly, the failures of the Roberts Court that led to the present moment. Doing so through hearings and by proposing and discussing responsive legislation will illustrate the acute need for ethical reform at the Court. Congress can in this way grow public and official support for legislative action even as it creates, as a contingency, a foundation for an investigation should the Court's resistance to accountability make it necessary. While this course places pressure on Chief Justice Roberts it also secures him the opportunity to initiate ethical reform from within the Court before Congress is forced to impose it from without. Similarly, it affords Justice Thomas the chance to resign with some dignity rather than perpetuate the ethical crisis that is imperiling the Court and our democracy. Most significantly, this approach allows Congress to honor its obligations as a matter of checks and balances, to the courts and our democracy, while minimizing the damage to the Court.

Public opinion toward the Court has already reached historic lows. Doubtless self-regulation on the part of the Supreme Court and resignation by justices who refuse to adhere to ethical standards would be preferable to an investigation and external imposition of accountability for all parties. But should the Court fail to undertake meaningful self-regulation in the face of growing scandal, Congress or the Judicial Conference, which can refer ethical and legal violations to the Department of Justice, must act instead. The longer scandals continue and the more complex the issues become, the less focus the issues and cases before the Court will receive and the greater the damage the Court will sustain.

We support the passage of legislation to reform the court and recognize that SCERT and other proposed legislation represents a step in the right direction. Ethics reform is overdue. But even the passage of one of these bills will not repair the image of the Court or revive public trust. Only the resignation of the party or parties responsible for the ethical debacle will make renewing trust in the Court a realistic goal.

REMARKS OF CHARLES G. GEYH*

HEARING BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE
ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION, AND FEDERAL RIGHTS, ON:

“ENSURING AN IMPARTIAL JUDICIARY: SUPREME COURT ETHICS, RECUSAL, AND
TRANSPARENCY ACT OF 2023”

JUNE 14, 2023

I regret that I was unavailable to testify in person at today’s hearing, but at the suggestion of Committee staff I am submitting these remarks on S. 359.

I am an Indiana University Distinguished Professor and hold the John F. Kimberling Chair in law at the Indiana University Maurer School of Law, in Bloomington. My writings on judicial conduct, ethics, selection, independence, accountability, and administration include more than one hundred books, book chapters, articles, reports, and other publications. I am a coauthor of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 6th ed. 2020) and author of *Courting Peril: The Political Transformation of the American Judiciary* (Oxford University Press 2016); *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center 3d ed. 2018); and *When Courts & Congress Collide: The Struggle for Control of America’s Judicial System* (University of Michigan Press 2006). In addition, I have served as co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct. Prior to entering academia in 1991, I was counsel to the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Administration of Justice.

I applaud the subcommittee for S. 359 and am supportive of the effort. The Supreme Court needs a code of conduct; disqualification procedure needs to be reformed and standardized; and the role of amici in federal litigation will benefit from greater transparency. I focus my remarks here on three issue areas: 1) provisions in section 2 of the Bill for a Supreme Court Code of Conduct, which I support, and which were the focus of an earlier hearing where witnesses raised questions concerning the constitutionality of S.359 that I address here; 2) provisions, also in section 2 of the Bill, for a disciplinary process applicable to the Supreme Court, about which I have reservations; and 3) provisions in sections 4 and 5 of the Bill, relevant to disqualification, which I support but with respect to which I have some concerns and suggestions.

1. A SUPREME COURT CODE OF CONDUCT

Public support for the Supreme Court is at an all-time low. Public suspicion that the Court is governed less by law than by ideological impulse is at an all-time high. At this perilous moment in its history, it is mission-critical for the Court to reassure a skeptical public that its ethics are

* I would like to thank Hannah Fogel for her superb research assistance on short notice.

above reproach—that its justices “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” to borrow a phrase from codes of judicial conduct that all courts *except* the Supreme Court of the United States have adopted.

In his letter to the Senate Judiciary Committee, declining the invitation to testify, the Chief Justice forwarded a statement from the Supreme Court in which its justices “reaffirm and restate foundational ethics principles and practices to which they subscribe.” In other words, the Court reaffirmed and restated its commitment to the status quo, to remain above the law that a code of conduct would supply.

Sadly, the litany of alleged ethical improprieties against members of the court render the status quo indefensible. In the late 1990s, Justice Ruth Bader Ginsburg presided over cases involving parties in which her husband held stock. The Associated Press, “High Court Justice Acknowledges Lapse,” *The New York Times* (June 4, 1998). A few years later, Justice Antonin Scalia accepted an invitation from the vice president to join him on Airforce 2 for a weekend of duck-hunting, while the VP was a named party in a case pending before the court. Savage, David, “Cheney and Scalia Went Hunting Together,” *The Washington Post* (January 14, 2004). Justices Scalia and Clarence Thomas both served as featured speakers at Federalist Society fundraising events, which violated the Code of Conduct for U.S. judges. Rmuse, “Justice Thomas and Scalia Violate Judicial Ethics by Headlining Right Ring Fundraisers,” *Politcs USA* (November 16, 2013). In 2016, Justice Ginsburg harshly criticized then-presidential candidate Donald Trump, which likewise violated the code applicable to the lower federal courts. Weiss, Debra Cassens, “Did Justice Ginsburg’s comments on Donald Trump violate ethics rules?” *ABA Journal* (July 12, 2016). Judge Brett Kavanaugh was the subject of numerous disciplinary complaints for his intemperate testimony during his Supreme Court confirmation proceedings—complaints that were dismissed for lack of jurisdiction upon his elevation to the Supreme Court. Totenberg, Nina, “Federal Panel of Judges Dismisses All 83 Ethics Complaints Against Brett Kavanaugh,” *NPR* (December 18, 2018). The leak of the court’s opinion in the *Dobbs* case, which overturned *Roe v. Wade*, would have violated the code applicable to the lower federal courts if it had been leaked by or at the instigation of a justice (we still don’t know how the opinion was leaked). Supreme Court of the United States, *Statement of the Court Concerning the Leak Investigation* (January 19, 2023); Geyh, Charles, “Judicial Ethics and Identity,” *Georgetown Journal of Legal Ethics* (2022). Justice Thomas’s failure to disqualify himself from a case in which he voted to stay an order directing President Trump to obey a subpoena for records that included correspondence from his spouse raised serious ethical questions, as have recent revelations that he accepted hundreds of thousands of dollars in unreported gifts from GOP megadonor Harlan Crow. Alemany, Jacqueline; Dawsey, Josh; Brown, Emma, “Ginni Thomas corresponded with John Eastman, sources in Jan. 6 House investigation say,” *The Washington Post* (June 15, 2022); Kaplan, Joshua; Elliott, Justin; Mierjeski, Alex, “Clarence Thomas and the Billionaire,” *Propublica* (2023).

More fundamentally, arguing, as some have, that the Supreme Court does not need a code of conduct because the Court has not misbehaved in ways egregious enough to warrant such a code is wrongheaded. The Code’s primary audience is not bad judges, but good ones, who seek guidance on the norms that good judges share and rules that good judges follow.

In the statement Chief Justice Roberts transmitted to this Committee, the Court marginalized the value of a Code, asserting that the Code's canons are comprised of "broadly worded principles that inform ethical conduct and practices. But they are not themselves rules. They are far too general to be used in that manner." This statement is demonstrably wrong.

The codes of conduct adopted by all fifty state supreme courts and the lower federal courts follow a template created by the American Bar Association's Model Code of Judicial Conduct. The Code of Conduct for Federal Judges, to which the Supreme Court refers in its statement, was promulgated by the Judicial Conference in 1973, and modeled after the ABA's 1972 Code of Judicial Conduct. The preamble to the 1972 Code, which the Judicial Conference in large part adopted, declared: "This Code, consisting of statements of norms denominated canons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated." The Current Model Code describes these aforementioned "rules," as "binding and enforceable." As of 1973, when the Judicial Conference promulgated its Code, Congress had yet to establish a disciplinary process for the lower federal courts, as a consequence of which it was premature to speak of the code as "enforceable." But the Code is undeniably a body of "rules" that state supreme courts across the country interpret and apply as a body of "rules." And while some rules are more generally phrased than others, fifty years' worth of precedent since the first Code was adopted has clarified ambiguities considerably. As explained below, I have reservations with instituting a disciplinary process for Code violations at this juncture, but not because the Code is too vaguely phrased to be characterized as rules that the justices can and should commit themselves to follow.

I do not share doubts expressed by some concerning the constitutionality of the statutory scheme that S. 359 contemplates. Luttig, J. Michael, Senate Judiciary Testimony (May 2, 2023); Tribe, Laurence H., Senate Judiciary Testimony (April 30, 2023). Article III, Section 1 of the U.S. Constitution provides that "the judicial power shall be vested in one supreme Court." Article I, Section 8 authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution...all...Powers vested by this Constitution." Article III, Section 2, declares that the Supreme Court shall have appellate jurisdiction "under such Regulations as the Congress shall make." And Article VI provides that justices shall "be bound by oath or affirmation to support this constitution."

Given these provisions, most thoughtful commentators have agreed that it would be constitutional for Congress to subject the Supreme Court to a code of conduct: it is necessary and proper for Congress to ensure that the impartiality, integrity, and independence of the Supreme Court it has established are above reproach; and that the appellate jurisdiction of the Court is exercised by justices who agree to conduct their business in an ethical manner. And indeed, Congress has exercised these powers to regulate Supreme Court ethics multiple times over the years. Congress regulates Supreme Court disqualification on terms nearly identical to those embedded in codes of judicial conduct. Compare 28 U.S.C. 455 to Canon 3C of the Code of Conduct for U.S. Judges. Congress regulates the gifts and outside income that justices must report, thereby exposing transactions and relationships between justices and parties that could call a justice's impartiality, independence, or integrity into question. 5 U.S.C. 131. And Congress has prescribed the oath of office for Supreme Court justices, which requires them to swear that

they will “administer justice without respect to persons, and do equal right to the poor and to the rich, and that [they] will faithfully and impartially discharge” their duties. 28 U.S.C. 453.

Some, however, including Professor Laurence Tribe and Judge J. Michael Luttig, have expressed doubts about the constitutional authority of Congress to delegate the task of promulgating a code of conduct to the Court itself. I do not share those doubts.

As an initial matter, the Supreme Court’s authority to promulgate rules necessary for it to exercise judicial power properly and effectively is arguably inherent, and the Supreme Court has exercised rule-making authority over its own practice and procedure since at least 1803. U.S. Const. Art. III, § 1; Supreme Court of the United States, “Historical Rules of the Supreme Court.” Moreover, Congress has explicitly authorized all federal courts, including the Supreme Court, to “prescribe rules for the conduct of their business,” provided that they are “consistent with Acts of Congress.” 28 U.S.C. 2071. Clearly, then, the Supreme Court has the authority to promulgate rules of judicial conduct for its own use.

More to a point raised at the prior hearing, Congress just as clearly has the Constitutional authority to delegate rule-making responsibility to the Supreme Court. In the Rules Enabling Act, Congress delegated procedural rulemaking authority to the federal courts, including the Supreme Court. 28 U.S.C. 2072-2074. In *Sibbach v. Wilson*, the Supreme Court upheld the Rules Enabling Act, declaring: “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes.” 312 U.S. 1 at *9 (1941).

In the Judicial Conduct and Disability Act of 1980, Congress delegated to the Judicial Conference and Circuit Judicial Councils the authority to “prescribe...rules for the conduct of proceedings under” a statutory scheme that Congress devised to discipline federal judges for misconduct. 28 U.S.C. 358. Insofar as Congress has the power to regulate Supreme Court ethics, as Professor Tribe and Judge Luttig rightly conclude, Congress may, as *Sibbach* tells us, exercise that power by delegating to the Supreme Court the authority to make rules consistent with a statute requiring the Supreme Court to adopt a code of conduct.

As a policy matter, I take issue with a statement made at the prior hearing, which characterized Congress delegating the task of promulgating a code of conduct to the Supreme Court, as “passing the buck.” Tribe, Laurence H., Senate Judiciary Testimony at 5 (April 30, 2023). In my perfect world, the Supreme Court comes to its senses, joins every other court system in the American judiciary, and adopts a code of conduct on its own initiative, rendering this piece of the Bill unnecessary. Failing that, however, legislation calling upon the Court to promulgate its own code is exponentially more desirable than Congress drafting legislation that dictates the terms of the Code that the Supreme Court must follow.

What codes of conduct do is afford judges within a jurisdiction the opportunity to get together and buy in to a set of ethical precepts that they revisit, revise, and internalize on an ongoing basis. It creates a code culture in which judges are ever mindful of their ethical responsibilities—a culture that recent ethics imbroglios indicate is absent from the Supreme Court. Given the organic nature of codes of conduct, and the importance of judges within the

jurisdiction buying into their terms, it is important for the Supreme Court to adopt a code for itself that it can embrace and amend as times and circumstances change. The approach that S. 359 takes is thus decidedly preferable to having Congress impose a Code on the Court with terms locked in place by statute.

2. SUPREME COURT DISCIPLINARY PROCESS

Whether the Supreme Court should promulgate a Code of Conduct strikes me as a no-brainer. Whether the justices should be subject to a disciplinary process for violating the Code is a separate and more controversial question. In a recent article on the “architecture” of judicial ethics, I described the judicial ethics landscape with reference to three components: 1) macro-ethics values, like impartiality, integrity, and independence, that systems of judicial ethics aim to further; 2) micro-ethics rules, that regulate judicial conduct to the end of promoting macro-ethics values; and 3) countervailing “relational ethics” concerns—concerns that must be considered in relation to the macro-ethics values that micro-ethics rules favor, and which can constrain the operation of those rules. Geyh, Charles, “The Architecture of Judicial Ethics,” *Articles by Maurer Faculty* (2021). Relational ethics is the trickiest to understand and can best be explained with examples. One relational ethics concern is the need for administrative efficiency: the judiciary has an institutional interest in the efficient and expeditious operation of their courts. Ethics rules that burden court operations by imposing restrictions on judicial conduct driven by macro-ethics rationales that judges find overstated invite assessments of whether the ethics gains of a given micro-ethics rule justify the efficiency losses.

Another relational ethics concern, at issue in provisions establishing the proposed disciplinary process for the Supreme Court in section 2 of the Bill, is institutional legitimacy: ethics regimes serve to promote public confidence in and hence the legitimacy of the judiciary, but overly aggressive regulation can arguably have the opposite effect by cultivating the misperception that unethical conduct is more prevalent than it is. Instituting a disciplinary process seeks to promote judicial accountability to the end of enhancing public confidence in the integrity, impartiality, and independence of the Supreme Court. But I fear that opening the door to any individual filing a disciplinary complaint against a Supreme Court justice, at this deeply polarized juncture in our nation’s history, would have the opposite effect: angry liberals and conservatives would swamp the Court with largely meritless disciplinary complaints against justices they disfavor and trumpet those complaints to the media. The net effect would be to undermine, rather than enhance, public confidence in the Court by creating the misimpression that Supreme Court justices are misbehaving at every turn. That is especially true of complaints filed against justices for failure to disqualify, because non-disqualification is typically attributable to honest error in making the wrong judgment call, rather than willful misconduct.

The lower federal courts adopted their code of conduct in 1973, seven years before Congress established a disciplinary process in 1980. I would encourage the subcommittee to consider staging its regulation of Supreme Court ethics in a similar way. Direct the Court to adopt a Code of Conduct now, monitor the Court’s experience under the Code, and at that juncture assess whether introduction of a disciplinary process is necessary.

3. DISQUALIFICATION REFORM

Section 5 of S. 359 would reform disqualification procedure by providing that motions to disqualify are decided by someone other than the judge whose disqualification is sought. This is an important reform that I wholeheartedly support.

Under the Federal disqualification statute, there are easy cases in which judges should disqualify themselves but do not, because they are insufficiently self-aware, are encumbered by an exaggerated sense of their own impartiality, or are not as attentive as they should be to their obligations under the statute. And then there are hard cases, often arising under section 455(a), which require disqualification when the judge's "impartiality might reasonably be questioned." In these hard cases, the need to disqualify can be a judgment call. Parties who seek a judge's disqualification and lose those judgment calls will disagree and be disappointed. But losing, by itself, does not destroy litigant confidence in the legitimacy of the courts. Psychologist and law professor Tom Tyler has shown that litigants will accept adverse outcomes as legitimate if they feel that they have been treated fairly in the litigation process. Tom Tyler, et al., *Social Justice in a Diverse Society* 82-83 (1997). The capacity of disqualification rules to preserve the perceived impartiality (and so the legitimacy) of the courts, then, may have less to do with uncertainties surrounding the scope of the substantive disqualification standards, than with the perceived fairness of the process by which those standards are applied.

This is where problems arise. The existing disqualification process over-relies on self-disqualification. When a party seeks the disqualification of a district judge, the authority to decide whether the statute requires disqualification is typically vested in the judge whose disqualification is sought. On the Supreme Court, the individual justices have the first and final say on their own disqualification.

Self-disqualification is problematic for several reasons: (1) psychological science tells us that people have difficulty detecting their own biases and appreciating how their conduct is perceived by others; (2) because judges must disqualify on their own initiative when circumstances warrant, by the time a party asks the presiding judge to disqualify, the judge may have considered the issue and decided against disqualification before the party has been heard; and (3) the judge may take offense at the allegation that she is, or appears to be, less than impartial, and struggle to evaluate the issue with sufficient detachment.

The oldest disqualification rule in the book dates back to *Dr. Bonham's Case*, in 1609, when Sir Edward Coke ruled that "no man shall be the judge in his own case." And yet, that principle is ignored every time a judge adjudicates the issue of her own impartiality. This point is not lost on the public, over 80% of which think that disqualification requests should be decided by a different judge. Geyh, Charles, "Why Judicial Disqualification Matters. Again." *Articles by Maurer Faculty* at n. 158 (2011). Accordingly, I support the Bill's proposal to end self-disqualification.

My sole concern with this section arises out of another “relational ethics” issue. The macro-ethics value of judicial impartiality, which is furthered by the Bill’s micro-ethics reform calling for three-judge review of disqualification motions, must be balanced against the relational ethics interest in administrative efficiency. To the extent that justice delayed is justice denied, the question becomes whether three-judge review of routine disqualification motions could delay proceedings unnecessarily, or worse—lead judges to streamline and truncate review in ways that render it too perfunctory to serve its purpose. If the subcommittee shares this concern, one alternative would be to provide for disqualification motions to be heard from a single judge in a different circuit.

I likewise support creating a mechanism whereby the Supreme Court can review requests to disqualify an individual justice, as provided in section 5 of the Bill. Among the states, some jurisdictions (such as Texas) have procedures whereby a high court judge’s non-disqualification is subject to review. Most do not, which recently gave rise to the startling spectacle of a North Carolina Supreme Court justice presiding over a case in which his father was the named defendant. Order, *North Carolina State Association for the Advancement of Colored People v. Moore & Berger*, Case No. 261A18-3, Jan. 7, 2022 (Philip E. Berger, Jr., Associate Justice.). The son’s optimistic assessment that a reasonable observer would not doubt his ability to rule impartially on his father’s case, because his father was appearing in his “official capacity” as a legislator, was not subject to review by anyone outside of the family.

Therein lies a second source of mischief: This notion that judges need not disqualify themselves when good friends (and now, perhaps, close relatives) appear as parties before the judge in their “official capacity,” derives from Justice Scalia’s 2005 memorandum declining to disqualify himself from *Cheney v. United States Dist. Court for the Dist. of Columbia*. 542 U.S. 367 (2004). While that case was pending before the Supreme Court, Justice Scalia joined Vice President Cheney on Airforce 2 for a weekend of duck-hunting in Louisiana. In support of his conclusion that justices need not disqualify themselves from cases in which personal friends appear before them in their “official capacity,” Justice Scalia cited no legal precedent. There was none. Instead, he described historical examples in which public officials who had cases pending before the Court socialized with justices who participated in those cases. But all of those examples predated 1974, when Congress amended the disqualification statute to require justices to disqualify themselves when their “impartiality might reasonably be questioned.” Freedman, Monroe, “Duck-Blind Justice: Justice Scalia’s Memorandum in the Cheney Case,” 18 *Geo. J. Legal Ethics* 229, 233-34 (2004).

Acting without the benefit of a collegial, deliberative process that full Court review would supply, Justice Scalia relied on outdated examples irrelevant to the amended statute he was parsing, to reach a highly problematic conclusion: that when a party before the court is a good friend of the judge with whom the judge vacations while the case is pending, a reasonable person would not doubt the judge’s impartiality as long as the friend is appearing in an “official capacity”—regardless of whether a decision adverse to the friend could result in professional ruin. And to make matters worse, Justice Scalia’s problematic assessment of his own impartiality has become problematic precedent for other judges, such as the one in North Carolina, to extend in even more problematic ways. Even if it would be extremely rare for the Court as a whole to second-guess a colleague’s disinclination to disqualify, having a procedure in place to ensure that

justices on the high court do not have the final word on their own fairness and fitness to preside will inspire greater confidence in the process.

To conclude not with a bang, but a whimper, I have thoughts on two smaller disqualification provisions in the Bill:

Section 4 provides that if a judge “learns of a condition that could reasonably require disqualification under this section, the justice or judge shall immediately notify all parties to the proceeding.” As phrased, this provision seems unlikely to serve its intended purpose. Section 455(a) already requires judges to disqualify on their own initiative if their impartiality “might reasonably be questioned”—requiring notice to the parties of the circumstances requiring disqualification adds little. The provision acquires meaning only if it obligates judges to notify the parties of possible grounds for disqualification under circumstances where the judge does not think disqualification is required. But as phrased, it is hard to imagine circumstances in which a judge would conclude that her impartiality could not reasonably be questioned (making disqualification unnecessary), and yet still conclude that circumstances “could reasonably require disqualification” (making notice necessary). My suggestion would be to modify language from comment 5 to Rule 2.11 in the Model Code of Judicial Conduct: “A judge [shall] disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

Second, I have some issues with the Bill’s Section 4 requirement that that judges disqualify themselves from cases in which a party “spent substantial funds” in support of the judge’s confirmation. First, the phrase “substantial funds” is an amorphous, litigation breeder. Second, what about the party who spent substantial funds to defeat a judge’s confirmation? Isn’t it just as likely that a justice would be biased against a party who spent substantial funds in opposition to her confirmation as she would be biased in support of a party who spent substantial funds in support of her confirmation? Third, the Bill imposes a six-year time limit on disqualification for gifts, but none for confirmation spending. In *Caperton*, the Supreme Court concluded that substantial spending in support of a judicial candidate (there, for popular election) can indeed be a disqualifying event, but that there is a temporal component to the analysis—the due process problem at issue there was exacerbated by the recency of spending by the party’s CEO in relation to case before the Court. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). If disqualifying gifts are subject to a time limit, perhaps so too should disqualifying confirmation support. All that said, my heart is with this provision, but my head wonders whether it may create more problems than it solves.



Statement of the Project On Government Oversight
 Before the Senate Judiciary Committee
 Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights
 on “Ensuring an Impartial Judiciary: Supreme Court Ethics, Recusal, and Transparency Act of 2023”
 June 14, 2023

Chair Whitehouse, Ranking Member Kennedy, and members of the subcommittee, thank you for the opportunity to submit this statement. The Project On Government Oversight (POGO) is pleased to endorse the Supreme Court Ethics, Recusal, and Transparency Act, S. 359. For many years, we have advocated for sensible ethics reform at the United States Supreme Court, which is the only court in the country without its own ethics code.

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.

We know that no government official — including a Supreme Court justice — is incorruptible. While a flurry of recent revelations about the conduct of Justice Clarence Thomas has brought new attention to this long-standing problem, no justice has been immune from questions about their ethical conduct.¹ It is worth underscoring this important point: *A demand for ethical constraints is not an attack on the Court or any single justice. It is simply common sense.* Our nation’s most powerful court should not be its least accountable.

This bill provides what is long overdue: a specific code of conduct for the Court; disclosure obligations on par with those demanded of other high-level government offices; and clearer disqualification obligations. It also closes loopholes that permit justices to avoid accountability for wrongdoing by virtue of their position on the highest court in the land.

We particularly applaud the bill’s provisions to strengthen recusal decision-making at all levels of the federal judiciary. Under the current system, a judge or justice facing a motion to recuse based on a statutory disqualification is themselves responsible for determining whether they must step aside.² In a system predicated on the principle that nobody should be a judge in their own case, this is untenable. The

¹ David Janovsky and Dylan Hedtler-Gaudette, “Congress, Don’t Lose the Plot on Judicial Ethics,” Project On Government Oversight, May 23, 2022, <https://www.pogo.org/analysis/2022/05/congress-dont-lose-the-plot-on-judicial-ethics>. In recent years, notable ethics controversies have involved Justice Ruth Bader Ginsburg’s comments about then-presidential candidate Donald Trump, as well as Justices Stephen Breyer and Samuel Alito owning stock in parties to cases. See, for example, Richard Wolf, “Supreme Court justices are selling stocks that can lead to forced recusals from cases,” *USA Today*, June 14, 2018, <https://www.usatoday.com/story/news/politics/2018/06/14/supreme-court-justices-shed-stocks-recusals/702849002/>; Sam Hananel, “Supreme Court justice took part in case despite wife’s stock ownership,” Associated Press, October 16, 2015, <https://www.pbs.org/newshour/economy/conflict-interest-supreme-court-justices-stocks>.
² 28 U.S.C. § 455 (2023), <https://www.law.cornell.edu/uscode/text/28/455>.

Act would improve this situation by clarifying conflicts that require recusal and by creating mechanisms for a review panel of other judges to weigh in on the necessity of recusal.

We have long argued that recusal reforms are particularly needed at the Supreme Court. As the justices' April 2023 "Statement on Ethics Principles and Practices" indicates, and as the attached article explains, the justices have collectively distorted principles of fairness to justify participating in cases despite conflicts.³ The Supreme Court's current practice, which undervalues recusal in favor of maintaining a full bench, is the justices' own invention, unmoored from their statutory ethical responsibilities and from common law.

Against this backdrop, it is clear that congressional action is necessary. As POGO has testified previously, "No ethics regime should be based on the mere faith that those entrusted with enormous power will simply 'do the right thing.' Of course, we hope that public servants will conduct themselves ethically, whether in their official capacity or in the private sphere. But trust alone is not a guardrail for our democracy."⁴

The Supreme Court Ethics, Recusal, and Transparency Act is a reasonable, measured, and necessary step to protect the Court's actual and perceived integrity and independence.

³ Chief Justice John Roberts et al., "Statement on Ethics Principles and Practice," April 25, 2023, <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>; David Janovsky, "High Court's Ethics Statement Places Justices Above the Law," *Law 360*, May 22, 2023, <https://www.law360.com/articles/1679821>.

⁴ "Undue Influence: Operation Higher Court and Politicking at SCOTUS": Hearing before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet, 117th Cong. (December 8, 2022) (statement of the Project On Government Oversight), https://docs.pogo.org/testimony/2022/POGO_Testimony_Protecting-Supreme-Court-Impartiality-Through-Ethics-Reform.pdf?_ga=2.121834891.1627322792.1686331853-1798763123.1644440071.

High Court's Ethics Statement Places Justices Above The Law

By **David Janovsky** (May 22, 2023)

A long-simmering ethics crisis at the U.S. Supreme Court has come to a boil. And while some may continue to hold out hope that the court will defuse the situation on its own by creating its own ethics rules, it is increasingly clear that such hope is entirely misplaced.

Last month, all nine justices took the unusual step of releasing a joint "Statement on Ethics Principles and Practices" that showed they have no interest in reform.[1]

The statement as a whole has been widely and appropriately criticized for defending a status quo that has proven wholly inadequate for ensuring public faith in the court's integrity.[2] In fact, the statement is a good illustration of the problem: A close read of a less prominent passage, one explaining how the justices handle recusals, shows how the court has twisted legal principles to put itself above the law.

Recusal is a bedrock safeguard of an impartial judiciary, a key way of ensuring that nobody is a judge in their own case. But if the public wants better safeguards and ethics reform on the Supreme Court, it shouldn't expect it from justices who make arguments like this.

Before parsing the justices' statement, it's important to remember that all federal judges, including Supreme Court justices, are already covered by a federal law — Title 28 of the U.S. Code, Section 455 — that defines the circumstances in which they must recuse themselves.

The law describes a number of situations that would pose impermissible conflicts of interest, such as having a personal or financial stake in the outcome of a case, having personal knowledge of or participation in the proceedings, or having a close family member involved in the case.

The law also requires recusal whenever a judge's impartiality might reasonably be questioned. This concern with apparent, in addition to actual, conflicts is no mere afterthought. It is addressed in the very first line of the statute. After all, the public's faith in the courts is the bedrock of their legitimacy.

In their statement, the justices pay lip service to federal recusal law, claiming that they "follow the same general principles and statutory standards as other federal judges." But the rest of their discussion of recusal then attempts to explain why the nine most powerful judges in the country actually hold themselves to a lower standard. As they tell it:

A recusal consideration uniquely present for Justices is the impairment of a full court in the event that one or more members withdraws from a case. Lower courts can freely substitute one district or circuit judge for another. The Supreme Court consists of nine Members who always sit together. Thus, Justices have a duty to sit that precludes withdrawal from a case as a matter of convenience or simply to avoid controversy. See *United States v. Will*, 449 U.S. 200, 217 (1980) (28 U.S.C. § 455 does not alter the rule of necessity).[3]

At first read, this may seem reasonable. After all, it's true that the Supreme Court doesn't have a mechanism for temporarily replacing justices who cannot hear a case. But that fact does not support the claims that follow.

The core claim is that, since a Supreme Court recusal means fewer than all nine justices hear a case, recusals should be avoided. As a factual matter, this simply isn't accurate. The court is entirely capable of hearing a case with fewer than nine justices: A quorum is defined by statute as six justices.[4]

While atypical, the court has dealt with lengthy absences before. In recent years, the court managed with an eight-justice bench after the death of Justice Antonin Scalia and the refusal of the U.S. Senate to take up a confirmation of his successor until after the 2016 election. The longest vacancy in the court's history, in the 1840s, stretched over two years.[5]

Federal law also provides for disposing of cases when a quorum is absent: The case is held over for the next term, or — if doing so would not result in a quorum — the judgment of the lower court is affirmed. These solutions won't result in blockbuster opinions, but they're a perfectly rational way to handle these situations.

Some, including then-Justice William Rehnquist, have argued that the real harm would be that an equally divided court would be forced to affirm the decision below, depriving the Supreme Court of an opportunity to "establish the law for our jurisdiction." [6]

But that is ultimately a policy argument, which underestimates the damage done when a justice hears a case despite a conflict, and which must yield to the command of the recusal statute.

If the mere fact of a shorthanded court isn't an insurmountable problem, are there other factors to validate the justices' reluctance to recuse? The statement from the justices offers two: the duty to sit, and the rule of necessity. Neither holds water.

The duty to sit, simply stated, holds that a judge must hear a case if they are not otherwise disqualified. Judges cannot avoid cases that would be inconvenient or difficult for them to rule on.[7]

For instance, Canon 3(A)(2) of the Code of Conduct for United States Judges, which the justices profess to consult while denying that it binds them, says, "A judge should hear and decide matters assigned, unless disqualified."

But as this canon states, invoking the duty to sit in the context of recusal decisions misses the point, because recusal is the proper response to disqualifications based on conflicts of interest.

Recusal in such cases is not, as the justices write dismissively in their statement, "a matter of convenience" or an effort "simply to avoid controversy." It is a statutorily mandated action to avoid the appearance or existence of bias.

Instead of recognizing this fact, the justices seem to be subscribing instead to what one legal scholar has termed the pernicious version of the duty to sit, one that justices have invoked to avoid recusing despite actual or apparent conflicts.[8]

In this framing, largely developed by Justice Rehnquist in 1972, the irreplaceability of the justices is an independent factor that weighs against any recusal.[9] But that brings us back to the argument above: A single recusal does not deny a quorum, and even in the extreme case of four recusals, there is a process for addressing the absence of a quorum.

Justice Rehnquist conceded that the duty to sit "is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified." [10]

The justices' invocation of the rule of necessity is an even greater stretch, one that is undermined by the very case cited in the ethics statement. The rule of necessity holds that all litigants have a right to seek judicial redress, so in cases where every possible judge would be disqualified, one judge must necessarily step in to rule on the case.

This was the situation in *U.S. v. Will* in 1980, when a group of federal district judges sued the government over modifications to planned cost-of-living salary adjustments.

Since those modifications affected the judiciary so broadly that every judge had an interest in the outcome, the Supreme Court held that recusal would have denied the plaintiffs their day in court.

In the words of Chief Justice Warren Burger, "Far from promoting [a fair forum], failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum." [11]

Though this may be true, this reasoning simply does not apply to an individual justice's recusal decision making: A single recusal, or even three, does not prevent the Supreme Court from hearing a case. And the court's inability to hear any given case that comes before it via certiorari is not in itself a denial of process.

After all, the court's docket is now almost entirely discretionary, and the number of cases in which the court grants certiorari has been in steady decline. Last term, only 70 cases were argued before the court, out of nearly 5,000 filed.[12] Clearly, the justices do not mind choosing not to hear cases for any number of reasons.

Finally, it is worth noting what is missing from the recusal discussion. If the justices are genuinely concerned that a recusal undermines the functioning of the court, they should try harder to refrain from engaging in conduct that would warrant recusal in the first place.

An easy starting point would be to divest from individual stocks, ownership of which has led to a substantial number of recusals and missed recusals.

Avoiding appearances before ideologically aligned organizations — of whatever political persuasion — would also help. And a stronger commitment to financial disclosure would reassure the public that conflicts are being caught and addressed.

The justices' discussion of recusals reveals not only that they are satisfied with a status quo in which they are bound by fewer ethics rules than every other federal judge, but also that they have twisted the few rules that do apply to them to hold themselves to a lower standard.

The Supreme Court is the most powerful court in the country; its ethics rules should reflect that by being stronger, not weaker, than those of other courts. But don't count on the justices to get that message.

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[1] Chief Justice John Roberts et al., Statement on Ethics Principles and Practices, April 25, 2023, <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>.

[2] Jessica Gresko, "Supreme Court on ethics issues: Not broken, no fix needed," Associated Press, April 26, 2023, <https://apnews.com/article/supreme-court-ethics-clarence-thomas-2f3fbc26a4d8fe45c82269127458fa08>; Abbie VanSickle, "Chief Justice Declines to Testify Before Congress Over Ethics Concerns," New York Times, April 25, 2023, <https://www.nytimes.com/2023/04/25/us/politics/justice-roberts-supreme-court-ethics.html>.

[3] Chief Justice John Roberts et al., Statement on Ethics Principles and Practices, April 25, 2023, <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>.

[4] 28 U.S.C. § 1.

[5] Drew Desilver, "Long Supreme Court vacancies used to be more common," Pew Research Center, February 26, 2016, <https://www.pewresearch.org/short-reads/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/>.

[6] Laird v. Tatum, 409 U.S. 824 (1972) (memorandum of Rehnquist, J. at 5), <https://caselaw.findlaw.com/court/us-supreme-court/409/824.html>.

[7] Jeffrey Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine," 57 Buff. L. Rev. 813 (2009), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1189&context=facpub>.

[8] Jeffrey Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine," 57 Buff. L. Rev. 813 (2009), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1189&context=facpub>.

[9] Laird v. Tatum, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.), <https://caselaw.findlaw.com/court/us-supreme-court/409/824.html>.

[10] Laird v. Tatum, 409 U.S. 824 (1972) (memorandum of Rehnquist, J. at 5), <https://caselaw.findlaw.com/court/us-supreme-court/409/824.html>.

[11] United States v. Will, 449 U.S. 217 (1980).

[12] Chief Justice John Roberts, 2022 Year-End Report on the Federal Judiciary, January 31, 2022, appendix at 5, <https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf>.