Testimony of Gabe Roth
Executive Director, Fix the Court

"The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency"

Hearing before the U.S. House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Intellectual Property and the Internet

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Chairman Johnson, Ranking Member Roby and members of the subcommittee:

Thank you for the invitation to testify today. My name is Gabe Roth, and I am executive director of Fix the Court, a national nonpartisan organization that advocates for greater transparency and accountability in our federal courts.

With Profs. Amanda Frost and Charles Geyh having discussed the constitutionality of pro-transparency reforms in the judiciary, and the history and wisdom of these proposals, I will spend my time on why these reforms are necessary today in helping the public better understand the work of our federal courts and fully trust the impartiality of its judges and justices.

The Supreme Court and lower courts often point to ways in which they have improved their public engagement efforts in recent years, from permitting online filing[1] to presiding over mock cases in their courtrooms with high school students[2]. These are admirable efforts. But they do not absolve the judiciary for refusing to adopt pro-transparency, bipartisan reforms that would restore faith in our courts at a time that faith has declined precipitously. Now on to the proposals at hand—

First, on whether the Supreme Court should have a formal, binding code of conduct and whether Congress should compel the justices to adopt one:

Profs. Frost and Geyh in their testimony today have described the history of the Judicial Conference's Code of Conduct for U.S. Judges, why the justices of the Supreme Court do not believe it applies to them and how Congress could, by statute, compel the justices to draft their own ethics code. I agree with their views and believe that the justices should welcome the opportunity to demonstrate their commitment to ethics. This does, however, raise a question I have often heard: is a Supreme Court Code of Conduct a solution in search of a problem?

I believe the answer is "no," and it is an easy "no." The impartiality of our judiciary should be beyond reproach, so having a basic ethics code for its members to follow is a natural outgrowth of that common value – one that should be no less rigorously applied to our nation's highest court.

[1] "Electronic Filing," Supreme Court of the United States, Nov. 13, 2017. https://www.supremecourt.gov/filingandrules/electronicfiling.aspx

[2] "Landmark Free Speech Case Opens Students' Eyes to Role of Appellate Courts," U.S. Courts, Apr. 18, 2019. https://www.uscourts.gov/news/2019/04/18/landmark-free-speech-case-opens-students-eyes-role-appellate-courts

It is not a coincidence that the top courts in nearly every U.S. state follow an ethics code that's modeled off the Judicial Conference's. The Supreme Court of Georgia, for example, has replicated the federal code's five canons almost verbatim[3], albeit combining canons one and two. The justices on the Supreme Court of Alabama abide by a seven-canon code[4], which takes the five canons of the federal code and adds two more, encouraging judges to engage in extrajudicial activities that promote justice and counseling them to file annual financial disclosure reports. Similarly, the courts of last resort in nearly every modern democracy have formal conduct codes[5].

Yes, there are recusal statutes that assert a judge or justice shall not sit on a case in which he or she has a financial interest or one in which a family member is taking part. But there arise gray areas during the course of performing one's duties as a judge or justice that are not directly covered by the recusal statute but that would be considered by a conduct code. This would include a judge or justice speaking publicly about a presidential candidate[6] or accepting gifts from a well-known political donor[7]. It would include a judge or justice appearing at an annual fundraiser for a partisan organization[8] or sitting on a case involving a publishing company[9] who has just paid her a hefty book advance.

I present these examples not to single out any individual member of the Supreme Court but to demonstrate that although the high court's opinions may be final, its members are not infallible. I am confident that most, if not all of the justices I just referred to would regret their actions in those

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[3] Georgia Code of Judicial Conduct: "Canon 1 – Judges shall uphold the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety in all of their activities.
"Canon 2 – Judges shall perform the duties of judicial office impartially, competently, and diligently.
"Canon 3 – Judges shall regulate their extra-judicial activities to minimize the risk of conflict with their judicial duties.
"Canon 4 – Judges shall refrain from political activity inappropriate to their judicial office."
https://www.gasupreme.us/wp-content/uploads/2015/06/georgia_code_judicial_conduct_revised_5-14-15.pdf.

[4] Alabama Judicial System Canons of Judicial Ethics: "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 his activities.
"Canon 3. A judge should perform the duties of his office impartially and diligently.
"Canon 4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.
"Canon 5. A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.
"Canon 6. A judge should regularly file reports of his financial interests.
"Canon 7. A judge or a judicial candidate shall refrain from political activity inappropriate to judicial office."
http://judicial.alabama.gov/library/RulesCanons.

[5] "Ethics Codes in Foreign Courts," comprising summaries of ethics codes in the top courts in Australia, Canada, Estonia, Finland, France, Italy, Sweden and the U.K., https://fixthecourt.com/wp-content/uploads/2019/06/Ethics-codes-in-foreign-courts.pdf.

[6] "Justice Ruth Bader Ginsburg calls Trump a 'faker,' he says she should resign," CNN, July 13, 2016.
https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html.

[7] "Friendship of Justice and Magnate Puts Focus on Ethics," N.Y. Times, June 18, 2011,
https://www.nytimes.com/2011/06/19/us/politics/19thomas.html.

[8] "Should Justices Keep Their Opinions to Themselves?" N.Y. Times, June 28, 2011,
https://www.nytimes.com/2011/06/29/opinion/29shesol.html.

[9] Supreme Court of the United States, 12-965, *Greenspan v. Random House, Inc., et al.*, *cert. denied*, Apr. 15, 2013.
According to Justice Sotomayor's 2012 financial disclosure report, available at
https://s3.amazonaws.com/s3.documentcloud.org/documents/710470/sotomayor-2012-2012.pdf, Random House paid her $1.925 million in advances in the year before this case reached the Supreme Court docket.

instances; a congressional directive compelling the justices to draft and adopt a conduct code would give the nine guidance in navigating through the gray areas we know they will encounter. And there's a reason that the Republican-led H.R. 6755 in the last Congress and the Democratic-led H.R. 1 in this Congress both included the creation and adoption of a code of conduct for the Supreme Court: it's a nonideological solution that leaders in both parties see value in.

If Congress has an Office of Ethics, two ethics committees and a Code of Official Conduct[10], and the executive branch has the Office of Government Ethics and Standards of Ethical Conduct for Branch Employees[11], the Supreme Court should, at the least, have an ethics code.

Second, on whether judges' and justices' annual financial disclosures should be posted online:

Here we find another way in which the Supreme Court, and the judiciary as a whole, operates differently from the other branches – and without good reason. There is currently no requirement that judges' and justices' annual financial disclosure reports[12] be placed online. To the outside observer, the current protocol makes it seem as if the judiciary is hiding something. Though there have been legislative proposals to require judges and justices to provide greater detail in their reports, from the value of their reimbursed transportation, lodging and food to closing the various gift loopholes that exist in federal law, for now, I want to focus on how the courts are behind the times digitally, and how easily that can be fixed.

The reports, as you know, since you as members of Congress fill out similar reports yourselves, play a valuable role in ensuring the ethical conduct of judges and justices. They list investments, so we can determine if a jurist has a financial entanglement that should compel a recusal. They list gifts and travel, so we can determine if those funding such trappings have open cases and are looking to curry favor. They list outside income, which has a statutory limit.

Transparency advocates are asking for something simple: the Administrative Office of U.S. Courts should follow the lead of Congress and the executive branch and create a webpage to which all Article III reports are uploaded each spring. They should be downloadable, machine-readable and, importantly, maintain an appropriate level of privacy. It should not be left up to Fix the Court to obtain the .tiff files of the reports we receive each year, covert them to .pdf files and then post them online, as we just did last week. We are happy to do it, but this is far from ideal. After all, members of the judiciary already must fill out and file their reports digitally, so the public should obtain them the same way, without having my organization act as the middleman.

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[10] House Committee on Ethics, "Code of Official Conduct," https://ethics.house.gov/publication/code-official-conduct.

[11] Office of Gov't Ethics, "Standards of Ethical Conduct for Employees of the Executive Branch" (eff. Jan. 1, 2017), https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf.

[12] Soon after the post-Watergate Ethics in Government Act passed, several federal judges challenged the disclosure requirement in federal court, 79-2351, *Duplantier et al. v. U.S.* The judges lost in the Fifth Circuit (from the opinion: "At issue in this class action brought by federal judges is the complex legal question of whether an act of Congress the Ethics in Government Act of 1978 insofar as its provisions require federal judges annually to file personal financial statements available for public inspection, is violative of the Constitution of the United States. After carefully balancing the interests involved, we conclude that the Act is not unconstitutional."), and the Supreme Court denied *cert.*, meaning the lower court ruling stood, and the disclosure requirement has remained to this day.

Two years ago the AO's Committee on Financial Disclosure began placing the reports on thumb drives, which they now distribute to members of the press and public for free upon request. That is a marked improvement over paper releases and has demonstrated that progress is possible. But we are not there quite yet, as it still can take many weeks, and sometimes months, for the reports to be prepared and distributed by an overworked committee staff (and I will explain why that delay is problematic in the next section).

Those who work for the Committee of Financial Disclosure have said that the main obstacle to more prompt, digital responses is staffing, as the same few individuals in charge of overseeing judges' and justices' annual filings work with nominees to file their initial financial statements. Given the current number of judicial vacancies, coupled with the pace of confirmations and the number of judges eligible to take senior status, all of which are projected to continue for decades, a greater investment in committee staff, coupled with an amendment to the disclosure statutes, could hasten the ability to digitize and disseminate these reports to the public.

Third, on why judges' and justices' recusal explanations should be made public:

Each term, the Supreme Court receives about 7,000 petitions for review, and close to 99 percent are denied. Among those denials, which are listed in batches in Monday orders lists, the following phrase or a close variation appears about 200 times[13] per term, "Justice X took no part in the consideration or decision of this petition."

This phrase denotes that a justice has disqualified himself or herself from voting on whether to hear a case. If that case is granted, then the docket will note a recusal in the same way. But that is all the court will say – not "Justice Breyer took no part because his brother, a federal judge in California, heard an earlier version of the case," not "Justice Alito took no part because his sister, a partner at a multinational law firm, worked on a brief in the case," not "Chief Justice Roberts took no part due to his stock ownership."

The exercise of appending a few words to a recusal notice, as I described in the three examples above, would accomplish several things. It would assist the justices in thinking more about their potential conflicts of interest. Since Fix the Court was founded about four years ago, we have identified[14] several missed recusals from the justices – instances in which a justice should have, according to the federal recusal statute, disqualified himself or herself from hearing a case but did not: for example, Chief Justice Roberts, Justice Breyer and Justice Alito have missed recusals due to their stock ownership; Justice Kagan and Justice Kennedy have overlooked their involvement in earlier versions of high court cases; and Justice Sotomayor failed to recuse from a suit against her publisher.

Recusal explanations would let the public evaluate the reason for there being fewer than nine justices considering a petition. In October Term 2016, for example, Chief Justice Roberts recused

[13] "The Supreme Court's Unexplained OT17 Cert. -Stage Recusals Explained," Fix the Court, May 3, 2018. https://fixthecourt.com/wp-content/uploads/2018/05/OT17-cert.-stage-recusals-chart.pdf

[14] "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," Fix the Court, June 2, 2019, https://fixthecourt.com/2019/06/recent-times-justice-failed-recuse-despite-clear-conflict-interest.

from at least four Verizon petitions[15], even though he sold his Verizon shares in June 2015[16]. That gave petitioners an unfortunate disadvantage, as it still takes four votes to grant a petition whether eight or nine justices are eligible to hear a case.

Finally, due to the timing of the release of the justices' disclosure reports, it is possible that a justice could recuse from a case and the public would be left in the dark for more than a year before learning the reason behind the disqualification. That's because, unlike top officials in the other branches, the justices are not beholden to the STOCK Act's requirement to report a securities transaction within 45 days. This information gap is not theoretical. In January 2016 Chief Justice Roberts sold his Microsoft shares in order to sit on a case[17], but there was no official confirmation until his subsequent disclosure report was released in June 2017[18].

You may be surprised to learn that the Supreme Court used to list recusal explanations[19]. In the late 19th and early 20th centuries, when a justice was not able to hear a case for any number of reasons – a prior vacancy, an illness and a delay due to riding circuit chief among them – the weekly orders list would state, and I will quote from a 1904 orders list[20] here, "Mr. Justice [Edward] White, not having been present at the argument, took no part in [the] decision" regarding, in this case, a Georgia waterworks contract. This one from 1889[21]: "Mr. Justice [David] Brewer, not having been a member of the court when this case was argued, took no part in [a] decision" involving elevated rail tracks and eminent domain.

The high court – and, truth be told, lower courts, whose judges face the same types of conflicts – should resume that practice in a nod to transparency. Since we know the judiciary tends not to make these types of improvements of their own volition, Congress could write a law requiring it to do so.

The measure could be structured so a disqualified jurist would refer back to the language of the recusal statute when announcing his or her recusal – e.g., that it was triggered by personal bias (28 U.S.C. §455(b)(1)), prior involvement in a case as an attorney or judge (§455(b)(2)), prior involvement as a government employee (§455(b)(3)), one's finances §455(b)(4) or one's family involvement §455(b)(5).

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[15] "OT16 Supreme Court Cert.-Stage Recusals," Fix the Court, July 18, 2017. http://fixthecourt.com/wp-content/uploads/2017/07/SCOTUS-orders-OT16.pdf.

[16] "Chief Justice Roberts 2015 Financial Disclosure Report." http://fixthecourt.com/wp-content/uploads/2016/06/Roberts-2015.pdf.

[17] "Chief Justice Roberts sold $250K in Microsoft stock," Associated Press, Feb. 4, 2016, https://www.detroitnews.com/story/news/nation/2016/02/04/supreme-court-justices-investments/79806880/.

[18] "Chief Justice Roberts 2016 Financial Disclosure Report." http://fixthecourt.com/wp-content/uploads/2017/06/Roberts-2016-Financial-Disclosure-Report.pdf.

[19] "FTC Calls on SCOTUS to Resume Century-Old Practice of Recusal Explanations," Fix the Court, Apr. 27, 2017. https://fixthecourt.com/2017/04/ftc-calls-on-scotus-to-resume-century-old-practice-of-recusal-explanations.

[20] "1904 Supreme Court Orders," https://www.supremecourt.gov/pdfs/journals/scannedjournals/1904_journal.pdf.

[21] "1889 Supreme Court Orders," https://www.supremecourt.gov/pdfs/journals/scannedjournals/1889_journal.pdf.

In closing, I believe that Congress has an important role to play in building a more open and accountable third branch – whether by encouraging a new code of conduct, granting greater access to financial disclosures or compelling explanations for judicial disqualifications.

I have been honored to work with members of this subcommittee and the full Judiciary Committee over the past few years on proposals that would build a more open and honest judiciary. That has included work on the Judiciary ROOM Act in the last Congress, which passed the full committee by voice vote[22] and would have vastly improved transparency in the third branch, by requiring live audio and video in federal appellate courts; a formal code of conduct and recusal explanations for Supreme Court justices; and improved public access to court documents.

I am pleased that this and related efforts are continuing in this Congress, as both Chairman Nadler and Ranking Member Collins[23] spoke positively about instituting an ethics code for the Supreme Court during a hearing in January, and members in both parties have in previous Congresses, as well.

These nonpartisan, good-government reforms would fortify the public's faith in our courts at a time when such faith is not a given, and the judiciary's consideration of reform remains underwhelming. I appreciate the subcommittee's attention to these issues.

Chairman Johnson, Ranking Member Roby and members of the subcommittee, thank you again for the opportunity to testify. I look forward to answering any questions you may have.

[22] "H.R.6755 - Judiciary ROOM Act of 2018," Sept. 13, 2018. https://www.congress.gov/bill/115th-congress/house-bill/6755/all-actions.

[23] Chairman Jerrold Nadler: "The Supreme Court [is] the only court in the country currently not subject to any binding code of ethics," at 9:00. Ranking Member Doug Collins: "I do want to find one – I always like to try and maybe find one point of agreement that we can have on this. […Let's] explain a little bit more about the Supreme Court and encouraging them to put [an ethics code] together because that's something I think we can find agreement on," at 1:02:47, "Hearing on H.R. 1, For the People Act," Jan. 29, 2019. https://www.youtube.com/watch?v=isb6ssJy2uY.