



**Testimony of Dylan Hedtler-Gaudette, Government Affairs Manager
Project On Government Oversight
before the House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
on “Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”
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Thank you, Chairman Johnson, Ranking Member Issa, and Members of the subcommittee for the opportunity to speak with you today about judicial ethics, financial conflicts of interest, and the public trust. My name is Dylan Hedtler-Gaudette and I am the Government Affairs Manager 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. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. The federal judiciary is a core focus of this work. As such, I am here to urge Congress to enact legislation that would help bolster the federal judiciary by strengthening its ethical standing and safeguarding its indispensable role in our constitutional system of ordered liberty.

The Constitution Project at the Project On Government Oversight recently convened a task force comprised of academics, experts, and former judges to analyze and assess some of the issues plaguing the federal judiciary and how to solve them.¹ The culmination of that convening was a comprehensive report in which we set forth proposals aimed at addressing numerous challenges to the continued legitimacy of the courts, with a particular focus on strengthening public faith in the Supreme Court. I would urge the members of the House Judiciary Committee to read this report, which I have included as an accompaniment to this testimony.

The North Star of my testimony today will be the need to ensure the legitimacy, integrity, and independence of the federal judiciary. The courts are tasked with deciding some of the weightiest issues of the day, and the federal judges who make those decisions must be impartial arbiters of the law. When that impartiality is called into question, the rule of law is undermined. And since lifetime appointments mean federal judges and Supreme Court justices don't face the same accountability measures as elected officials, it's critical that they are — and that they are perceived to be — impartial. That is why a recent report from the *Wall Street Journal* is so troubling: It found that more than 130 federal judges had financial conflicts of interest that

¹ Task Force on Federal Judicial Selection, Project On Government Oversight, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, (July 8, 2021), <https://www.pogo.org/report/2021/07/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy/>.

should have triggered recusals in cases they ruled on.²

It is imperative to emphasize that these issues are not new, but rather a reflection of a more fundamental problem: the federal judiciary is the least transparent, and therefore least accountable, branch of government. This characterization applies across a range of dimensions, and it requires systemic fixes.

Recommendations

There are a wide range of reforms worthy of consideration, but I will focus on a relatively narrow set of proposals that will help achieve the goal of promoting more accountability, transparency, and efficacy within the federal judiciary by strengthening its independence and integrity. It is vital to point out that enhancing accountability and transparency are meant to strengthen key features of the federal judiciary, most especially the decisional independence of federal judges and Supreme Court Justices.

These five proposals address longstanding problems in the judiciary by expanding financial disclosure requirements, requiring transparency in recusal decisions, and supporting the development of a code of ethics that will apply to the Justices of the Supreme Court, who also happen to be nine of the most powerful people in the nation.

1. Amend the Ethics in Government Act of 1978 to require all federal judges, including Justices of the Supreme Court, to file periodic transaction reports when they make securities transactions in excess of \$1,000.³ These reporting requirements should be modeled on those set forth for members of Congress and certain executive branch officials in the Stop Trading on Congressional Knowledge (STOCK) Act.⁴
2. Amend the Ethics in Government Act of 1978 to require all financial disclosure documents filed by federal judges to be posted online, including annual financial disclosures and periodic transaction reports (as required by recommendation 1 above).
3. Amend the Ethics in Government Act of 1978 to require more detailed disclosure and reporting from federal judges (including Justices of the Supreme Court) with regard to travel and gifts provided by third parties, including specifically requiring additional information about personal hospitality perks and the nature and details of events attended.
4. Amend 28 U.S.C. § 455 to require federal judges (including Justices of the Supreme Court) to provide explanations for recusal decisions publicly and in a timely manner.⁵
5. Direct the Supreme Court of the United States to draft and publish a code of ethics. Provide for a public notice and comment process.

² James Grimaldi, Coulter Jones, and Joe Palazzolo, “131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest,” *Wall Street Journal*, September 28, 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>.

³ Ethics in Government Act of 1978, 5 U.S.C. (2010), <https://www.govinfo.gov/app/details/USCODE-2010-title5/USCODE-2010-title5-app-ethicsing>.

⁴ Stop Trading on Congressional Knowledge Act of 2012, Pub. Law No. 112-105, 126 Stat. 291 (2012), <https://www.govinfo.gov/app/details/STATUTE-126/STATUTE-126-Pg291>.

⁵ Disqualification of justice, judge, or magistrate judge, 28 U.S.C. § 455 (2011), <https://www.govinfo.gov/app/details/USCODE-2011-title28/USCODE-2011-title28-partI-chap21-sec455>.

There is and has been bipartisan support for each of these proposals. POGO recently worked with an expert task force, including two former state supreme court chief justices, a former federal circuit judge, and a leading scholar of the federal courts. Their report identifies improving financial and ethics rules as among the most important reforms for safeguarding the judiciary's legitimacy.⁶ These experts span the political spectrum, and their consensus around the need for these kinds of reforms is instructive.

In addition to broad-based support for these reforms in civil society, I want to highlight and commend bipartisan support in Congress, particularly from Ranking Member Issa (R-CA). A bill he introduced in the 115th Congress contained some of these ideas, including the creation of a code of ethics **that applies to Supreme Court Justices** and additional transparency around recusal decisions.⁷ Building on that proposal, the chairman of this sub-committee, Representative Hank Johnson (D-GA), introduced a bill in the 116th Congress that also integrated many of these reforms.⁸ And another member of the House Judiciary Committee, Representative David Cicilline (D-RI), led the House version of a bipartisan bill in the 116th Congress that would require more transparency in travel and gift arrangements for federal judges.⁹

It isn't just the House that has expressed bipartisan interest in and support for these proposals. Earlier this year, the chair and ranking member of the Senate Judiciary Committee sub-committee responsible for overseeing the federal judiciary, Senator Sheldon Whitehouse (D-RI) and Senator John Kennedy (R-LA), respectively, sent a letter to the Department of Justice and the U.S. Marshal Service regarding the Supreme Court, asking for documents relating to their travel and hospitality funded by third parties.¹⁰ In a similar vein, Senator Whitehouse and Senator Lindsey Graham (R-SC) sent a letter earlier this year to Chief Justice John Roberts calling on the federal judiciary to "strengthen judicial ethics standards."¹¹ Senator Whitehouse led the Senate version of the House bill to address opacity in judicial travel and who pays for it.¹² And Senator Kennedy introduced a bill that would essentially require Supreme Court Justices to file periodic transaction reports.¹³ The number and variety of solutions from across parties and chambers highlights the fact that the problem of judicial branch integrity is nonpartisan — and persistent.

⁶ Task Force on Federal Judicial Selection, *Above the Fray*, 15-18 [See note 1].

⁷ Judiciary Reforms, Organization and Operational Modernization Act of 2018, H.R. 6755, 115th Cong., § 201-202 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6755/text>.

⁸ Twenty-First Century Courts Act, H.R. 6017, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/6017/text>.

⁹ Judicial Travel Accountability Act, H.R. 4715, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/4715/text?r=6&s=>.

¹⁰ Madison Alder, "Senators Seek Justices' Travel Records in Bipartisan Letter," *Bloomberg Law*, June 8, 2021, <https://news.bloomberglaw.com/us-law-week/senators-seek-justices-travel-records-in-bipartisan-letter>.

¹¹ Office of Senator Sheldon Whitehouse, "Whitehouse, Graham Call on Federal Judiciary to Strengthen Judicial Ethics Standards," Press Release, February 2, 2021, <https://www.whitehouse.senate.gov/news/release/whitehouse-graham-call-on-federal-judiciary-to-strengthen-judicial-ethics-standards->.

¹² Judicial Travel Accountability Act, S. 2632, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2632/text?r=71&s=1>.

¹³ Supreme Court Transparency Act, S. 956, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/956/text>.

Expanding Financial Disclosure Requirements and Why It Matters

The recent *Wall Street Journal* investigation was not the first to uncover instances of judges failing to recuse in cases where they had financial conflicts.¹⁴ This ongoing problem underscores the insufficiency of current disclosure laws. The judiciary should, at a minimum, be brought up to the same level as Congress and the executive branch in terms of financial disclosure, transparency, and reporting rules. This can be effected by folding judges and justices into standard reporting mechanisms, modernizing the way disclosures are made available, and expanding the breadth and depth of information necessary to complete financial disclosures.

Congress currently requires federal judges, including Supreme Court Justices, to file annual financial disclosures per the Ethics in Government Act of 1978. However, these disclosures are filed in an arcane and byzantine process that requires no publicly available posting online of the documents. In contrast, financial disclosure documents for Congress and the executive branch are easily accessible and available online.¹⁵ If judicial financial disclosures were similarly available, it would be much easier for litigants and watchdogs to catch conflicts sooner, rather than watching cases including potential conflicts proceed through the courts while someone else takes on the painstaking and labor-intensive searches that the current system requires. While the onus is on judges to identify their own conflicts and act accordingly, greater transparency provides a second line of defense that is clearly needed.

Congress could help create that line of defense by amending the Ethics in Government Act of 1978 to require all financial disclosure documents filed by federal judges to be posted online, including annual financial disclosures and periodic transaction reports.

Another significant shortcoming of judicial financial disclosure and reporting is that federal judges and Supreme Court Justices do not have to comply with certain disclosure rules meant to expose and prevent insider trading. Members of Congress (as well as some of their staff) and certain segments of executive branch officials must comply with periodic transaction reporting requirements when they make securities transactions, such as stock trades.¹⁶ But while federal judges and Supreme Court Justices have similar levels of access to nonpublic information with which they could make insider trades, no such reporting rules apply to them. This discrepancy makes little sense.

Congress could address this imbalance by amending the Ethics in Government Act of 1978 to require all federal judges, including Justices of the Supreme Court, to file periodic transaction reports when they make securities transactions in excess of \$1,000.¹⁷ These reporting

¹⁴ Reity O'Brien, Kytja Weir, and Chris Young, "Federal Judges Plead Guilty," *Center for Public Integrity*, April 28, 2014, <https://publicintegrity.org/2014/04/28/14630/federal-judges-plead-guilty>.

¹⁵ "Financial Disclosure Reports," *Clerk of the U.S. House of Representatives*, accessed October 12, 2021, <https://disclosures-clerk.house.gov/PublicDisclosure/FinancialDisclosure>; "Financial Disclosures," *The White House*, accessed October 12, 2021, <https://www.whitehouse.gov/disclosures/financial-disclosures/>.

¹⁶ Jack Maskell, "The STOCK Act, Insider Trading, and Public Financial Reporting by Federal Officials," *Congressional Research Service*, R42495 (April 18, 2013), <https://sgp.fas.org/crs/misc/R42495.pdf>.

¹⁷ Ethics in Government Act of 1978 [see note 3].

requirements should be modeled on those set forth for members of Congress and certain executive branch officials in the Stop Trading on Congressional Knowledge (STOCK) Act.¹⁸

Finally, federal judges and Supreme Court Justices currently have insufficient restrictions and transparency requirements when it comes to travel perks and personal hospitality gifts from third parties, including stakeholders with cases and interests before the courts.¹⁹ As POGO has long noted, public appearances by the Justices that do not involve reimbursements or gifts can still color the public's perception of impartiality, and public disclosure and improved access to information about these extrajudicial engagements is critical.²⁰

Congress could undergird the public's faith in the judiciary by amending the Ethics in Government Act of 1978 to require more detailed disclosure and reporting from federal judges (including Justices of the Supreme Court) with regard to travel and gifts provided by third parties, including specifically requiring additional information about personal hospitality perks and the nature and details of events attended.

From time to time, security concerns will be offered as a reason why additional transparency and disclosures relating to financial information is inappropriate. And we agree that ensuring the physical safety and security of government officials — including federal judges — is a legitimate concern and an important matter. But the proposals we endorse here to support better accountability and transparency have little bearing on those safety issues. Furthermore, Congress can also pursue other legislative measures aimed at strengthening the safety and security of those who serve in the judiciary, including by providing for appropriate redactions within disclosure and reporting strictures.

Transparency in Recusal Decisions and Why It Matters

As our task force noted, “our Constitution and common law have shaped a jurisprudence in which the public has access to all criminal and civil judicial proceedings. Thus, another important facet of judging is communication with the public.”

However, this communication is lacking in one crucial area: judges are not required to provide any rationale or explanation for recusal decisions. The Justices provided these explanations around the turn of the twentieth century, but they have not done so since 1904.²¹

Recusals are where the rubber meets the road in terms of ensuring the most essential characteristic of the judicial process broadly and of judges specifically: impartiality. The only

¹⁸ Stop Trading on Congressional Knowledge Act of 2012, Pub. Law No. 112-105, 126 §291 (2012), <https://www.govinfo.gov/app/details/STATUTE-126/STATUTE-126-Pg291>.

¹⁹ Mark Berman and Christopher Ingraham, “Supreme Court justices Are rock stars. Who pays when the justices travel around the world?” *Washington Post*, February 19, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/what-supreme-court-justices-do-and-dont-disclose/>.

²⁰ Sarah Turberville, “Closing the Gap in Judicial Ethics,” *Project On Government Oversight*, January 29, 2019, <https://www.pogo.org/testimony/2019/01/closing-the-gap-in-judicial-ethics/>.

²¹ Gabe Roth, “Explaining the Unexplained Recusals at the Supreme Court,” *Fix the Court*, May 3, 2018, <https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf>.

way impartiality can be guaranteed is if those in the position to adjudicate cases are free of conflicts that would render their decisions corrupt, suspect, or otherwise illegitimate.

But as we have learned — through the *Wall Street Journal* report, along with the years and years of similar reporting that preceded it — the current system relies entirely on the flawed and imperfect assessment of the judges themselves to make recusal decisions, often resulting in glaring mistakes or intentional malfeasance.²² Due to the lack of accountability and transparency when it comes to recusal decisions, there is a lack of credibility when it comes to the impartiality of federal judges. It threatens the entire edifice of justice and the rule of law upon which our constitutional system is based.

It also represents a missed opportunity, especially for the Supreme Court, to give the public more insight into its decision-making and help build more explicit rules and norms for what situations merit recusal.²³

That’s why we recommend Congress amend 28 U.S.C. § 455 to require federal judges (including Justices of the Supreme Court) to provide explanations for recusal decisions publicly and in a timely manner.²⁴

A Supreme Court Code of Ethics and Why It Matters

The Supreme Court does not have a formal code of ethics to which its members must adhere, even though all other federal judges have such a code, as do both Congress and the executive branch.²⁵ When delving into the question of why all other federal judges are accountable to a specific and publicly available code of ethics, while the Supreme Court is not, Chief Justice Roberts has said that Justices “do in fact consult the Code of Conduct in assessing their ethical obligations.”²⁶ However, episodes over the last two decades have made clear that the Supreme Court’s “consultation” of the Code is not sufficient.²⁷

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. Were Supreme Court Justices to be held to

²² Gabe Roth, “More Than 100 Federal Judges Failed to Recuse When They Owned Stock in a Litigant. What’s Their Excuse(s)?”, *Fix the Court*, September 30, 2021, <https://fixthecourt.com/2021/09/100-federal-judges-failed-recuse-owned-stock-litigant-whats-excuses/>.

²³ Task Force on Federal Judicial Selection, *Above the Fray*, 17-18 [see note 1].

²⁴ Disqualification of justice, judge, or magistrate judge, 28 U.S.C. § 455 [see note 5].

²⁵ “Code of Conduct for United States Judges,” *United States Courts*, last modified March 12, 2019, <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>; “Code of Official Conduct,” *U.S. House of Representatives Committee on Ethics*, February 26, 2021, <https://ethics.house.gov/publications/code-official-conduct>; “Standards of Conduct for Employees of the Executive Branch,” *U.S. Office of Government Ethics*, accessed October 12, 2021, https://www.oge.gov/web/oge.nsf/resources_standards-of-conduct.

²⁶ Chief Justice John Roberts, Supreme Court of the United States, *2011 Year-End Report on the Federal Judiciary*, (December 31, 2011), 4, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

²⁷ “Justice Ruth Bader Ginsburg Bashes Donald Trump, Calls Him ‘a Faker,’” ABC News, July 12, 2016, <https://abcnews.go.com/Politics/justice-ruth-bader-ginsburg-bashes-donald-trump-calls/story?id=40518233> ; Eric Lipton, “Scalia Took Dozens of Trips Funded by Sponsors,” *New York Times*, February 26, 2016, <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html>

the same ethical standard as all other federal judges, their conduct would have violated the Code, or, even more seriously, the Judicial Conduct and Disability Act of 1980.²⁸ As such, they could have been subject to censure or sanction of some kind.²⁹ However, since the Justices' adherence to the code is purely voluntary, there are no consequences when they violate the ethics rules that bind judges in lower courts. And this real and perceived "above the law" stance of the Supreme Court has a damaging effect on its legitimacy and integrity.

Creating a public code of ethics would show that the Supreme Court does not see itself as "above the law." It would instead provide the people whose laws it helps shape with an example of the Court's integrity. The perception of impartiality is just as important to the Court's legitimacy as actual impartiality. After all, as the saying goes: perception is reality. This reality is perhaps the strongest argument in favor of adopting a code of conduct for our nation's highest court.

It's an important reason why we believe Congress should direct the Supreme Court to draft and publish a code of ethics, and it should provide for a public notice and comment process.

Congressional Authority to Promote Judicial Ethics

Enacting the recommendations above would be a modest expansion of laws that have existed for roughly four decades to bring the judiciary in line with the level of transparency that is currently required of Congress and the executive branch. In other words, we are not asking for the judiciary to do anything more than the other branches, but rather insisting that the public interest be served by creating a more accountable and transparent judiciary across the board.

It is also important to point out that the judiciary itself has already weighed in on the appropriateness of financial disclosure requirements for federal judges. In *Duplantier v. United States* (1979), the Fifth Circuit ruled decisively that recently enacted financial disclosure requirements that applied to all three branches of government via the Ethics in Government Act of 1978 were not only constitutional, but vital to ensuring that the public can trust the work of the judiciary.³⁰ Judge Ainsworth, writing for the Fifth Circuit, addressed every argument the Judicial Conference has recycled to argue against these reforms now.³¹

The court upheld Congress's constitutional authority to enact laws aimed at "restoring public confidence and deterring conflicts of interest" in the judiciary.³² It also closely considered the potential that additional disclosure of information could increase the risks associated with public

²⁸ Complaints against judges and judicial discipline, 28 U.S.C. §§ 351-364 (2011), <https://www.govinfo.gov/app/details/USCODE-2011-title28/USCODE-2011-title28-partI-chap16&collectionCode=USCODE>.

²⁹ Complaints against judges and judicial discipline, 28 U.S.C. §§ 351-364 [see note 28].

³⁰ *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), [https://www2.oge.gov/web/oge.nsf/0/B74260A52A239F72852585BA005BF01F/\\$FILE/Duplantier%20v.%20US.pdf](https://www2.oge.gov/web/oge.nsf/0/B74260A52A239F72852585BA005BF01F/$FILE/Duplantier%20v.%20US.pdf).

³¹ Letter from Judicial Conference Secretary James C. Duff to Representative Martha Roby, Ranking Member of the Subcommittee on Courts, Intellectual Property and the Internet, concerning House Judiciary subcommittee hearing, "The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency," June 19, 2019, <https://docs.house.gov/meetings/JU/JU03/20190621/109678/HHRG-116-JU03-20190621-SD002.pdf>. Secretary Duff expressed the Judicial Conference's opposition to several measures under consideration, including requiring online posting for financial disclosures and codifying recusal explanations.

³² *Duplantier v. United States* at 668 [see note 30].

service, namely risk to one’s person or family. However, the court concluded that the substantial public interest served by increased financial disclosures — such as alerting litigants to potential conflicts of interest and instilling the public with confidence in the integrity of the judiciary — outweighed these risks.³³ It bears mentioning that every nominee has the freedom to decline a nomination to the judiciary if they deem the risk too high.

Given that the Constitution empowers Congress to enact these kinds of reforms for the judiciary, given that previous congressional action indicates the same level of authority, and given that the courts themselves have weighed in on the side of the public interest in requiring disclosure and reporting from federal judges, the path forward is clear. It is hard to the point of impossible to accept any arguments that building on the existing and so-far insufficient matrix of ethics and disclosure rules for the federal judiciary is in any way inappropriate or unnecessary. Federal judges and Supreme Court Justices enjoy lifelong appointments and are not subject to regular democratic accountability checks in the way that Congress and the president are. This makes accountability and transparency in the courts, through robust ethics and disclosure requirements, even more essential.

Conclusion

The good news here is that Congress, through both Article I and Article III powers, is well within its constitutional remit to consider and enact reforms across the breadth of the federal judiciary.³⁴ Previous laws enacted by Congress, such as the Ethics in Government Act of 1978 and the Judicial Conduct and Disability Act of 1980, provide a helpful framework for additional reforms aimed at shoring up the ethical standing of the courts.

We are therefore calling on Congress to enact legislation that includes the recommendations we have laid out in the preceding testimony. In doing so, Congress can boost public trust in the judiciary specifically and in the federal government more broadly. Because of the dismal public view of government and increasing concerns about government corruption, there is no more important task for Congress in this moment than to enhance the accountability, transparency, and ethicality of all three branches of government.³⁵

³³ *Duplantier v. United States* at 670 [see note 30].

³⁴ U.S. Constitution, art. I, § 8, cl. 9; art. III, § 1; art. III, § 2, cl. 2.

³⁵ Pew Research Center, *Americans’ Views of Government: Low Trust but Some Positive Performance Ratings* (September 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>.