

“Building Confidence in the Supreme Court Through Ethics and Recusal Reforms”

Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary

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Testimony of Gabe Roth, Executive Director of Fix the Court

Chairman Johnson, Ranking Member Issa and Members of the Subcommittee: thank you for the opportunity to testify on ways we can build confidence in our highest court via more exacting ethics and recusal standards. There’s clearly a lot that needs to be fixed in these areas.

Back in 2016, a Supreme Court justice failed to recuse in a major patent case despite owning shares in one party’s parent company.¹ That same year, a different justice attended a \$500-per-plate dinner in Texas with finance, legal and oil executives.² Another justice that year omitted from her financial disclosure report the fact that a public university paid for as many as 11 rooms in one of the state’s fanciest hotels for her, her security detail and some family friends.³

In 2019, in the Supreme Court building, two justices met with the head of an organization that had submitted amicus briefs in three unresolved and highly contested cases.⁴ Later that year, two justices failed to recuse from a petition involving their book publisher, though the two have earned \$3.5 million combined from that company in the last few years.⁵

In 2020 a justice failed to recuse from a case regarding the constitutionality of a federal law even though, in her previous job, she likely worked on a legal strategy to defend said law.⁶ And last year, a justice had dinner with a prominent politician and a dozen of his friends and then gave a speech — with that politician at the justice’s side — in which the justice said the Supreme Court “is not comprised of a bunch of partisan hacks.”⁷

These are just a handful of examples of the justices of the Supreme Court flouting basic ethics rules in the handful of years my organization, Fix the Court, has existed. Dozens more are listed at the end of this statement.

¹ Chief Justice Roberts initially failed to recuse in a merits case, 14-1538, *Life Technologies Corp. v. Promega Corp.*, despite owning up to \$250,000 in shares of Thermo Fisher Scientific, which owns Life Technologies. He did recuse after the error was brought to his attention after oral argument.

² The source is a public records request Fix the Court made to the University of Texas-Arlington in 2019, the files of which were uploaded to a cloud storage app ([link](#)) that have since been deleted either by the app or the university. I am seeking to get them restored.

³ See response to Fix the Court’s 2019 public records request to the University of Rhode Island re: Justice Sotomayor’s 2016 commencement speech ([link](#)).

⁴ In Oct. 2019, Justices Alito and Kavanaugh met with the head of the National Organization for Marriage at the Supreme Court per [this photo](#). NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC*, that were unresolved at the time.

⁵ Justices Sotomayor and Gorsuch failed to recuse in 19-560, *Nicassio v. Viacom, et al*, where Penguin Random House was a party on the side of the respondents. By this point, Sotomayor had earned about \$3 million from her book contracts with PRH since becoming a justice and Gorsuch had earned \$555,000.

⁶ Justice Kagan did not recuse from several Obamacare merits cases — including 11-393, *NFIB v. Sebelius*; 14-114, *King v. Burwell*; and 19-840, *California v. Texas* — even though she was the U.S. solicitor general at the time the White House and her office were crafting the legal defense of the law.

⁷ Justice Barrett famously gave this speech in Louisville last year; see, “Justice Amy Coney Barrett argues US Supreme Court isn’t ‘a bunch of partisan hacks,’” *Louisville Courier-Journal*, Sept. 12, 2021 ([link](#)).

And none of the justices referenced above was Clarence Thomas.

When asked over the years about how they confront questions of ethics, the justices say⁸ they look to precedent, scholarly articles or seek advice from their colleagues. But which precedents, which articles and which scholars? That there is not a single, definitive source the justices use for guidance is in itself problematic, as it means they'll be more likely come to different conclusions about their ethical obligations.

This era of the nine justices operating, as has been said, like nine independent law firms must end.

It shouldn't be the case that about half the justices, that we know of, are accepting flights on private planes, often paid for by public entities or big-time political benefactors, while the rest tend to stick with business or coach.⁹ It shouldn't be that two justices are leaving some of their free trips off their annual financial disclosure reports,¹⁰ while the rest are doing their best to file accurately. It shouldn't be that three justices are trading individual stocks — and being unable to participate in some cases and petitions because of it — when the rest do not.¹¹ It shouldn't be that two justices recuse when a case concerning the work done by a parent or a sibling comes before the Court, but two justices refuse to recuse when a case concerning the work done by their parent or their spouse comes before the Court.¹²

Today's hearing has been called in large part to talk about the absence of a Supreme Court Code of Conduct, so anticipating this, I sat down earlier this month and considered what such a Code might look like. I started with the Code that exists for lower court judges¹³ and took out the parts that don't apply to the justices, such as dealing with witnesses and the like. Then I figured a Supreme Court Code could use more detail in a few key areas, like on attending fundraisers, participating in activities with political candidates and lending the prestige of the office to advance others' interests.

Although I didn't finish the project — my job title isn't mentioned in the Constitution, so I found this a bit presumptuous in the end — I came to the conclusion that this is not a problem that lacks a solution. It can be done. It must be done.

On Feb. 3, 2022 — before the news broke that Justice Thomas' wife Ginni was texting with former White House Chief of Staff Mark Meadows about strategies for overturning the election at a time when the justice was participating in cases dealing with election results — two dozen leading legal ethics scholars wrote to Chief Justice

⁸ See, e.g., the Chief Justice's 2011 Year-End Report on the Federal Judiciary: "The Justices, like other federal judges, may consult a wide variety of other authorities to resolve specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues."

⁹ From my research and public records requests, I have found examples of Justices Scalia, Thomas, Breyer opting to fly via private jet. (Justice Alito was scheduled to take one, but a hurricane canceled his flight.) See generally, "When Justices Go to School: Lessons from Supreme Court Visits to Public Colleges and Universities" ([link](#)).

¹⁰ See, "2 SCOTUS justices agree to amend financial disclosures after Fix the Court asks questions," ABA Journal, March 24, 2020 ([link](#)).

¹¹ Chief Justice Roberts, Justice Breyer and Justice Alito are the three, collectively holding shares in about three dozen companies. See "Justices' 2020 Financial Disclosure Reports" ([link](#)).

¹² Justice Breyer recuses when a case comes to the Court via his brother's, Judge Charles Breyer's, courtroom in the Northern District of California. Justice Kavanaugh has recently recused from two petitions, 21-348, *Johnson & Johnson, et al., v. Fitch*, and 20-1223, *Johnson & Johnson, et al., v. Ingham, et al.*, in which an issue his father had previously worked — namely whether there's a link between talcum powder and ovarian cancer — reached the Court. Justice Barrett did not recuse from a recent case, 19-1189, *BP p.l.c., et al., v. Mayor and City Council of Baltimore*, involving Shell Oil, though her father was an executive there and Shell was on her circuit court conflicts list ([link](#)). Justice Thomas has never recused in a case involving the political activities of his wife.

¹³ See, "Code of Conduct for United States Judges" ([link](#)).

Roberts¹⁴ asking that he write a formal Supreme Court Code of Conduct. Such a document, they wrote, would “assist the justices in addressing potential conflicts of interest and other issues in a way that is consistent and builds public trust in the institution.” Their letter concludes:

[A]t a time when public institutions are redoubling their efforts to improve the public’s trust, we maintain that a formal, written Code, offering a uniform set of principles that justices and the public alike would look to for guidance, would benefit the Court and the nation.

It’s not just me or the legal academy who feels that a Code would be such a benefit; it’s also the American people and those who represent them in Congress. According to a poll taken earlier this month,¹⁵ more than three-fourths of Democrats, Republicans and Independents say they support the adoption of a code of ethics for the justices. That tracks with surveys that my organization, Fix the Court, and its forerunner, the Coalition for Court Transparency, have taken half a dozen times in the past decade.¹⁶

What’s more, current and past Republicans and Democrats on this very Committee have offered support for a SCOTUS Code of Conduct.¹⁷ At a 2017 Courts Subcommittee hearing, then-Chairman Darrell Issa said, “When it comes to transparency [...], when it comes to the ethics of the judiciary, we” — meaning Congress — “have an obligation. We cannot alone simply say we’ll wait to impeach a judge from time to time.”

At a full Committee hearing in 2019, Chairman Jerry Nadler lamented that “the Supreme Court [is] the only court in the country currently not subject to any binding code of ethics.” At the same hearing, then-Ranking Member Doug Collins said he believed drafting a Supreme Court Code of Conduct was “something I think we can find agreement on” across the aisle.¹⁸ And Courts Subcommittee Chairman Hank Johnson said at a 2021 hearing: “People are surprised when they learn that the Supreme Court isn’t bound by a code of ethics, unlike nearly every other court in America. It just doesn’t fit with their understanding of what it means to be a judge, let alone a justice of the United States Supreme Court.”¹⁹

A Code is not a panacea. No one believes that its mere existence would end the spate of ethical lapses I recount in the appendix to this testimony. But it is a critical step in a suite of reforms that are so desperately needed to build trust in our nation’s highest court.

The next step should be an obvious one, as well, as recent events have made it clear that the rules governing recusal must be expanded to reflect modern times. “Nemo iudex in causa sua,” i.e., “no one should be a judge in their own cause or case,” is centuries old. The main judicial recusal law,²⁰ which has roots from America’s founding, was expanded in 1948 and 1973. It is time for the next chapter to be written.

¹⁴ See, “Two Dozen Legal Ethics Scholars Ask Chief Justice Roberts for an Ethics Code,” Fix the Court, Feb. 3, 2022 ([link](#)).

¹⁵ See, “Voters Are Split on Their Perception of the Supreme Court, but Support a Code of Ethics for Justices,” April 19, 2022 ([link](#)).

¹⁶ See generally, “New Poll: Greater Transparency at SCOTUS May Be the Only Thing the Left and Right Agree On,” June 12, 2018 ([link](#)).

¹⁷ Other conservatives who support a Supreme Court Code of Conduct include those who signed the April 8, 2022, letter, “Statement on the Need for SCOTUS to Adopt a Compulsory Ethics Code,” that was released by the group Checks & Balances ([link](#)).

¹⁸ See, “Hearing on H.R. 1, For the People Act,” Jan. 29, 2019 ([link](#)).

¹⁹ “The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency,” June 21, 2019 ([link](#)).

²⁰ 28 U.S.C §455.

If a justice's spouse was paid a quarter million dollars at the time her benefactor co-wrote an amicus brief in a major case, that justice shouldn't participate in the case.²¹ If a justice receives lavish gifts and is flown around the country by organizations funding merits and amicus briefs, there should be recusals in those cases.²² If a justice's wife's communications with a third party are subject of a congressional investigation, and the Supreme Court is asked to rule on the validity of that investigation, the justice should recuse from that determination.²³

The current law says a judge or justice must recuse when his impartiality might reasonably be questioned. I am a reasonable person, and I question Justice Thomas' impartiality in each of the examples I just mentioned and, sadly, in many more (*see generally* Appendix A).

But I'll grant that the "reasonable person" standard might be vague. So is the line two subsections later in the recusal law, which says, "A judge should [...] make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."

To inspire confidence in our jurists' impartiality, we must do better. Judges — and justices; let's include them here, too, by title — must take the proactive step to inform themselves of any personal and any financial interests of their spouses (and of themselves). They must seek out and make a frequently updated list of any interest²⁴ they or their spouse has that could be impacted by the outcome of a proceeding.

One more thing: if you're a justice and you're given a free trip or a gift by a Supreme Court litigant or amicus, you should have a "cooling off" period. Take that trip, accept that gift —but you must then wait a few years until you participate in a case involving the source of the perk.

All of these provisions — an ethics code, a more exacting recusal standard, a way to ensure that parties filing briefs aren't unduly trying to influence the justices and a formal "cooling off" period — are in the 21st Century Courts Act of 2022 (H.R. 74265 and S. 4010) that was introduced in the House and Senate earlier this month.

Why do we need this bill? Because time and again we see that, left to their own devices, the justices will do almost nothing to change policies and build a more modern, trustworthy institution.²⁵

The nine all know that, as I mentioned before, some of their colleagues are flying on megadonors' private planes, and others are receiving gifts 500 times larger in value than the limit they're supposed to adhere to.²⁶ But the justices have not lobbied for any new laws, nor have they put any new accountability measures in place.

²¹ Justice Thomas participated in 17-965, *Trump v. Hawaii*, though his wife Ginni earned more than \$235,000 total in 2017 and 2018 from the Center for Security Policy, whose founder Frank Gaffney signed an amicus brief in the case.

²² For example, in 2008 Thomas attended a Koch Industries-backed retreat in Palm Springs, Calif., at a time in which Koch was bankrolling several litigants with cases before the Supreme Court.

²³ Thomas failed to recuse in the petition 21A272, *Trump v. Thompson*, over the Jan. 6 Committee's access to documents related to the insurrection, even though Ginni signed a letter in December denouncing Committee's very existence, and it's likely documents that indicate her involvement to invalidate the election results will be turned over to the Committee.

²⁴ *E.g.*, if your wife is texting someone about end times related to an issue that's before the justices, that counts as "an interest."

²⁵ I'm interested in solutions not only for the current nine but also for the judges and justices of the future: more and more these days our federal judges are coming from the ranks of law clerks, and a lack of any action to fix the lapses I've mentioned would signal to that next generation of judges that there are no repercussions for speaking at a fundraiser or effectively endorsing a Senate candidate weeks before his primary.

²⁶ The justices were not included in the 1989 Ethics Reform Act, which updated the gift acceptance laws, but in 1991 Chief Justice Rehnquist wrote a resolution stating the nine would follow its strictures ([link](#)). That policy remains in effect today. In 2016, Justice Ginsburg accepted a prize worth \$1,000,000, which is 500 times the \$2,000 limit. She did, though, donate it all to charity (*see generally*, Appendix A).

Here's a timely example: The FY23 budget proposal the Supreme Court released a few weeks ago²⁷ contained no request for funding, say, the installation of a software-based conflict-check system so the justices might overlook conflicts less often. It included no funding request for an ethics officer who'd assist the justices in clarifying whether their participation in certain cases or petition determinations might pose a conflict. There was no ask for a travel ombudsman, who'd vet the dozens of free trips to fancy and far-flung locales that the justices receive each year to ensure they're not compromising their ethics.

But there was a request for \$15.9 million for the "Supreme Court Courtyard Restoration." Eleven percent of their budget next year will go to interior landscaping — recall that the building is essentially a square-shaped donut — and not on several areas I've just mentioned that are sorely in need of some upkeep to maintain the public's trust.²⁸

Finally, it's important to recall that this hearing is not a first attempt at fixing the judiciary's ethical lapses; the campaign to improve the recusal law and impose an ethics code on the justices goes back decades. Instead of recounting that history here, though, I want to focus on a more recent effort.

In 2018, the full Judiciary Committee passed a bill²⁹ called the Judiciary ROOM Act.³⁰ Led by Courts Subcommittee Ranking Member Issa, who was then chairman, the bill included a Code of Conduct for the Supreme Court; a requirement that the justices, when they recuse, give a brief explanation for that decision; and a requirement that the justices livestream their oral arguments.

These elements were carried forward into the 21st Century Courts Act of 2020,³¹ and they are included once more in the 21st Century Courts Act of 2022.

It's this spirit of bipartisanship that I pray carries the day. Thank you again for the opportunity to testify.

²⁷ See "FY 2023 Congressional Budget Request, United States Supreme Court: Care of the Building and Grounds" ([link](#)).

²⁸ I also bring up the budget to point out that it's completely constitutional for Congress to give the justices \$15.9 million for that restoration, as it is for Congress and to withhold such discretionary funding if the justices fail to write an ethics code.

²⁹ See "House Judiciary Approves Major Transparency Bill Featuring Several of Our 'Fixes,'" Fix the Court, Sept. 14, 2018 ([link](#)).

³⁰ H.R. 6755 in the 115th Congress.

³¹ H.R. 6017 in the 116th Congress.

Appendix A: Recent Ethical Lapses by Supreme Court Justices

These lapses were compiled by Fix the Court staff in March and April 2022. They are by a justice's seniority, then in chronological order. They comprise mostly those that have occurred since FTC's founding in 2014. Citations were omitted for ease of reading but are available on FixTheCourt.com.

Current justices:

Chief Justice John Roberts

— Failed to recuse in 14-972, *ABB Inc., et al. v. Arizona Board of Regents, et al.* (cert. denied), despite owning shares in Texas Instruments stock, a party on the ABB side. (2015)

— Initially failed to recuse in a merits case, 14-1538, *Life Technologies Corp. v. Promega Corp.*, despite owning shares in Thermo Fisher Scientific, which owns Life Technologies; did recuse after the error was brought to his attention after oral argument. (2016)

— Failed to recuse in 17-1287, *Marcus Roberts et al. v. AT&T Mobility* (cert. denied), despite owning shares in Time-Warner, which had merged with AT&T. (2018)

Justice Clarence Thomas

— Accepted private plane rides and gifts, including a bible once owned by Frederick Douglass valued at \$19,000, from financier Harlan Crowe. Crowe also donated \$500,000 to help Ginni Thomas establish Liberty Consulting in 2011, a platform she used to lobby against laws like Obamacare that were before the Court; gave \$175,000 to a library in Savannah to name a wing after Thomas; and raised millions to build a museum in Thomas' hometown of Pin Point, Ga. (multiple years)

— Attended a Koch Industries-backed retreat in Palm Springs, Calif., at a time in which Koch was bankrolling several litigants with cases before the Supreme Court. (2008)

— Name was used in promotional materials for the nonprofit NRA Foundation, which stated its 2009 National Youth Education Summit included "exciting question and answer discussions with [the] wife of Supreme Court Justice Clarence Thomas." (2009)

— Was found to have omitted data on five years of Ginni's employment (2003-07), where she earned \$686,589 from the Heritage Foundation, from his annual financial disclosures. (2011)

— Attended the annual Eagle Forum conference, which, at up to \$350 a head, may have been a fundraiser. Ginni Thomas used the justice's appearance as a fig to increase attendance, urging in promotional materials that prospective attendees come to hear "my amazing husband." (2017)

— Participated in 17-965, *Trump v. Hawaii*, though Ginni earned more than \$235,000 total in 2017 and 2018 from the Center for Security Policy, whose founder Frank Gaffney signed an amicus brief in the case. (2017-18)

— Prominently displays in his Court chambers a photo of Vice President Mike Pence's swearing-in, which Thomas presided over, that's signed by Pence. (2017-present)

— Omitted from his financial disclosure report the reimbursements for transportation, food and lodging he received from Creighton University School of Law, where he taught that year. After FTC's report on justices' lavish trips was released in 2020, amended his report, though the amendment wasn't made public until 2022 (2017-22)

— Omitted from his financial disclosure report the reimbursements for transportation, food and lodging he received from the law schools of the University of Kansas and the University of Georgia, where he taught that year. After FTC's report on justices' lavish trips was released in 2020, amended his report, though the amendment wasn't made public until 2022. (2018-22)

— Documentary about his life financed by several groups, including the Koch Foundation, Judicial Education Project and Scaife Foundation, that were funding Supreme Court litigants and amici around the time the film was produced and released. (2019- 2020)

— Failed to recuse in any of the 2020 election petitions that reached the Supreme Court, even though it is likely Ginni had an “interest,” cf., 28 U.S.C. §455(b)(5)(iii), in the outcome of the election, seeing as how her publicly released text messages and social media and listserv posts show she was actively working with high-level Trump administration officials to subvert and overturn its results. (2020-2021)

— May have been in contact with Fla. Gov. Ron DeSantis possibly around the time in which Florida was a respondent in 21A247, *Ohio v. OSHA, et al.*, over the federal test-or-vax mandate. (2021)

— Failed to recuse in the petition 21A272, *Trump v. Thompson*, over the Jan. 6 Committee’s access to documents related to the insurrection, even though Ginni signed a letter in December denouncing Committee’s very existence, and it’s likely documents that indicate her involvement to invalidate the election results will be turned over to the Committee. (2022)

— Is participating in 20-1199, *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, even though Ginni sits on the board of the National Association of Scholars, which filed an amicus brief in the case. (2022)

— Name is being used on third-party website, JusticeThomas.com, at the bottom of which is written “© 2022 · Justice Clarence Thomas.” Though the domain name was purchased by Domains By Proxy, LLC, it is unlikely that Thomas himself maintains it, and it encourages visitors to purchase his memoir. (2022)

— Posed for a photo in a Supreme Court alcove with Herschel Walker, a Senate candidate in Georgia, seven weeks before Walker’s primary election; photo was tweeted out by Walker’s campaign communications director and hasn’t been deleted as of today, April 10. (2022)

Justice Stephen Breyer

— Failed to recuse in merits case 14–840, *FERC v. EPSA*, despite owning shares in Johnson Controls, a party on the EPSA side. Breyer learned about the conflict the day after oral argument and sold the stock. (2015)

— Attended a \$500-per-plate dinner at the University of Texas at Arlington with finance, legal and oil executives ahead of his talk at the school. The high price suggests the event was a fundraiser. (2016)

— Along with Alito, failed to recuse in 18-6644, *Feng v. Komenda and Rockwell Collins, Inc.* (cert. denied), though he owns shares in Rockwell’s parent company, United Technologies Corp. Said he had “no way of knowing” about the conflict since Rockwell didn’t file a response, which is spurious reasoning. (2019)

— While asking a question during oral argument in a public charge case, apparently gave away the result in 20-601, *Cameron v. EMW Surgical Center*, where Ky. Attorney General Daniel Cameron asked to intervene to defend a state law when no other governmental representative would defend it. (2022)

— Nothing wrong with justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Justice Samuel Alito

— Failed to recuse in merits case 07-582, *FCC, et al., v. Fox Television, et al.*, despite holding 2,000 shares of Disney stock on behalf of his minor children. ABC, which Disney owns, was a party on the respondents’ side. (2008)

— Failed to recuse in merits case 17-290, *Merck Sharp & Dohme Corp. v. Albrecht*, despite owning shares in Merck. Eventually sold shares and unrecused. (2017-2018)

— Along with Kavanaugh, met with the head of the National Organization for Marriage at the Supreme Court. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC* that were unresolved at the time. (2019)

— Attended Secretary of State Mike Pompeo’s taxpayer-funded Madison Dinner with other politicians and GOP donors. (2019)

— Along with Breyer, failed to recuse in 18-6644, *Feng v. Komenda and Rockwell Collins, Inc.* (cert. denied), though he owns shares in Rockwell’s parent company, United Technologies Corp. (2019)

— Speech to Federalist Society annual convention included discussion on COVID’s impact on religious exercise at a time when cases concerning the topic remained active at the Court. (2020)

— Failed to recuse in 20-6256, *Valentine v. PNC Financial Services, et al.* (cert. denied), where one of the respondents was PNC Bank, whose shares Alito owns. (2021)

— Chillingly, given power imbalance between a justice and a journalist, quoted directly from a journalist’s article on the “shadow docket” in speech attempting to rebut the justices’ increasing use of emergency orders to make impactful rulings. (2021)

Justice Sonia Sotomayor

— Failed to recuse in 12-965, *Greenspan, v. Random House* (cert. denied), even though the respondent, her book publisher, had months before spent tens of thousands of dollars sending her around the country to promote her autobiography. (2013)

— Omitted from financial disclosure that the University of Rhode Island paid more than \$1,000 for her round-trip flight for a commencement speech, as well as up to 11 rooms in one of the state’s fanciest hotels for her, her security detail and possibly some family friends. The trip included a five-car motorcade from the airport, and URI ordered 125 copies of her autobiography for the appearance. (2016)

— Failed to recuse in 19-560, *Nicassio v. Viacom, et al.* (cert. denied), where Penguin Random House was a party on the side of the respondents. By this point, Sotomayor had earned more than \$3 million from her book contracts with PRH since becoming a justice. (2019-20)

— Initially failed to recuse from merits case 19-518, *Colorado Department of State v. Michael Baca, et al.*, despite her close friendship with Polly Baca, one of the respondents. After some months, she did recuse. (2020)

Justice Elena Kagan

— Failed to recuse from several Obamacare merits cases — including 11-393, *NFIB v. Sebelius*; 14-114, *King v. Burwell*; 19-840, *California v. Texas* — even though she was the U.S. solicitor general at the time the White House and her office were crafting the legal defense of the law. (2011, 2014 and 2020)

— Initially failed to recuse in the (argued and reargued) merits case 15-1204, *Jennings v. Rodriguez*, despite her previous work on the case when U.S. solicitor general. Stepped aside when the error was brought to her attention. (2016 and 2017)

— A speech she gave at the University of Wisconsin Law School was part of its Dean’s Summit, which is an annual gathering for those who pledge at least \$1,000 per year to the school. (2017)

— Failed to recuse in 19-720, *U.S. v. Briones, Jr.*, a case that was remanded to the Ninth Circuit, even though she had previously participated in an earlier version of this case. (2021)

— Nothing wrong with justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Justice Neil Gorsuch

— Gave a talk at Trump International Hotel in Washington to The Fund for American Studies. TFAS is an associate member of the State Policy Network, whose Illinois-based partner organization was at the time representing Mark Janus in a major union dues case, 16-1466, *Janus v. AFSCME*, that was argued the following year. (2017)

— Failed to recuse in 19-560, *Nicassio v. Viacom, et al.* (cert. denied), where Penguin Random House was a party on the side of the respondents. Gorsuch has earned more than \$650,000 from his PRH book contract since becoming a justice. (2019-20)

— Nothing wrong with justices voting but as of 2020 was a registered Republican. (2020)

— Spoke at a Florida Federalist Society event that was closed to the press and included appearances by Gov. Ron DeSantis and former Vice President Mike Pence. (2022)

Justice Brett Kavanaugh

— Told the Senate Judiciary Committee during his confirmation hearing, “As we all know, in the United States political system of the early 2000s, what goes around comes around,” among other musings. Unclear what this was in reference to. (2018)

— Along with Alito, met with the head of the National Organization for Marriage at the Supreme Court. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC* that were unresolved at the time. (2019)

Justice Amy Barrett

— Americans for Prosperity spent more than \$1 million to help get Barrett confirmed, and she did not recuse from the merits case 19-251, *Americans for Prosperity Foundation v. Bonta*. (2021)

— Gave a speech at the McConnell Center at the University of Louisville, standing next to Minority Leader Mitch McConnell, during which she exhorted the public not to view the Court as political. The speech, for which video streaming and video recording were prohibited, was preceded by dinner with Barrett, McConnell and 12 to 15 of the senator’s friends. (2021)

Future justices:

Judge Ketanji Brown Jackson

— Nothing wrong with future justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Former justices:

Justice Ruth Bader Ginsburg

— Likened a Sen. Grassley proposal to create a judiciary inspector general’s office to Stalinism, saying that such oversight “is a really scary idea” that “sounds to me very much like [how] the Soviet Union was.” (2006)

— Was a featured presenter at the 100th anniversary gala of liberal magazine *The New Republic*. Worse, the event was underwritten by Credit Suisse, which earlier in the year was a party in a Court petition. (2014)

— Gave an interview to *The New Republic* in which she offered a dim view of a Texas anti-abortion law, HB2. The law was eventually challenged all the way to the Supreme Court, and Ginsburg did not recuse from the case. (2014-16).

— Called then-candidate Donald Trump a “faker” with “an ego” in an interview with CNN. Said she couldn’t “imagine what the country would be [like] with Donald Trump as our president” in an interview with the *New York Times*. Later apologized, saying, “My recent remarks [...] were ill-advised, and I regret making them. Judges should avoid commenting on a candidate for public office.” Ginsburg never recused from a case in which President Trump was a litigant. (2016; 2017-2020)

— Accepted a lifetime achievement award from the Genesis Prize Foundation, which came with a \$1 million in prize money that she later donated, though judicial gift regulations cap the value of what may be accepted at \$2,000. (2017)

— Following her Genesis Prize acceptance, was the guest of businessman Morris Kahn on a tour of the Middle East; Kahn had business before the Court the previous year — 17-136, *Openet Telecom, Inc. v. Amdocs* (cert. denied) — which preserved a lower court victory for Kahn’s company (Amdocs) and from which Ginsburg did not recuse. (2017-18)

— Accepted the \$1 million Berggruen Institute prize for philosophy and culture (also donated the money). (2019)

— Nothing wrong with justices voting but as of 2020 was a registered Democrat. (2020)

Justice Anthony Kennedy

— Press reports indicate he spoke to the Trump presidential campaign as the campaign was compiling a list of prospective Supreme Court nominees. (2016)

— Initially failed to recuse in merits case 17-269, *Washington v. U.S.*, despite his previous work on it as a lower court judge. Stepped aside once the error was identified. (2018)

Justice Antonin Scalia

— Voiced his opposition to tribunals for Guantanamo detainees weeks before the Court heard a case on that issue (from which he did not recuse, despite public outcry), saying, “We are in a war. We are capturing these people on the battlefield. [...] War is war, and it has never been the case that when you capture a combatant, you have to give them a jury trial in your civil courts. It's a crazy idea to me.” (2006)

— Attended Koch Industries-backed retreat in Palm Springs, Calif., at time in which Koch was bankrolling several litigants with cases before the Supreme Court. (2007)

— Addressed a closed-door, closed-press event, called a "Conservative Constitutional Seminar," hosted by the Tea Party Caucus. (2011)

— During a speech in Brooklyn, and as he and his colleagues were weighing the very issue, said it's “truly stupid” the Court would have the “last word” on whether an NSA surveillance program oversteps the bounds of the Fourth Amendment. (2014)

— Flew on a private plane, furnished by John Poindexter, from Houston to Marfa, Tex., to stay for free in a \$700-per-night room on Poindexter's ranch, where Scalia sadly passed away. Poindexter was a 2015 Supreme Court litigant in 15-150, *Hinga v. MIC Group*, cert. denied; Poindexter's company, J.B. Poindexter & Co., owns MIC Group. (2015-16)

Appendix B: Recent Ethical Lapses by Lower Court Judges

These lapses were compiled by Fix the Court staff in March and April 2022 and are in chronological order. Citations have been included.

1. In Jan. 2020, Fifth Circuit Judge Kyle Duncan deliberately misgendered the respondent, a transgender woman, more than two dozen times in his opinion in *U.S. v. Varner*.³²
2. In Mar. 2020, then-Western District of Kentucky Judge Justin Walker at his investiture ceremony disparaged the Chief Justice of the United States, talked about his appearances on Fox News and in so many words (e.g., “We will not surrender”) spoke as if he were separating himself from half the country — and half people whose litigation he’d soon be ruling on.³³
3. In June 2020, D.C. Circuit Senior Judge Laurence Silberman sent an email to every judge in his court and all D.C. District judges, plus other courthouse staff, in which he criticized a Senate proposal to rename U.S. military bases named after Confederate officers as “madness” and downplayed slavery being a cause of the Civil War.³⁴
4. In Dec. 2020, Senior Southern District of Iowa Judge Robert Pratt insulted then-President Trump and those he pardoned in a media interview, saying, “It’s not surprising that a criminal like Trump pardons other criminals. [...] Apparently to get a pardon, one has to be either a Republican, a convicted child murderer or a turkey.”³⁵
5. In April 2021, Judge Silberman in his opinion in *Tah v. Global Witness Publishing* went far beyond the facts of the case to rail against the purported media “bias against the Republican Party,” calling the *New York Times* and *Washington Post* “Democratic Party broadsheets” and adding that “Silicon Valley [...] similarly filters news delivery in ways favorable to the Democratic Party.”³⁶
6. In May 2021, a panel of Fifth Circuit judges removed Southern District of Texas Judge Lynn Hughes from a case, *U.S. v. Khan*, due to what the panel called a “fixed and inflexible view of the case” after making several anti-government remarks, including calling Justice Department lawyers “blue-suited thugs” and “retarded” and expressing, per the panel, that government attorneys, are “lazy, useless, unintelligent, or arrogant.”³⁷
7. In Aug. 2021, Ninth Circuit Judge Lawrence VanDyke in his opinion in *Ford v. Peery* compared his colleagues to career criminals, who would feel no “shame” if they had to confront what he called their “rap sheet,” i.e., a series of opinions VanDyke described as “habeas dysfunction.”³⁸
8. In Sept. 2021, Ninth Circuit Senior Judge Carlos Bea accepted an award at an event hosted by failed insurrectionist John Eastman.³⁹

³² *U.S. v. Varner*, 948 F.3d 250 (2020).

³³ See Judge Walker’s speech at this [link](#).

³⁴ See, “A judge’s all-courthouse email sparks debate over removal of Confederate symbols,” *Washington Post*, June 16, 2020 ([link](#)).

³⁵ See, “Federal judge in Iowa ridicules Trump’s pardons,” *Associated Press*, Dec. 29, 2020 ([link](#)).

³⁶ *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231 (2021).

³⁷ *U.S. v. Khan*, 997 F.3d 242 (2021).

³⁸ *Ford v. Peery*, 9 F.4th 1086, 1097 (2021).

³⁹ See, “Ninth Circuit Judge Carlos Bea Despicably Agrees to Be Honored by John Eastman’s Claremont Institute, at Event with Orwellian Panel on ‘Election Integrity,’” *Election Law Blog*, Sept. 1, 2021 ([link](#)).

9. In Sept. 2021, when confronted about breaking the federal recusal statute by *Wall Street Journal* reporters investigating judges' participation in cases in which they had a financial interest in a party, several judges downplayed the significance of their lawbreaking and their responsibility to have complied with the law. Examples include: Eastern District of Texas Judge Rodney Gilstrap pleading ignorance as to what was required by the recusal statute, claiming he had declined to disqualify himself in some cases because he believed they'd require little or no action on his part and in others because he didn't think his wife's holdings fell under the ambit of the law; Central District of California Judge R. Gary Klausner saying he had delegated conflict-screening to his staff; and Senior Eastern District of New York Judge I. Leo Glasser and District of Nebraska Judge John Gerrard faulting the judiciary's own financial reporting requirements, claiming that by only requiring the disclosure of stock ownership annually, they did not have motivation to keep themselves informed of their holdings year-round.⁴⁰
10. In Jan. 2022, Judge VanDyke wrote a bizarre separate concurrence to his own majority opinion in order to mock his fellow Ninth Circuit judges' jurisprudence on gun cases and demean their integrity.⁴¹
11. In Jan. 2022, in the midst of the Omicron surge, Fifth Circuit Judge Jerry Smith demanded that an attorney remove his mask during oral argument despite the fact that the attorney was plainly audible and made his preference to remain masked clear.⁴²
12. In Jan. 2022, writing that "The Good Ship Fifth Circuit is on fire," Judge Smith in a case involving United Airlines' vaccine mandate for employees lambasted his two colleagues who held the majority in a 2-1 decision, calling it "incoherent reasoning" and "an orgy of jurisprudential violence," which, had he written it himself, would cause him to "hide [his] head in a bag."⁴³
13. In Feb. 2022, Fifth Circuit Judge James Ho gave a speech defending Georgetown University Law Center's Ilya Shapiro for tweeting that President Biden's pledge to nominate a Black woman to the Supreme Court would result in a "lesser" nominee who will "always have an asterisk attached."⁴⁴

Of the judges listed above, only Silberman (in the all-court email instance) and Pratt to my knowledge have apologized for their intemperance.

⁴⁰ See, "Federal Judges With Financial Conflicts," *Wall Street Journal*, Sept. 28, 2021 ([link](#)).

⁴¹ *McDougall v. County of Ventura*, 20-56220 (5th Cir., Jan. 20, 2022).

⁴² See, "5th Circuit judge accused of forcing DOJ attorney to remove mask," *Reuters*, Feb. 3, 2022 ([link](#)).

⁴³ *Sambrano v. United Airlines*, 21-11159 (5th Cir., Feb. 17, 2022).

⁴⁴ See, "'Go ahead and cancel me too.' Judge defends embattled Georgetown Law hire," *Reuters*, Feb. 16, 2022 ([link](#)).