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Written Testimony

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Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on
BUILDING CONFIDENCE IN THE SUPREME COURT THROUGH ETHICS
AND RECUSAL REFORMS
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Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee,

Thank you for this invitation to testify at this hearing, titled “Building Confidence in the Supreme Court Through Ethics and Recusal Reforms.” Unfortunately, the title does not reflect what this hearing is really about. If confidence in the Court is lacking, it is not due to issues of ethics or recusals. Rather, confidence in the Court is undermined by the coordinated campaign by some Democrats and their allies in the corporate media to smear conservative Justices with the *goal* of delegitimizing the Court. Why now? Because some liberals fear that the Court finally has a working originalist majority that may sweep away a number of liberal precedents that cannot stand up to more rigorous constitutional scrutiny. And in this effort, Democrats and the media are trying to threaten, intimidate, destroy, and remove any Justice who may constitute this conservative working majority.

If you think this is hyperbole, perhaps a brief reminder is in order. Democrat Senator Chuck Schumer stood on the steps of the Supreme Court in March 2020 threatening Justices Kavanaugh and Gorsuch as the Court heard oral argument on an abortion case: “I want to tell you Gorsuch. I want to tell you Kavanaugh. You have released the whirlwind and *you will pay the price*. You won’t know *what hit you* if you go forward with these awful decisions.”

Less than a year earlier, Democrat Senator Sheldon Whitehouse, the lead sponsor of this Supreme Court ethics reform legislation, and other Democrat Senators filed an amicus brief in a Second Amendment case pending at the Supreme Court, where Senator Whitehouse threatened that the Court better drop the case or face the consequences. He wrote: “The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be ‘restructured in order to reduce the influence of politics.’”

And now, we are in the middle of the latest attack in the forty-year war on Justice Clarence Thomas, this time an all-out assault on the Justice and his wife Ginni for so-called ethical

transgressions, such as Justice Thomas not recusing because of his wife's political opinions and activities. It is a false and malicious attack on two good people.

Many on the Left hate Justice Thomas because he is a black conservative who has never bowed to those who demand that he must think a certain way because of the color of his skin. They tried to destroy him during his confirmation hearings, then tried to mock and marginalize him with racist attacks when he first joined the Court. And now, thirty years later, Thomas is still standing strong, considered by many to be our greatest Justice.

The *New Republic's* Michael Tomasky, for example, wrote that Justice Thomas should be impeached because he did not recuse from the Obamacare case after his wife had opined that Obamacare was "a disaster." But Tomasky's views are driven by politics and outcome, not by law or ethics. And they also are absurd, as a spouse having opinions on issues that may come before the Court has never been the basis for recusal by any other justice or judge. Undaunted by facts, many Democrats and the press portray Ginni Thomas's work as a threat to the Court's integrity. Welcome to feminism 2022—conservative women must shut up and stay in the kitchen, or at least out of politics. And that is actually what Tomasky suggested that Justice Thomas tell his wife.

Justice Thomas has acted ethically and honorably at all times. To date, Justice Thomas has had no reason to recuse himself from any case because of his wife's opinions or activities. The recusal standard that the Left is applying to Justice Thomas has no grounding in the law or in precedent. Rather, it is an entirely outcome-driven effort to change the results of cases that may come before the Supreme Court and to delegitimize past cases decided by the members of the Court with whom the current critics disagree.

The opinions and political activity of a spouse or other family member are not, and should not be, the basis for requiring a judge or justice to recuse themselves. The relevant part of the judicial recusal statute requires federal judges to recuse from cases when a family member is a party or litigant to a case, when the judge knows a family member has "an interest that could be substantially affected by the outcome of a proceeding," or when a judge's "impartiality might reasonably be questioned."

Federal judge Stephen Reinhardt, a liberal icon on the Ninth Circuit, refused to recuse from a case in 2011 regarding a ban on same sex marriages, even though his wife, who at the same time was the head of the ACLU Southern California chapter, publicly expressed her opposition to this ban and her organization joined two amicus briefs opposing the ban in the district court below. Judge Reinhardt wrote that his wife's "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues." Judge Reinhardt concluded that a reasonable person would not believe he would be partial simply because of his wife's or her organization's views. Judge Reinhardt also determined that his wife had no "interest" in the outcome of this case "beyond the interest of any American with a strong view concerning the social issues that confront this nation." That may sound familiar, as it is the same explanation that Thomas's defenders have offered.

When Judge Reinhardt voted exactly as his wife and the ACLU/SC had advocated, nobody accused him of being a puppet of his wife. Rather, left-leaning members of the press applauded this working couple arrangement. In fact, Professor Stephen Gillers, a well-known judicial ethics expert, filed a brief defending Reinhardt, writing: “[A] spouse’s views and actions, however passionately held and discharged, are not imputed to her spouse, and Judge Reinhardt is not presumed to be the reservoir and carrier of his wife’s beliefs. ... A contrary outcome would deem a judge’s spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty.”

D.C. Circuit Judge Nina Pillard likewise participated in a case in which her husband, David Cole, the ACLU’s national legal director, publicly advocated a specific outcome. For example, Cole praised a district court judge’s decision rejecting President Trump’s challenge to a congressional subpoena for his taxes. The D.C. Circuit panel affirmed this ruling, and then Judge Pillard, sitting on an en banc panel, voted against a petition for rehearing. Thus, she voted the same way her husband had advocated in his article.

David Cole had been prolific in his commentary on major hot button issues in the Trump Administration, including immigration, LGBTQ, treatment of Guantanamo Bay detainees, and election law issues. He has been appropriately activist in carrying out his work as the ACLU’s legal director, but no one called for Judge Pillard to recuse from all cases related to the Trump Administration because of her husband’s antipathy toward that Administration. Of course, were Judge Pillard a conservative, many on the Left would be demanding her recusal, resignation, or impeachment.

Judge Reinhardt and Judge Pillard were correct not to recuse, but given these examples, there is no basis for Justice Thomas to recuse because his wife expressed an opinion on an issue or generally worked with groups that, without her involvement, separately filed amicus briefs with the Court. Judge Reinhardt’s wife publicly stated she is against a ban on same sex marriages; her group joined two amicus briefs in the court below. David Cole said Trump was required to turn over his taxes to a congressional committee. Ginni Thomas said Obamacare is a disaster. Why do Judges Reinhardt and Pillard not have to recuse, and Justice Thomas does?? What is the difference other than that Justice Thomas is a black conservative whose opinions and jurisprudence, and the separate political views of his wife, displease the chattering classes and many Democrats in Congress?? I would urge you to read Judge Reinhardt’s opinion and Professor Gillers’s brief on these matters and try to draw any principled distinction between the cases that would require Justice Thomas to recuse.

Gabe Roth of Fix the Court recently complained, “With Ginni Thomas, it’s been part of a pattern and practice; a lot of folks are tired of that activism and are concerned that it could potentially be bleeding into the conversations she has with her husband.” Is Gabe Roth tired of David Cole’s activism? Has he publicly criticized David Cole? Is he worried that Cole and Judge Pillard are talking about cases for which he has expressed an opinion on an issue that will come before her? I am unaware of him expressing any concerns.

Or what about Ed Rendell, who was Mayor of Philadelphia, Governor of Pennsylvania, and the head of the Democrat National Committee, while he was married to federal judge Marjorie Rendell? Did judicial ethics experts grow tired of his political activity or advocacy? Were these experts concerned that his views would be imputed to his wife?

One unsettling aspect of the current attacks on Justice Thomas is the unsubtle view that Justice Thomas is intellectually dependent on the white people around him. For example, Jane Mayer and Jill Abramson wrote that, on the D.C. Circuit, “Thomas developed an unusually close friendship with – some would say reliance on – his fellow jurist Laurence Silberman.” Next, he was a puppet of Justice Scalia, unable to think for himself and blindly voting with Justice Scalia, another racist trope driven by the Left, including again, Jane Mayer and Jill Abramson, who wrote that Thomas “frequently seemed content to let Scalia write the dissenting opinion, to which he merely added his silent assent.”

Thomas is the most independent-minded justice to sit on the Court, voting by himself in dissent in his first conference meeting in 1991 and persuading several other justices, including Justice Scalia, of his views. For many years, Thomas has written the most opinions per year of any other justice. His superb memoir, *My Grandfather's Son*, makes it abundantly clear that Thomas has fiercely resisted being told what to think or do his entire life. Yet the Left persists with this racist smear.

For example, in Philip Bump's recent piece in the *Washington Post*, he writes that “Mayer's piece dances around the question of how much influence Ginni Thomas has over her husband,” and Bump references a quote Mayer uses from a 1991 *Washington Post* piece: “The one person [Clarence] really listens to is Virginia.” And then Bump adds another quote from the 1991 story: “He depends on her for advice.” Bump (and Mayer) use these quotes to imply that Thomas is dependent on Ginni's views and opinions for his views. Similarly, in Michael Kranish's attack on the Thomases in the *Washington Post*, he quotes democratic operative Mark Fabiani wondering aloud whether there is “a single opinion that Justice Thomas has ever written that is inconsistent with his wife's far right-wing views?” Justice Thomas certainly triggers the Left to reveal their racism.

The current attacks on the Thomases show that ethics charges are being weaponized for political purposes. If these standards being applied to the Thomases were applied to Justice Ruth Bader Ginsburg, she would have violated these standards many times over.

Justice Ginsburg's husband Marty Ginsburg practiced at a law firm that appeared several times before the Supreme Court, and she never recused herself. She even voted in favor of her husband's colleague's client. The press does not like to deal with the Marty Ginsburg example, so they have dishonestly reported that he left his law firm for teaching when Justice Ginsburg became a judge.

Marty Ginsburg's client Ross Perot endowed a chair in Marty's name at a law school after Marty solved a complex tax question, and Justice Ginsburg never recused when Ross Perot or his company EDS appeared before the court.

Jane Ginsburg wrote a legal article on a case pending before the Supreme Court, the petitioner cited Jane's article in his brief, and RBG voted exactly as her daughter advocated. One court watcher, in reviewing the decision, wrote that "Justice Ginsburg--perhaps influenced by her daughter . . . copyright scholar Jane Ginsburg . . . ends up as a copyright hawk."

Under the current law and precedent, Justice Ginsburg should not have recused in these matters. But neither should Justice Thomas based on his wife's opinions or activities to date.

Some on the Left and in the corporate media have raised concerns that Justice Thomas did not recuse from cases where a group that had received an award from Ginni Thomas subsequently filed an amicus brief with the Court. This is laughable. By way of comparison, Ginsburg never recused from cases in which the National Organization of Women (NOW) filed amicus briefs at the Court, despite Justice Ginsburg having served on the Board of Directors for the NOW Legal Defense fund in the 1970s. Justice Ginsburg even donated an autographed copy of her VMI opinion to the pro-abortion NOW Political Action Committee, which auctioned off the opinion at a fundraiser in 1997. In 2004, she spoke at a lecture named after her for the NOW Legal Defense Fund, and two weeks before that lecture, Justice Ginsburg voted in favor of a position advocated by the NOW Legal Defense Fund in an amicus brief. I am unaware of any Democrat on this Committee or in Congress raising significant concerns about Justice Ginsburg's conduct.

Most troubling, Justice Ginsburg also directly attacked Donald Trump on multiple occasions during the 2016 presidential campaign. Justice Ginsburg called him "a faker" and criticized him for not disclosing his tax returns. She even voiced concerns about Trump being president.

Left wing journalist Mark Joseph Stern wrote that "what Ginsburg is doing right now—pushing her case against Trump through on-the-record interviews—is not just unethical; it's dangerous." Stern added:

Given all of these compelling reasons that Ginsburg should have refrained from speaking her mind about Trump, why did she take the risk? It seems clear that Ginsburg has made a very conscious decision to cash in her political capital after years of holding her fire. The justice is 83, and while she remains healthy and sharp, she probably won't sit on the court for much longer. She won't be impeached—Supreme Court justices must do much worse to suffer *that* sorry fate—and she can't be voted out. In effect, Ginsburg has nothing to lose but her good name. And that, it seems, is what she has decided she is willing to risk if it might potentially rally her admirers against Trump's looming peril. . .

And so, sensing the menace that Trump undoubtedly poses to her country, Ginsburg abandoned judicial propriety to wrestle in the mud with a candidate she detests. It is not pretty, it is not pleasant, and it may not even be that smart. But it may be the one thing the justice can do to help prevent a President Trump. And to her mind, that alone may make it worthwhile.

Ultimately, however, Stern seems to be making excuses for Justice Ginsburg's behavior, notwithstanding the concerns he raised. And while he also noted that there could be legitimate calls for Justice Ginsburg to recuse from all cases involving the Trump Administration, Justice Ginsburg never recused from any such case. She even sat on a case where President Trump was challenging a congressional subpoena for his tax returns. Of course, she voted against President Trump.

If Justice Ginsburg's personal foray into presidential politics was insufficient to trigger the ethical handwringing of the Left, it is difficult to take seriously the current outrage over the political opinions of Justice Thomas's wife. He is not his spouse, and he is not her puppet. Justice Ginsburg, by contrast, directly expressed her own political views in an effort to influence a Presidential election. I am unaware of any Democrat currently on this Committee or their allies in the corporate media having called for hearings or talking of impeaching Justice Ginsburg in light of her overtly partisan conduct and refusal to recuse from Trump-related cases, and specifically the tax-related case. But we sit here today because Justice Thomas did not recuse from cases in which his wife expressed political opinions or worked with groups that made comments or filed amicus briefs on various issues that come before the Court.

Lost in all of this discussion is the fact that, contrary to much reporting by the corporate press, a federal law on recusal applies to the Supreme Court. 28 U.S.C. § 455 sets forth when a judge or justice should recuse. In 1993, seven members of the Supreme Court issued a Statement on Recusal Policy regarding family members, in which the seven Justices developed a policy implementing section 455. And that is what they follow today.

The seven Justices wrote that with respect to a family member being a lawyer involved with litigation, they would only recuse if that family member/lawyer was appearing before the Supreme Court as part of a litigation team or was making money from the outcome of litigation. In other words, a family member could have served as a lawyer on a team (not as the lead lawyer) in a lower court, but if they do not appear before the Supreme Court and are not being compensated with respect to the litigation, the Justice would not recuse. Thus, based on this Statement implementing section 455, Justice Thomas has properly never recused based on his wife's opinions or activities.

The proposed legislation under consideration today would require the Supreme Court to adopt a Code of Conduct, and if it does not, the Code adopted by the Judicial Conference for the lower courts, shall apply to the Supreme Court. Chief Justice Roberts has noted that Justices already consult the Code and other sources in making recusal decisions. As Russell Wheeler, a Brookings fellow who was the long-time Deputy Director for the Federal Judicial Center, has noted, "The Judicial Conference has no authority to require that [lower court] judges comply with the Code. The Code makes clear that . . . it is advisory. . . . The notion nevertheless persists that the Code 'binds' lower court judges as would a statute, and that a Code for the Supreme Court would similarly 'bind' the justices."

Whether or not it is a good idea for the Court itself to adopt a more robust or proscriptive Code of Ethics, a statute purporting to bind the Court on such matters may run afoul of the separation of powers.

And I would note that one of the Senators pushing hardest for a Code to apply to the Supreme Court would run afoul of that Code if it were applied to him. The Code urges Judges to not be a member of a club that discriminates. Senator Whitehouse belonged to a private club that appears to exclude black members. He claims he “transferred” his membership to his wife, who now belongs to the club, and he attends through her membership. Rules for thee, not for me.

With respect to the bill’s provisions that the entire Supreme Court shall sit as a panel to review recusal motions from a party against one of the Justices, there are serious questions whether that would pass constitutional muster. A recusal decision is a judicial ruling, and Congress would be mandating how the Supreme Court, established by the Constitution, shall issue judicial decisions. Once again, regardless of the wisdom (or lack thereof) of such procedures, the choice regarding how to decide motions and cases is for the Court itself, not Congress, to make.

On a more practical side, parties may flood the Court with recusal requests to sideline a Justice who the party fears may rule against their position. Perhaps a party files a recusal claim, based on Senator Whitehouse’s claims, that conservatives Justices are bought and paid for by dark money and cannot be fair and open-minded on matters pertaining to every issue under the sun. Perhaps non-parties will try to join in the spectacle with their own requests or briefs. Under this provision, the Court will have to meet and decide on these recusal requests.

Unlike lower courts, there are only Nine Justices and one recusal could severely hamper the functioning of the Court. Justices have a “duty to sit,” and should only recuse when required. As Justice Scalia wrote in properly refusing to recuse in the Cheney litigation, “My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons.” And even where the Court rejects a requested recusal, having to rule on many such requests will divert attention from the more pressing substance of the Court’s work.

With respect to requiring a Justice to specify in writing why he or she is recusing, this provision also may not survive judicial scrutiny. A recusal decision is a judicial ruling, and therefore, Congress would be mandating the manner by which a Justice makes his or her ruling. It could also be the camel’s nose in the tent, whereby Congress may then pass a law requiring the Supreme Court to issue a written ruling on every denial of cert, complete with a requirement that they explain why the petition was denied. Such congressional micro-managing of the judicial function is troubling and quite possibly unconstitutional.

There is nothing wrong with ethics or recusals at the Supreme Court. The Justices are ethical and honorable public servants and occasionally recuse themselves where the situation warrants. But the trigger for this new proposed legislation is a ginned-up smear attack on Justice Thomas and his wife. Continually blasting the Court for so-called “ethical” transgressions has of course led the American people to have a lower view of the Court. Perhaps the self-fulfilling nature of

the hyperbolic claims about the loss of public confidence in the Court is the very point of the current attacks and proposals for “reform.”

To support any reform legislation right now would be to validate these vicious political attacks on the Supreme Court.