Statement of Sarah Turberville, The Constitution Project at the Project On Government Oversight
Before the House Committee on the Judiciary
"Closing the Gap in Judicial Ethics"
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Thank you, Chairman Nadler, Ranking Member Collins, and Members of the Committee for the opportunity to speak with you today about H.R. 1, the For The People Act of 2019. My name is Sarah Turberville and I am the director of The Constitution Project at the Project On Government Oversight. Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing; The Constitution Project was founded in 1997 and joined POGO in 2017. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

STATEMENT ON H.R. 1, THE FOR THE PEOPLE ACT OF 2019

Section 7001 of the For the People Act would close a conspicuous gap in federal ethics rules. It would require the Judicial Conference of the United States to issue a code of conduct applicable to each judge and justice of the United States, which may include provisions "that are applicable only to certain categories of judges or justices."[1] We strongly support this long-overdue ethics reform and encourage lawmakers to view this measure as a first step toward preserving the actual and perceived integrity of the federal courts.

By extending a code of ethics to the Supreme Court for the first time, the legislation seeks to balance the need to enhance the public's faith in the judiciary with the imperative to safeguard the separation of powers between the legislative and judicial branches. While tough questions concerning the scope and enforcement of a code of conduct for the Supreme Court may arise, the benefits of applying such a code to the justices—including the benefits that would flow to the public's understanding and perception of the courts—far outweigh any disadvantages.

A code of conduct for all judges and justices of United States courts could increase public confidence in the legitimacy, integrity, and independence of the courts. It would also better ensure fairer application of ethics rules—perhaps with the added benefit of the justices' closer scrutiny of their own conduct. A code of conduct for the entire federal judiciary has bipartisan support. In the last Congress, a Republican-sponsored bill contained an identical provision.[2]

[1] U.S. House of Representatives, "For the People Act of 2019" (H.R. 1), Introduced January 3, 2019, by Representative John P. Sarbanes. https://www.congress.gov/116/bills/hr1/BILLS-116hr1ih.pdf (Downloaded January 25, 2019)
[2] U.S. House of Representatives, "Judiciary ROOM Act of 2018" (H.R. 6755), Introduced September 10, 2018, by Representative Darrell E. Issa. https://www.congress.gov/bill/115th-congress/house-bill/6755 (Downloaded January 25, 2019)

JUDICIAL CODES OF CONDUCT

The concept of a code of conduct governing the behavior of judges is not new. In 1924, the American Bar Association (ABA) published its Model Code of Judicial Conduct. The ABA has since revised and updated the Model Code several times, most often with an eye toward better reflecting the need for unassailably ethical conduct by judges. Such conduct, and the public perception of such conduct, is essential to ensuring the judiciary is not only independent but enjoys the legitimacy conferred by public trust.

The Model Code, which has been adopted in whole or in various iterations by two-thirds of the states (an additional eight states are considering revising their codes in light of the ABA's latest revision), consists of several "canons" of judicial conduct.[3] The Judicial Conference of the United States adopted its Code of Conduct for United States Judges in 1973, based on the Model Code. The Code of Conduct applies to a wide range of judges: "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges." In addition, "the Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code."[4] It reads:

> Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary
> Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
> Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently
> Canon 4: A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office
> Canon 5: A Judge Should Refrain from Political Activity[5]

Taken together, the ABA Model Code and the Code of Conduct for United States Judges ensure that virtually every individual serving as a judge in this country is held accountable to a basic code of conduct. The glaring exception is the nine justices of the Supreme Court.

EXISTING ETHICS PROVISIONS FOR SUPREME COURT JUSTICES

Without doubt, the Supreme Court is exceptional. It is the only court created by the Constitution, which provides numerous protections for the Court's independence (for example, justices retain their positions for life during "good behavior").[6] Even so, Congress can place obligations on the justices that do not interfere with the courts' structural or decisional independence endowed by

[3] Each canon is accompanied by clarifying rules. In addition, the ABA has included commentaries with each canon offering further context and definition to the individual canons but also to the code as a whole. American Bar Association, "Jurisdictional Adoption of Revised Model Code of Judicial Conduct," October 17, 2018. https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/ (Downloaded January 7, 2019); American Bar Association, "Model Code of Judicial Conduct," 2010. https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ (Downloaded January 25, 2019)

[4] Judicial Conference of the United States, *Guide to Judiciary Policy*, Vol. 2, Ch. 2, 2014 https://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf (Downloaded January 25, 2019) (Hereinafter Code of Conduct)

[5] Like the ABA Model Code, the Code of Conduct has extensive commentary. Code of Conduct.

[6] United States Constitution, Art. III, Sec. 1.

the Constitution. Throughout history, whether by mandating the size of the Court, determining the length and dates of its term, setting out recusal standards, or imposing financial disclosure requirements, Congress has exercised its constitutional prerogative to pass laws that govern the Court's form and function.[7]

For example, several statutory provisions govern the conduct of federal judges, including Supreme Court justices. Most notably, Section 455 of Title 28 of the United States Code specifies when judges must recuse themselves from a proceeding.[8] In addition to a blanket obligation to recuse "in any proceeding in which [their] impartiality might reasonably be questioned," the law instructs judges to step aside when they have personal biases toward parties or knowledge of disputed facts; have previously been involved with a case as a lawyer, judge, or public servant; have a financial interest or a family member with a financial interest in the outcome; or when they or a family member are involved in or could be affected by the proceedings. This provision applies to "any justice, judge, or magistrate judge."

Further, the Ethics in Government Act of 1978 requires all federal judges, including Supreme Court justices, to submit annual financial disclosures.[9] To enforce this requirement, the Judicial Conference can refer to the attorney general anyone who is suspected of willfully failing to file required information or falsifying their disclosure.[10] There are civil and criminal penalties for these violations, and the Judicial Conference has promulgated regulations to facilitate compliance with the Act.[11] Notably, and in contrast with the Code of Conduct, which explicitly does not apply to Supreme Court justices, the regulations adopt the statute's definition of "judicial officer," which does include the justices.[12]

Members of the nation's highest court are not, however, covered by the Judicial Conduct and Disability Act of 1980, which created a process for the filing and investigation of complaints,

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[7] Congress's authority to structure the Supreme Court primarily flows from Article I, Sec. 8 of the Constitution, which empowers it "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." For example, the Judiciary Act of 1869 legislated the composition of the Supreme Court as a nine-member bench, consisting of a chief justice and eight associate justices. U.S. Congress, "An Act to Amend the Judicial System of the United States," 1869. https://www.loc.gov/law/help/statutes-at-large/41st-congress/session-1/c41s1ch22.pdf (Downloaded January 25, 2019)

[8] 28 U.S.C. § 455. The provision, originally passed in 1940, was extended to appeals court judges and Supreme Court justices in 1974.

[9] 5 U.S.C. App. § 101(f)(11).

[10] 5 U.S.C. App. § 104(b).

[11] 5 U.S.C. App. § 104(a); Judicial Conference of the United States, *Guide to Judiciary Policy*, Vol. 2D, 2018. https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf (Downloaded January 24, 2019)

[12] The statutes barring federal employees from receiving gifts and limiting their outside income apply to judges (5 U.S.C. § 7353(a); 5 U.S.C. App. §§ 501-505). However, the Judicial Conference has "delegated its administrative and enforcement authority under [the laws] for officers and employees of the Supreme Court of the United States to the Chief Justice," and explicitly excludes the justices from the rules, muddying their applicability to them. Regardless, the justices comply with those requirements as a matter of Court policy. Judicial Conference of the United States, *Guide to Judiciary Policy*, Vol. 2C, Ch. 6 § 620.65(a), 2010. https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf; Judicial Conference of the United States, *Guide to Judiciary Policy*, Vol. 2C, Ch. 10 § 1020.50, 2010. https://www.uscourts.gov/sites/default/files/vol02c-ch10.pdf; Chief Justice John Roberts, "2011 Year-End Report on the Federal Judiciary," December 31, 2011, p. 6. https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf (Downloaded January 24, 2019) (Hereinafter Roberts Report)

and for discipline of federal judges, based on misconduct or an inability to perform the job.[13] (A violation of the Code of Conduct is not necessarily sufficient grounds for punishment under the Act.[14])

WHY DO WE NEED A CODE OF CONDUCT FOR THE SUPREME COURT?

While the Code of Conduct does not formally apply to the justices, Chief Justice Roberts has said that they "do in fact consult the Code of Conduct in assessing their ethical obligations."[15] However, episodes over the last two decades have made clear that the Supreme Court's consultation of the Code is not sufficient. In several notable instances, the conduct of a Supreme Court justice clearly would have violated one or more of the Code's canons of judicial conduct. In other words, if Supreme Court justices were held to the same ethical standard as all other federal judges, their conduct would have been prohibited by the Code, or, even more seriously, the Judicial Conduct and Disability Act, and they could have been subject to censure or sanction of some kind.[16]

Most recently, during his 2018 confirmation process, then-Judge Brett Kavanaugh implied that he would partake in retribution for what he perceived as unfair treatment during the process. Judge Kavanaugh described the allegations of sexual misconduct against him as a partisan conspiracy and said that "what goes around comes around."[17] This comment likely violated the second canon of the Code of Conduct, the commentary for which states, "[a]n appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Now that Justice Kavanaugh is on the Court, these comments have arguably already harmed the perception of the Court's impartiality.

In another well-publicized incident, in the midst of the 2016 presidential campaign, Justice Ruth Bader Ginsburg made public comments that would have appeared to violate the Code of Conduct, were she subject to it. In an interview with the *New York Times*, she said: "I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president."[18] Justice Ginsburg went on to say, "For the country, it could be four

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[13] 28 U.S.C. §§ 351-364.

[14] Judicial Conference of the United States, *Guide to Judiciary Policy*, Vol. 2E, Ch. 3, Commentary on Rule 3, 2016, p. 7. http://www.vaed.uscourts.gov/documents/judcmplaintproc.pdf. The Act provides that "[a]ny person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct." 28 U.S.C. § 351.

[15] Roberts Report, p. 4.

[16] 28 U.S.C. §§ 351-364.

[17] "Testimony of Brett Kavanaugh, before the Senate Judiciary Committee on 'Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States,'" September 27, 2018 (Bloomberg Government transcript). https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/ (Downloaded January 25, 2019)

[18] Adam Liptak, "Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term," *New York Times*, July 10, 2016. https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html (Downloaded January 14, 2019)

years. For the court, it could be—I don't even want to contemplate that." With this statement, Justice Ginsburg would be in violation of the fifth canon, which expressly prohibits publicly endorsing or opposing a candidate for public office. Her statements would also be a possible violation of the third canon, which disqualifies a judge from hearing a case where they have a personal bias or prejudice concerning a party. While Justice Ginsburg later apologized for her comments, they raise concerns about the perception of her impartiality in cases in which President Donald Trump is a party.[19]

In a widely reported incident, in 2004, the late Justice Antonin Scalia participated in a hunting trip with Vice President Dick Cheney, mere weeks after the Supreme Court had agreed to hear a case that had been brought against the Vice President.[20] This kind of potential conflict of interest could certainly have violated the second canon, which states that judges should avoid "impropriety and the appearance of impropriety." Ultimately, the decision not to recuse was Justice Scalia's own, demonstrating one of the shortcomings of Supreme Court ethics enforcement. He rejected the argument that the hunting trip (which he pointed out had been planned before the petition for certiorari in the case had been filed and, he said, did not result in meaningful private conversations with Vice President Cheney, though he had been a guest on Air Force Two) was reasonable cause to question his impartiality.[21]

As these incidents demonstrate, this is not a novel problem. Our federal courts operate on a two-tiered system of ethics: lower court judges—whose decisions may be appealed—are held to account through a code of conduct and the Judicial Conduct and Disability Act. Supreme Court justices—whose decisions are often irreversible and have the widest impacts—are trusted to self-police.

The fate of the 83 ethics complaints lodged against now-Justice Kavanaugh provide a stark example of this incongruity. These complaints alleged he had violated the Judicial Conduct and Disability Act—encompassing violations of four of the five canons of conduct for United States judges—during his confirmation hearings in 2018, 2006, and 2004.[22] Chief Justice John Roberts referred the matter to the chief judge of the Tenth Circuit Court of Appeals to investigate the complaints.[23] But, on December 18, 2018, the Tenth Circuit's Judicial Council released its report, finding that while the allegations were "serious," nonetheless, "the complaints must be dismissed because, due to his elevation to the Supreme Court, Justice Kavanaugh is no longer a judge covered by the Act."

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[19] Jessica Taylor, "Ginsburg Apologizes for 'Ill-Advised' Trump Comments," *NPR*, July 14, 2016. https://www.npr.org/2016/07/14/486012897/ginsburg-apologies-for-ill-advised-trump-comments (Downloaded January 24, 2019)

[20] Dan Collins, "Scalia-Cheney Trip Raises Eyebrows," *CBS News*, January 17, 2004. https://www.cbsnews.com/news/scalia-cheney-trip-raises-eyebrows/ (Downloaded January 25, 2019)

[21] Notably, Scalia seemed to concede that he was bound by § 455, even though he concluded it did not apply to the situation ("My recusal is required if, by reason of the actions described above, my 'impartiality might reasonably be questioned.' 28 U.S.C. §455(a)") *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004) (Scalia, J. memo). https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf (Downloaded January 24, 2019) (Hereinafter Scalia Memo)

[22] *In Re: Complaints Under the Judicial Conduct and Disability Act*, Order, Judicial Council of the Tenth Circuit, 2018, p. 4. http://www.uscourts.gov/courts/ca10/10-18-90038-et-al.O.pdf (Downloaded January 25, 2019) (Hereinafter Judicial Council Order)

[23] Judicial Council Order; 28 U.S.C. §§ 352 et seq.

While a Supreme Court code of conduct would not in itself address the limited scope of the Judicial Conduct and Disability Act, Section 7001 of the For The People Act of 2019 would begin rectifying the imbalance in ethics standards.

A code of conduct would help inform justices' decision-making on recusals as well as extrajudicial comments and activities. Because a justice's decision to recuse from a case could have lasting implications for the Court, the law, and the country, questions concerning recusal are particularly challenging at the Supreme Court.[24] For instance, in his 2004 memo in *Cheney*, Justice Scalia wrote that recusal to avoid the perception of bias "might be sound advice if I were sitting on a Court of Appeals. ... There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different."[25] The often-counterproductive argument that justices have a "duty to sit"—that is, to hear cases—may have the effect of keeping justices involved in cases where recusal is prudent.[26] A code of conduct that offers guidance for balancing the duty to sit with the obligation to recuse could help the justices address the tension between the two.

Regardless of whether the situations I have just described represent cases where the justices' impartiality was actually impaired, the perception of impartiality is just as important to the Court's legitimacy. This reality is perhaps the strongest argument in favor of adopting a code of conduct for our nation's highest court. Such a code of conduct would provide explicit guidance to the justices to carefully assess whether a public statement or event could be objectively perceived as undermining their impartiality, independence, or integrity. It would also give the public a better sense of how the justices decide whether or not to recuse.

GUARDING AGAINST IMPROPER THREATS OF JUDICIAL DISCIPLINE

As we laud the introduction of this bill, we issue one note of caution. Congress and the Judicial Conference must take care to ensure that ethics enforcement is never used as a vehicle to retaliate against judges or justices for decisions with which policymakers may disagree. The decisional independence of the courts is a hallmark of our constitutional system. On too many occasions, judicial disciplinary procedures—up to and including threats of impeachment—have been used to retaliate against judges for issuing unpopular decisions.[27] As a Constitution Project task force on the courts said in 2000:

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[24] Supreme Court of the United States, "Statement of Recusal Policy," November 1, 1993. http://eppc.org/docLib/20110106_RecusalPolicy23.pdf (Downloaded January 24, 2019)

[25] Scalia Memo, p. 3.

[26] For example, see Jeffrey Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine," *Buffalo Law Review*, Vol. 57, 2009. https://scholars.law.unlv.edu/facpub/232/ (Downloaded January 25, 2019)

[27] For instance, at least six federal district judges were threatened with impeachment because of controversial rulings in the 1990s. The Constitution Project Task Forces of Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, New York: The Century Foundation, 2000, p. 139-145. http://constitutionproject.org/pdf/uncertain_justice.pdf (Downloaded January 25, 2019) (Hereinafter Task Force Report)

> …resort[ing] to judicial discipline as a vehicle for discouraging or correcting judicial error can be problematic. Judges' independence could be compromised if they must decide cases in the shadow of a judicial conduct organization poised to take action against them, should it deem one of their decisions sufficiently erroneous or unjustified.[28]

The fact that the canons of judicial conduct prohibit judges from making extrajudicial comments about their decisions exacerbates this concern. Unlike most public officials, judges cannot defend their decisions publicly and "set the record straight."[29] It is therefore incumbent on policymakers to defend the independence of the third branch, even in the face of politically unpopular decisions.

By assigning the task of developing an ethics code to the Judicial Conference, H.R. 1 takes an appropriately cautious approach to the complicated issue of judicial discipline. In fact, it is important to note that, while the Code of Conduct can inform disciplinary proceedings for lower-court judges, the disciplinary process stems from the Judicial Conduct and Disability Act, and not from the Code of Conduct itself. Further, the Act mandates the dismissal of complaints related to the merits of a case.

NEXT STEPS: REQUIRE GREATER TRANSPARENCY

Many task forces, blue-ribbon panels, and special commissions on the courts in recent decades have recommended developing mechanisms to provide the public with a better understanding of the operation of the judiciary.[30] We believe that robust disclosure obligations and enhanced transparency governing all United States judges—including those on the Supreme Court—would advance these goals. We urge Congress to consider measures beyond Section 7001 that would provide the public and litigants with accurate and timely information about relevant extrajudicial conduct of United States judges and justices.

Bringing greater transparency to recusal decision-making should be a priority. Judges' and justices' reasons for recusal are often unstated; the Supreme Court's decisions and orders simply note if a justice did not participate in an opinion or proceeding. A public explanation of the justification for recusal would promote the development of a body of precedent to support consistent application of recusal standards across the federal judiciary, and would assist judges in identifying situations that require actions like divestments so that they need not recuse in the future. Additionally, the public and litigants have a right to know why an individual in such a consequential position must step away from presiding over a case.

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[28] Task Force Report, p. 152.
[29] Task Force Report, p.151.
[30] For example, Task Force Report; Judicial Conference of the United States, *Strategic Plan for the Federal Judiciary*, September 2015. https://www.uscourts.gov/sites/default/files/federaljudiciary_2015strategicplan.pdf (Downloaded January 26, 2019); American Bar Association, *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence*, Washington, DC, 1997, https://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.authcheckdam.pdf (Downloaded January 27, 2019); James Sample, David Pozen, and Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice, 2008. https://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf (Downloaded January 28, 2019)

Litigants and the public should also have access to information about judges' and justices' public and non-public appearances. The Code of Conduct encourages judges to participate in charitable, educational, and civic activities; it prohibits them from participating in extrajudicial activities that "reflect adversely on [their] impartiality."[31] The current process for reporting these appearances is not adequate. Justices and judges report just some of these activities in their financial disclosures. Those disclosures seem to be triggered not by the fact of the appearance, but by reimbursements for transportation, lodging, or meals.[32] Since it is the appearances themselves that could color the public's perception of impartiality, public disclosure and improved access to information about these extrajudicial engagements is critical.

Congress should consider robust rules requiring timely disclosure of judges' and justices' appearances, regardless of their financial component; such rules would go a long way toward improving the public's awareness of judges' and justices' actions, while also requiring judges and justices to scrutinize their extrajudicial conduct carefully so as to avoid the appearance of impropriety.

Congress should also examine the current financial disclosure obligations for federal judges and justices to determine if the transactions and thresholds triggering disclosure are sufficient, as well as examine the need for improved public access to those disclosures.[33]

CONCLUSION

The federal courts rely on the public's belief in their legitimacy as a coequal branch of government in order to ensure that their rulings are honored. Public trust in the integrity of the judges and justices who comprise the judiciary is indispensable to that legitimacy. While the courts, and the Supreme Court in particular, generally enjoy higher levels of public faith and trust than the other two branches of government, incidents like the ones I have outlined erode the public's confidence in the institution.[34] Section 7001 is a long-overdue proposal to address pressing ethical questions concerning the Supreme Court, and should continue to receive bipartisan support.

We urge Congress to pass this provision to enhance both the actual and perceived integrity of our nation's federal courts, including the Supreme Court.

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[31] Code of Conduct, Canon 4.

[32] The rules for judicial financial disclosures require judges to report reimbursements from any single source that are individually worth more than $156 and in aggregate worth more than $390. Thus, an appearance that only resulted in a $40 parking reimbursement would not have to be reported, nor would an appearance that did not result in a reimbursement. Judicial Conference of the United States, *Guide to Judiciary Policy*, Vol. 2D, Ch. 3 § 330, https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf.

[33] See, for example, Fix the Court, "Financial Disclosures." https://fixthecourt.com/fix/financial-disclosures/

[34] Jeffrey Jones, "Trust in Judicial Branch Up, Executive Branch Down," *Gallup*, September 20, 2017. https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx (Downloaded January 27, 2019); Gallup, "Confidence in Institutions," 2018. https://news.gallup.com/poll/1597/confidence-institutions.aspx (Downloaded January 27, 2019)