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Subcommittee on the Courts, Intellectual Property and the Internet

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

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INTRODUCTION

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

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

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

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

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

1. Recusal Laws

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

[1] Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792).
[2] Section 144 of Title 28, which applies only to district court judges, requires the recusal of a judge who has a "personal bias or prejudice in the matter." A third statute, Section 47 of Title 28, provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." Although this statute applies only to lower court judges, Supreme Court justices generally recuse themselves from cases they heard of decided when sitting on lower courts.
[3] 28 U.S.C. § 455.

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

2. The Ethics in Government Act of 1978

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

3. The Ethics Reform Act of 1989

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

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

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

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

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

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[4] 5 U.S.C. app. 4, § 102 (2012).
[5] 5 U.S.C. app. 4, § 104(a).
[6] 5 U.S.C. § 7353(a)(2) (2011).
[7] 28 U.S.C. § 351(a) (2006).
[8] 28 U.S.C. § 355(b).
[9] Code of Conduct for United States Judges, *available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.*

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

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

II. DEFICIENCIES OF EXISTING RECUSAL AND ETHICS LEGISLATION.

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

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

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

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

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

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

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

[10] Code of Conduct for United States Judges at 2-3, Canon 1.
[11] Code of Conduct for United States Judges at 3, Canon 1 cmt.

public confidence in the integrity of the judicial process."[12] When the justices on the nation's highest court are free from ethical limits and oversight, that omission undermines the public's faith in the federal courts.

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

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

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

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

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[12] Liljeberg v. Health Servs. Acquisition Corp., 48 U.S. 847, 860 (1998) (citing S. Rep. No. 93-419, at 5 (1973)).
[13] Megan Brenan, "Confidence in Supreme Court Modest, but Steady," *Gallup* (July 2, 2018), https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx.
[14] RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT (2018).
[15] *See generally* Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 Kansas Law Review 531 (2005) (describing the publicity surrounding debates of Justice Antonin Scalia's refusal to recuse himself from a case after a vacation with a government litigant).
[16] 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), at 4, *available at https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf*.
[17] Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules, Kennedy, Breyer Say*, 79 U.S. L. Wkly. 2389, 2389 (Apr. 19, 2011).
[18] *See* "A Question of Integrity: Politics, Ethics, and the Supreme Court," ALLIANCE FOR JUSTICE, http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/federalist-society-fundraiser.pdf; *see also*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[26] Federal Rules of Civil Procedure 26 & 37.

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

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

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

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

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

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[27] JAMES E. PFANDER, ONE SUPREME COURT 2 (2009).
[28] 28 U.S.C. § 1.
[29] 28 U.S.C. § 2.
[30] Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting a constitutional challenge to a law obligating Supreme Court justices to sit as circuit judges); WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 55 (1995) (describing circuit riding as a "physical arduous task that [the justices] found irksome").
[31] 28 U.S.C. § 453.

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

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

CONCLUSION

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