

Statement of
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on Federal Judicial Ethics, Transparency, and Accountability
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Committee on the Judiciary, House of Representatives
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Chairman Johnson, Ranking Member Roby, members of the Subcommittee: Thank you for this opportunity to testify at this oversight hearing federal judicial ethics regulation.

Since September 2005, I have been a Visiting Fellow in the Brookings Institution and president of the Governance Institute—a small, non-partisan, non-profit organization that analyzes interbranch relations.

From 1991 to 2005, I was Deputy Director of the Federal Judicial Center, the courts' research and education agency. While at the Center and for about a year after, I was, in essence, the part-time staff director for the "Breyer Committee" (after its chair, Justice Stephen Breyer), which Chief Justice William Rehnquist appointed in 2004 to assess the judicial branch's implementation of the Judicial Conduct and Disability Act. The committee reported to the Judicial Conference in September 2006¹ that chief circuit judges and judicial councils were largely implementing the Act as Congress intended, although it found problems with the disposition of some "high visibility" complaints.

Based on the report, the Conference's Judicial Conduct and Disability Committee developed new, mandatory, and more aggressive rules governing the processing of complaints.² Credit for the report and the rules goes in part to then-House Judiciary Committee Chairman, F. James Sensenbrenner, who called attention in early 2004 to what the Breyer Committee confirmed was an improper dismissal of a highly newsworthy judicial conduct complaint,³ leading to the Breyer Committee's creation.⁴

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Below I comment on some questions that the subcommittee is examining. As I stressed on Monday when I received the invitation to testify, I appear on behalf of neither the majority nor the minority. It is a pleasure to join Professors Frost and Geyh, colleagues who have made substantial contributions to sound federal judicial ethics policy.

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¹ "Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice," (Sept, 2006), available at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentid=C6CA3DC8B22AC2D78525728B005C9BD3

² Available as amended at https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf

³ See report, id at note 1, at 73-75.

⁴ Id at 131.

I frame my testimony having in mind the code of conduct admonition that judges will “be the subject of constant public scrutiny and [must] accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”⁵ That sound advice, however, is not a license to regulate judges’ affairs so obtrusively as to deter responsible individuals from entering or remaining in judicial service.

The U.S. Supreme Court and Codes of Conduct

The United States Judicial Conference has published a “Code of Conduct for United States Judges” —that is, circuit, district, bankruptcy, and magistrate judges. It is not a disciplinary mechanism but rather a set of aspirational guidelines.

Supreme Court justices have repeatedly stated that they look to the Code for guidance. Nevertheless, a formal code of conduct for the Court would serve the same salutary purpose as does the Code of Conduct for U.S. Judges. It would affirm that formal conduct maxims are in place for the justices to consult and would help deter meritless criticism that they operate in an ethics-free environment.

Who should create the code? The best approach, I submit—and as Professor Geyh has proposed⁶--is for the Court itself to promulgate its own code of conduct, just as the Judicial Conference created the code for the courts in its administrative ambit. Chief Justice Roberts apparently is considering that approach.⁷

Various proposals, including H.R. 1057, would have the Judicial Conference fashion a code that would apply to all federal judges, including members of the Court. With deference, that runs counter to Congress’s 1939 decision to separate the administration of the bulk of the federal judiciary from the administration of the Court. To oversimplify, the courts of appeals and district courts administer themselves through the Judicial Conference and the circuit judicial councils. Likewise, the Supreme Court administers itself.⁸ One reason that justices and judges in the 1930s endorsed that arrangement, and that Congress wrote it into law, was the sense that the justices are unfamiliar with the administrative dynamics of the so-called lower courts, and the judges of those courts, in turn, are unfamiliar with the Court’s administrative challenges. That is likely as true in the specific matter of ethics regulations as it is as to judicial administration generally. In short, at least in the federal judiciary, lower court judges should not be making administrative policy to govern the Supreme Court except in limited circumstances dictated by practical necessity.

Whether Congress should—or even could, constitutionally—require the Court to create its own ethics code is a difficult question. Chief Justice Roberts argued in his 2011 year-

⁵ Code of Conduct for United States Judges, Commentary on /Canon 2A, available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf

⁶ Charles Geyh and Stephen Gillers, *The Supreme Court Needs a Code of Ethics*, POLITICO (Aug. 8, 2013), <http://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-95301.html>

⁷ Tim Ryan, Chief Justice Roberts Weighs Ethics Code for High Court, Courthouse News Service, March 7, 2019, at <https://www.courthousenews.com/chief-justice-roberts-weighs-ethics-code-for-high-court/>

⁸ See for an introductory explanation, Wheeler, *A New Judge’s Introduction to Federal Judicial Administration* (2003), available at <https://www.fjc.gov/sites/default/files/2012/NewJudge.pdf> See also Peter Fish, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 128, 138-42 (1973). See in particular, Title 28, United States Code, Sections 331, 332 and chapters 41, 42, and 45.

end report that because the Constitution creates the Supreme Court, Congress may lack the authority to regulate its ethics. At the least, he said, “[t]he Court has never addressed whether Congress may impose . . . [ethical] requirements on the . . . Court.”⁹ On the other hand, Justice Breyer, during a Senate Judiciary Committee hearing, referred to rules on “what [income] you can take or can’t take, . . . the reporting requirements, and some of the general ethics requirements—can’t sit in [conflict-of-interest] cases —those are statutory, and I think they bind us, period.”¹⁰ The way to avoid confronting the matter is for the Court, acting on its own volition, to create a code of conduct.

Requiring Publicly Available Reasons for Recusals

Section 455 of title 28 sets out waivable and non-waivable circumstances in which justices and judges must recuse themselves. Some have argued that Congress should oblige jurists to explain why they recuse themselves, or do not recuse themselves (in response to the relatively rare petitions seeking recusal).

Often the reason for a recusal is fairly obvious—for example, a Supreme Court case from the court on which a newly minted justice served. Recusals based on financial conflicts are usually straightforward. Some explanations clear the air. In 2004, Justice Scalia refused for some time to explain why he refused to recuse himself in litigation involving a vice-presidential task force. When he finally issued a memorandum of explanation,¹¹ the general reaction, as I recall, was to accept his explanation but ask what took so long.

These examples notwithstanding, requiring disclosure of reasons for all recusals may start judicial ethics regulation down a slippery slope. Some non-financial recusals could involve delicate personal matters involving judges, family members, and third parties, the airing of which would serve little public purpose. A mandate to explain such a recusal could lead judges to eschew recusal rather than air their dirty laundry or that of a family member or some third person. It would be difficult to fashion a rule that exempts such delicate situations from disclosure while still requiring disclosure of more mundane circumstances. Even requiring a simple statement that a recusal is for other than financial conflicts might, in some communities, give rise to speculation as to the real reason.

In any event, arguments over whether judges should explain recusal decisions—and how to police non-compliance—seem to me less important than whether and when recusal decisions should be made solely by the subject judge, subject only to appellate review when available. The movement in the states to take such decisions out of the hands of the judge whose recusal is at issue¹² may bear study of its pluses and minuses in the federal judicial context. Professor Frost has offered related suggestions on recusal processes.¹³

⁹ 2011 Year-End Report on the Federal Judiciary, SUPREME COURT OF THE UNITED STATES (Dec. 31, 2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

¹⁰ *Considering the Role of Judges Under the Constitution of the United States: Hearing before the Senate Judiciary Committee*, 112th Congress (2011); see also Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. OF LEGAL ETHICS 443, 449-450 (2013).

¹¹ Memorandum from Justice Scalia on *Chaney v. U.S. District Court*, 541 U.S. 913 (2004)

¹² See, e.g., Russell Wheeler and Malia Reddick, *Judicial Recusal Procedures: A Report on the IAALS Convening* (2017), available at https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf

¹³ Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531 (2005)

On-line Availability of Judges' and Justices' Financial Disclosure Forms

Judges file statutorily required disclosure forms in May to disclose finances during the previous calendar year. The forms are a partial vehicle at best for catching conflicts of interest because they do not necessarily reveal the current state of judges' finances. Financial disclosure is mainly a concession to the transparency that judges and other public officials accept for the privilege of public service.

So far the Judicial Conference has taken a moderate position on making financial disclosure forms public. It authorizes their release electronically, on a case-by-case basis, after redactions requested by the judge in question.

Whether the Administrative Office of the U.S. Courts should make all judges' financial disclosure forms routinely available on-line, as are those of legislative and executive office holders, is a different matter. For one thing, judges are likely to face threats from greater numbers of individuals—those who feel aggrieved by judicial proceedings and seek information with which to menace judges whom they hold responsible for their problems. General redactions of judges' forms are unlikely to account for individualized threats.

The judicial branch has on occasion been averse to transparency; for example, it resisted for too long putting on-line the so-called "Biden" or "Civil Justice Reform Act" reports¹⁴ that identify individual judges' delayed motions and case dispositions.¹⁵ That occasional aversion to transparency should not cloud an understandable reluctance to protect personal financial information from widespread, random dissemination.

Blind Trusts

As to requiring judges to establish blind trusts for their holdings, Congress has said that "[a] judge should inform himself [sic] about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and other minor children residing in his household."¹⁶ Partly on this basis, the Judicial Conference's Code of Conduct Committee "has consistently advised that the use of a blind trust would be incompatible with a judge's duty to 'keep informed' about financial interests under Canon 3C(2),"¹⁷ which essentially repeats the relevant provision of the Judicial Disqualification statute.

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Thank you for the opportunity to testify this morning. I will do my best to answer any questions you may have of me.

¹⁴ "Enhancement of judicial information dissemination" o 28 U.S.C. § 476

¹⁵ Available at <https://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report>

¹⁶ See 28 U.S. C. §§ 455 (c)

¹⁷ Codes of Conduct Committee, Advisory Opinion 110 ("Separately Managed Accounts," available at https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf)