



**Statement of the Project On Government Oversight  
Before the House Judiciary Subcommittee on Courts, Intellectual Property, and the  
Internet  
“Building Confidence in the Supreme Court Through Ethics and Recusal Reforms”  
April 27, 2022**

Thank you, Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee for the opportunity to submit this comment about ethics, the Supreme Court, and Americans’ trust in vital democratic institutions.<sup>1</sup> 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.

Last year, we convened a task force of experts — including former judges with varied ideological backgrounds — who issued a report, *Above the Fray*, containing several recommendations to turn down the temperature on Supreme Court selection and enhance the court’s legitimacy.<sup>2</sup> While many potential Supreme Court reforms are the subject of considerable debate, there is wide support for improving Supreme Court ethics rules, which would serve a critical role in restoring the public’s faith in the court.

The creation and implementation of strong ethics rules can and should begin, regardless of any other reforms.

Strengthening Supreme Court ethics requires a multifaceted approach that should address several key substantive shortcomings in the current ethics regime: subjective recusal standards; insufficient guidance surrounding conduct that undermines justices’ perceived impartiality; and inadequate disclosure of potential conflicts.

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<sup>1</sup> This testimony draws on several previous POGO publications, including *H.R. 1, the “For the People Act of 2019”*: Hearing before the House Committee on the Judiciary, 116th Cong. (January 29, 2019) (testimony of Sarah Turberville, Director, The Constitution Project at POGO) <https://www.pogo.org/testimony/2019/01/closing-the-gap-in-judicial-ethics/>; Task Force on Federal Judicial Selection, *Above the Fray*, Project On Government Oversight, July 8, 2021, <https://www.pogo.org/report/2021/07/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy/>; *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*: Hearing before the House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, 117th Cong. (October 26, 2021) (testimony of Dylan Hedtler-Gaudette, Government Affairs Manager, POGO), <https://www.pogo.org/testimony/2021/10/pogo-testimony-increasing-transparency-and-accountability-in-the-judicial-branch/>; Sarah Turberville and David Janovsky, “A Potential Watershed Moment on Supreme Court Ethics,” Project On Government Oversight, March 31, 2022, <https://www.pogo.org/analysis/2022/03/a-potential-watershed-moment-on-supreme-court-ethics/>.

<sup>2</sup> Project On Government Oversight, *Above the Fray* [see note 1].

Filling these gaps will likewise require multiple approaches, including strengthening and expanding existing laws and creating a code of conduct for the Supreme Court. Finally, all these reforms should contain mechanisms to ensure full and faithful compliance.

The recently introduced 21st Century Courts Act is a commendable step toward addressing many of these issues. This testimony elaborates on the ethics challenges facing the court to help guide the committee as it considers that bill and any future legislation.

## **The Need for Supreme Court Ethics Reform**

As the most prominent judges in the country, there is little doubt that justices of the Supreme Court have a significant influence on the public’s understanding of the workings and role of the courts, and — consequently — on their trust in the judiciary’s commitment to fairness and impartiality. The concentration of power among just a handful of people on the court underscores how vital it is for justices to comport with a robust ethical framework.

There are a handful of statutes, case law, and norms that currently provide a basic — and, as my testimony argues, insufficient — ethics framework for the Supreme Court. Section 455 of Title 28 of the United States Code specifies when judges and justices must recuse themselves from a proceeding. It contains a blanket obligation to recuse whenever a judge or justice’s “impartiality might reasonably be questioned.”<sup>3</sup> The Ethics in Government Act of 1978 also confers limited ethical responsibilities by requiring federal judges, including Supreme Court justices, to submit annual financial disclosures.<sup>4</sup>

However, these laws have gaps that undermine their aims — and Chief Justice John Roberts has publicly cast doubt on whether these laws are actually binding on Supreme Court justices.<sup>5</sup> And members of the nation’s highest court are not covered by the Judicial Conduct and Disability Act of 1980, which created a process for the filing and investigation of complaints and for discipline of federal judges.<sup>6</sup>

According to Chief Justice Roberts, the Supreme Court justices also consult the “Code of Conduct for United States Judges,” which does not formally apply to the justices but governs the conduct of judges in lower federal courts.<sup>7</sup> But episodes over the last two decades — including several in very recent memory — have made clear that the Supreme Court’s informal consultation of the code is not sufficient. Appearances matter in government ethics, and the inadequacy of the Supreme Court’s ethics rules sends a signal, even if unintended, that the justices are above the standards for every other judge.

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<sup>3</sup> The provision, originally passed in 1940, was extended to appeals court judges and Supreme Court justices in 1974. The law also 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. 28 U.S.C. § 455 (2021), <https://law.cornell.edu/uscode/text/28/455>.

<sup>4</sup> 5 U.S.C. App. § 101(f)(11), [https://uscode.house.gov/view.xhtml?req=\(title:5a%20section:101%20edition:prelim](https://uscode.house.gov/view.xhtml?req=(title:5a%20section:101%20edition:prelim).

<sup>5</sup> Chief Justice John Roberts, “2011 Year-End Report on the Federal Judiciary,” (December 31, 2011), 7, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

<sup>6</sup> 28 U.S.C. §§ 351-364 (2021), <https://www.law.cornell.edu/uscode/text/28/part-I/chapter-16>.

<sup>7</sup> Roberts, “2011 Year-End Report on the Federal Judiciary,” 4 [see note 5].

Ethics reform is neither partisan nor personal. Lapses are not limited to justices who ascribe to a particular judicial philosophy or were nominated by presidents of one party or the other. Every justice who has served in the last decade has done something that has raised questions about propriety and impartiality.<sup>8</sup>

While ethics reform must be informed by past incidents, it is fundamentally a forward-looking effort, one designed to ensure the Supreme Court has the best possible system in place to support the public's faith in the institution.

## **The Importance of a Code of Conduct**

Every other federal judge is bound by a code of conduct.<sup>9</sup> The only exceptions are the most visible and consequential jurists in the land — the justices of the Supreme Court.

Having been entrusted with that great power, the justices owe the public not only a commitment to the ethical use of power, but also a conspicuous demonstration of their ethical conduct. While the simplest solution may be to apply the “Code of Conduct for United States Judges” to the Supreme Court as well, the existing code of conduct for lower federal court judges does not address a number of issues that are particular to the ethical conduct of Supreme Court justices, such as disqualification and the impact of public appearances and other off-the-bench conduct. It is time for the justices to be bound by a code of conduct that accounts for the unique circumstances that accompany service on the nation's highest court.

A Supreme Court code of conduct is a bipartisan idea whose time has come. In 2018, Ranking Member Issa sponsored a bill that contained a provision for a Supreme Court code of conduct.<sup>10</sup> The recently introduced 21st Century Courts Act similarly directs the court to create a code for itself.<sup>11</sup> Even President Biden's bipartisan Commission on the Supreme Court — a body unwilling to endorse any specific recommendations following its exhaustive, multi-month review of Supreme Court reforms — seemed to agree that the court would benefit from a code. It wrote, “experience in other contexts suggests that the adoption of an advisory code would be a positive step on its own, even absent binding sanctions.”<sup>12</sup>

As we will discuss below, a Supreme Court code of conduct is one avenue for addressing some of the substantive shortcomings in the current ethics regime for the court.

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<sup>8</sup> Fix the Court, “Ahead of House Hearing on SCOTUS Ethics, We Recount the Justices' Many Ethical Lapses,” March 2, 2022, <https://fixthecourt.com/2022/03/ahead-house-hearing-scotus-ethics-recount-justices-many-ethical-lapses/>; Turberville and Janovsky, “A Potential Watershed Moment on Supreme Court Ethics” [see note 1]

<sup>9</sup> Judicial Conference of the United States, “Code of Conduct for United States Judges,” *Guide to Judiciary Policy*, vol. 2, ch. 2 (March 12, 2019), 2, [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf).

<sup>10</sup> Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6755>.

<sup>11</sup> 21st Century Courts Act, 117th Cong. § 2 (2022), [https://www.whitehouse.senate.gov/imo/media/doc/21CA%20Bill%20Text%20\(117th\)%20EMBARGOED%20to%201130%204-6.pdf](https://www.whitehouse.senate.gov/imo/media/doc/21CA%20Bill%20Text%20(117th)%20EMBARGOED%20to%201130%204-6.pdf).

<sup>12</sup> Presidential Commission on the Supreme Court of the United States, *Final Report*, December 2021, 221, <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

## Addressing Recusal

On its face, the federal law that governs recusal standards for federal judges applies to Supreme Court justices as well.<sup>13</sup> But unlike lower court judges, recused Supreme Court justices cannot be replaced, making their recusal decisions even more consequential. Supreme Court ethics reform must adequately account for unique circumstances facing a justice's disqualification from hearing a case. This requires rebalancing the justices' current reluctance to recuse in any but the most extreme circumstances and creating a system that leads to more transparent and impartial decision-making around recusals.

Currently, when deciding whether to recuse, Supreme Court justices weigh the impact of an actual or perceived conflict of interest against concerns about the evenly split decision that could result from their disqualification. The often-counterproductive argument that justices have a "duty to sit," that is, to hear cases, has the effect of keeping justices involved where objective considerations would suggest recusal was prudent.<sup>14</sup>

Recusal for even apparent conflicts is far more beneficial to the court than having nine justices hear any given case.<sup>15</sup> Any new code of conduct should critically examine the presumptions on which the "duty to sit" is based.<sup>16</sup> As our task force emphasized, recent history and scholarship have shown that an even-numbered court is not a significant problem.<sup>17</sup> In fact, the evidence

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<sup>13</sup> See 28 U.S.C. § 455. In his 2011 letter on judicial ethics, Chief Justice Roberts questioned whether § 455 could constitutionally be applied to the justices [see note 5].

<sup>14</sup> For example, see Jeffrey Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine," *Buffalo Law Review*, vol. 57 (2009), 813-958, <https://scholars.law.unlv.edu/facpub/232/>. In his 2004 memo in *Cheney v. U.S. Dist. Ct.*, 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." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004) (Scalia, J. memo), 3, <https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf>.

<sup>15</sup> Judges do have a responsibility to hear cases: Canon 3(A)(2) of the "Code of Conduct for United States Judges" states, "a judge should hear and decide matters assigned, unless disqualified" [see note 9]. However, the purpose of this provision is not to narrow the instances where disqualification is required, but rather to prevent judges from avoiding potentially unpopular issues. See Stempel, "Chief William's Ghost," 818-834 [see note 14].

<sup>16</sup> Congress attempted to address the justices' reluctance to recuse following Justice Rehnquist's citation of what became known as the "duty to sit" to justify his refusal to disqualify from a case where a conflict was readily apparent. See *Laird v. Tatum*, 409 U.S. 824, 838 (1972); Sherrilyn A. Ifill, "Do Appearances Matter?: Judicial Impartiality and the Supreme Court in *Bush v. Gore*," *Maryland Law Review*, vol. 61, no. 3 (2002), 619, <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3174&context=mlr>. In 1974, Congress amended the judicial disqualification statute requiring judges' and justices' recusal in cases where their "impartiality might reasonably be questioned." See 28 U.S.C. § 544 (2022), <https://www.law.cornell.edu/uscode/text/28/544>. In 1993, Justices William Rehnquist, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Ruth Bader Ginsburg issued a recusal policy statement that expressed an unwillingness to recuse in some circumstances due to the perceived impact of recusal on the court: "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." "Statement of Recusal Policy," November 1, 1993, 1, [http://eppc.org/docLib/20110106\\_RecusalPolicy23.pdf](http://eppc.org/docLib/20110106_RecusalPolicy23.pdf).

<sup>17</sup> See Ryan Black and Lee Epstein, "Recusals and the 'Problem' of an Equally Divided Supreme Court," *Journal of Appellate Practice and Process*, vol. 7, no. 1 (2005), 81, <https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1315&context=appellatepracticeprocess>.

suggests otherwise — the court may be more inclined to seek common ground and more modest and narrow decisions when faced with the prospect of an even split.<sup>18</sup>

Even so, there are reforms that could allay any concern about a split decision. The “duty to sit” is rendered moot if the court can replace a recused justice. While such a reform would be a departure, there is good precedent at the federal and state level. Retired Supreme Court justices already have the option of hearing cases as part of circuit court panels, and the law could be modified to allow them to fill in for recused justices as well.<sup>19</sup> This practice is already in place in states like New Hampshire, where the law permits the state’s chief justice to randomly select a retired justice to temporarily serve if there is a vacancy left due to a disqualification.<sup>20</sup>

Congress should also clarify the recusal statute to better specify the types of situations that require recusal. While the current law lists several specific scenarios, largely dealing with conflicts from financial or employment relationships, many scenarios fall under the law’s catch-all provision, which requires recusal when a reasonable person would doubt a judge’s impartiality.<sup>21</sup> The 21st Century Courts Act would add much-needed detail, including specifying additional financial or work entanglements by judges or their families that require recusal and covering organizations affiliated with ones that pose a direct conflict.<sup>22</sup>

Revised recusal rules, both in statute and a code of conduct, should also clarify when financial or other circumstances involving a justice’s family member would counsel the justice’s disqualification from a case. This is not to suggest a justice should be disqualified simply because a spouse or child has strong views on controversial topics. The law currently requires recusal when a justice’s immediate family has an “interest that could be substantially affected” by the outcome of a case, but it provides little elaboration.<sup>23</sup> If a relative is closely affiliated with a litigant, amicus, or issue before the court, that should call for a more critical analysis. The public has no way of knowing what justices and their close relatives discuss, and the public should not have to take it on faith that relatives who are tied to litigants are refraining from exerting influence.

Stronger recusal rules will have limited use if the enforcement mechanism is not improved. Currently, lower court judges and the justices decide for themselves if they can sit impartially on a case.<sup>24</sup> The justices’ recusal decisions (or refusals) lack even the rudimentary enforcement

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<sup>18</sup> In 2017, Justice Samuel Alito commented, “Having eight was unusual and awkward. That probably required having a lot more discussion of some things and more compromise and maybe narrower opinions in some cases that we would have issued otherwise.” Quoted in Jess Bravin, “With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc,” *Wall Street Journal*, April 21, 2017, <https://www.wsj.com/articles/BL-WB-68082>. See also Adam Liptak, “A Cautious Supreme Court Sets a Modern Record for Consensus,” *New York Times*, June 27, 2017, <https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html>.

<sup>19</sup> 28 U.S.C. § 294 (2022), <https://www.law.cornell.edu/uscode/text/28/294>.

<sup>20</sup> NH Rev Stat § 490:3 (2018), <https://law.justia.com/codes/new-hampshire/2018/title-li/chapter-490/section-490-3/>.

<sup>21</sup> 28 U.S.C. §455(a) (2022), <https://www.law.cornell.edu/uscode/text/28/455>.

<sup>22</sup> 21st Century Courts Act, §§ 3-4 [see note 11].

<sup>23</sup> 28 U.S.C. §455(b)(5)(iii) (2022), <https://www.law.cornell.edu/uscode/text/28/455>.

<sup>24</sup> “A fair trial in a fair tribunal is a basic requirement of due process. ... To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” In re Murchison, 349 U.S. 133, 136 (1955), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep349/usrep349133/usrep349133.pdf>. The



mechanism that exists for lower courts, where failure to recuse can be grounds for vacating a decision on appeal.

New ethics rules, either as additions to the recusal statute or in a Supreme Court code of conduct, should seek to remove recusal decisions from the justice in question. This is especially important because the recusal statute defines many conflicts in terms of how a third party — a “reasonable person” — would view the judge’s conduct. It is no criticism of a justice’s temperament to note that they are poorly positioned to analyze their own conduct through this lens.

For model solutions, the court should look to the states. Some state courts, ranging from Texas to California, have rules that provide for a judge other than one with a potential conflict to make the disqualification decision.<sup>25</sup> These state supreme courts typically refer a recusal motion to the full court or authorize a party to appeal a justice’s refusal to recuse to the full court.<sup>26</sup> The 21st Century Courts Act takes this approach as well, requiring justices to refer recusal motions to the full court.<sup>27</sup> Alternatively, the code could create mechanisms like allowing a panel of circuit judges to issue an advisory opinion on whether a Supreme Court justice should recuse.

However it addresses recusal, bringing greater transparency to recusal decision-making must be a priority for a new code. 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 Supreme Court code of conduct should call for the disclosure of the reason for any

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court has restated this principle on numerous occasions. Examples include *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

<sup>25</sup> See, e.g., Cal. Code Civ. P. 170.3(c)(5): “A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge’s answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson.”

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=170.3](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=170.3);

Utah R. Civ. P. 63(c)(1): “The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge” <https://casetext.com/rule/utah-court-rules/utah-rules-of-civil-procedure/part-vii-judgment/rule-63-disability-or-disqualification-of-a-judge>. At the federal level, Article III judges may “bow out of the case or ask that the recusal motion be assigned to a different judge for a hearing,” but the law does not require it. In *re United States*, 158 F.3d 26, 34 (1st Cir. 1998) <https://casetext.com/case/in-re-united-states-24>.

<sup>26</sup> See, e.g., Tex. R. App. P. § 16.3: “[t]he challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court ... [t]he challenged justices or judge must not sit with the remainder of the court to consider the motion as to him or her” <https://www.txcourts.gov/media/1437631/texas-rules-of-appellate-procedure-updated-with-amendments-effective-2117-with-appendices.pdf>; Alaska Stat.

22.20.020(c): “If a judicial officer denies disqualification the question shall be heard and determined by ... the other members of the supreme court”

<https://www.touchngo.com/iglcntnr/akstats/Statutes/Title22/Chapter20/Section020.htm>. See also Matthew Menendez and Dorothy Samuels, Brennan Center for Justice, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, (2016), 23 (note 47), <https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification?msclkid=ce736735c4c511eca4005dd767210fdb>; Russel Wheeler and Malia Reddick, Institute for the Advancement of the American Legal System, *Judicial Recusal Procedures*, (June 2017), 5-8,

[https://iaals.du.edu/sites/default/files/documents/publications/judicial\\_recusal\\_procedures.pdf](https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf).

<sup>27</sup> 21st Century Courts Act, § 3 [see note 11].

voluntary recusal.<sup>28</sup> This would promote the development of a body of precedent to support consistent application of recusal, assist judges in identifying situations that require actions like divestments so that they need not recuse in the future, and help to rebuild public faith in the court by reaffirming that 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.

## Addressing Questionable Conduct

Public actions that cast doubt on their impartiality are a common issue for Supreme Court justices, and any code of conduct for the court must provide guidance that helps justices avoid such actions, because even the appearance of impropriety can hurt the court. A few recent examples can both demonstrate the need for such guidance and illustrate the types of actions that should be directly addressed by a code of conduct.

The most direct form of questionable conduct is statements from justices themselves. Justices have offered public comments that would lead a reasonable person to conclude that their impartiality and judicial temperament is impaired. For example, during his 2018 confirmation process, then-Judge Brett Kavanaugh implied that he would retaliate for what he perceived as unfair treatment during the process. He described the allegations of sexual misconduct against him as a partisan conspiracy and said that “what goes around comes around.”<sup>29</sup> In another well-publicized incident, in the midst of the 2016 presidential campaign, Justice Ruth Bader Ginsburg made public comments denigrating then-candidate Donald Trump. 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.”<sup>30</sup> Both later apologized for their comments, but each instance underscores how justices can at times act in ways that raise questions about possible biases toward the subjects of their comments.<sup>31</sup>

A second area of concern relates to justices’ appearance before organizations that are perceived to be partisan — even if the organization does not identify as a political entity.<sup>32</sup> While the code of conduct for federal judges encourages them to participate in charitable, educational, and civic

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<sup>28</sup> As the nonpartisan advocacy organization Fix the Court has noted, it was the court’s practice in the late 1800s to give brief explanations for a justice’s non-participation in a case. The practice ended for unknown reasons in 1904. 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>.

<sup>29</sup> *Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*, Hearing before the Senate Judiciary Committee, 115th Cong. (September 27, 2018) (testimony of Brett Kavanaugh), <https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript>.

<sup>30</sup> 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).

<sup>31</sup> Brett M. Kavanaugh, “I am an Independent, Impartial Judge,” *Wall Street Journal*, October 4, 2018, <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822?mod=e2tw>; 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>.

<sup>32</sup> Canon 5 directs a judge to refrain from holding office in a political organization, publicly endorse any political candidate, or make any contribution to a political candidate or organization and states that a judge may not engage in any other political activity. However, under Canon 4(C), a judge may assist nonprofit law-related organizations in planning fundraising activities and may be listed as an officer, director, or trustee. “Code of Conduct for United States Judges” [see note 9].

activities, it prohibits them from participating in extrajudicial activities that “reflect adversely on the judge’s impartiality.”<sup>33</sup> And the Judicial Conference already advises judges against participating in “law-related activity with political overtones” that would “give rise to an appearance of engaging in political activity.”<sup>34</sup>

In 2020, the Judicial Conference issued a draft advisory opinion which would have specified that “formal affiliation” with the conservative Federalist Society and the progressive American Constitution Society would be inappropriate.<sup>35</sup> It was scrapped after nearly 200 federal court judges — many of whom were associated with the Federalist Society — voiced opposition.<sup>36</sup>

Despite the opinion’s retraction, its theory was sound. Justices Kavanaugh, Samuel Alito, Clarence Thomas, and Neil Gorsuch have all spoken at Federalist Society events.<sup>37</sup> Like their conservative counterparts, Justices Ginsburg, Stephen Breyer, and Sonia Sotomayor have all spoken at various American Constitution Society events while serving on the court.<sup>38</sup>

To avoid even the specter of bias, a Supreme Court code of conduct should advise justices to avoid affiliating with organizations that cast doubt on the justices’ impartiality, as these distinctly ideological groups do. The code could mirror the example set by Chief Justice Roberts and Justice Elena Kagan, both of whom have avoided such appearances, potentially due to the heavy partisan perception these events create.<sup>39</sup>

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<sup>33</sup> “Code of Conduct for United States Judges,” Canon 4 [see note 9].

<sup>34</sup> Judicial Conference Committee on Codes of Conduct, “Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates,” Advisory Opinion No. 116, February 2019, [https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019\\_final.pdf](https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf).

<sup>35</sup> Judicial Conference Committee on Codes of Conduct, “Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association,” Exposure Draft Advisory Opinion No. 116, January 2020, <http://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf>.

<sup>36</sup> Letter from Federal Judges to Robert Deyling, Assistant General Counsel, Administrative Office of the United States Courts, regarding Advisory Opinion No. 117, March 18, 2020, <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf#page=1>.

<sup>37</sup> Kalvis Golde, “At Federalist Society convention, Alito says religious liberty, gun ownership are under attack,” *SCOTUSblog*, Nov. 13, 2020, <https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/>; “Justice Clarence Thomas at the Federalist Society,” C-SPAN, September 8, 2018, <https://www.c-span.org/video/?450905-1/justice-clarence-thomas-speaks-federalist-society>; Richard Wolf, “Supreme Court Justice Brett Kavanaugh Gets Hero’s Welcome from Conservative Federalist Society,” *USA Today*, Nov. 14, 2019, <https://www.usatoday.com/story/news/politics/2019/11/14/brett-kavanaugh-supreme-court-justice-federalist-society/4195854002/>; Mariana Alfaro, “Gorsuch to headline GOP lineup of speakers at Federalist Society; media barred from his speech,” *Washington Post*, February 4, 2022, <https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-supreme-court/>.

<sup>38</sup> *Private: Justice Ruth Bader Ginsburg to Address ACS National Convention*, AMERICAN CONST. SOC. (Mar. 1, 2012) <https://www.acslaw.org/expertforum/justice-ruth-bader-ginsburg-to-address-acs-national-convention/>; “Conversation with Supreme Court Justice Sonia Sotomayor,” C-SPAN, June 8, 2018, <https://www.c-span.org/video/?446713-1/conversation-supreme-court-justice-sonia-sotomayor>; “United States Supreme Court Justice Stephen Breyer in Conversation with Dean Alan Morrison, Introduced by Judge Ketanji Brown Jackson,” American Constitution Society, June 8, 2017, <https://www.acslaw.org/video/united-states-supreme-court-justice-stephen-breyer-in-conversation-with-dean-alan-morrison-introduced-by-judge-ketanji-brown-jackson/>.

<sup>39</sup> As Supreme Court reporter Adam Liptak said, “By not attending [the annual conventions of the American Constitution Society and Federalist Society], Kagan and [Roberts] are really showing the way. It is such a small thing, to simply stay at home. ... There is so much evidence of politicization in the Court and there is no need for the



Public comments and organizational affiliations are not the extent of potential questionable conduct by justices. A code of conduct provides an opportunity for guidance on issues discussed elsewhere in this testimony, including recusals based on the conduct of a spouse or prior participation in a case before the court,<sup>40</sup> private travel paid for by litigants before the court,<sup>41</sup> and participation in events funded by litigants and potential beneficiaries of the court's decision-making.<sup>42</sup>

## Improving Disclosures

Disclosure is a cornerstone of government ethics rules, giving the public insight into potential conflicts of interest and helping officials identify situations that would require their recusal. As mentioned above, Supreme Court justices are covered by some portions of the Ethics in Government Act's disclosure requirements. But, as my colleague Dylan Hedtler-Gaudette testified to this subcommittee last fall, they are not currently covered by some key disclosure requirements that other officials follow.<sup>43</sup> And given the unique circumstances facing the justices, they should be required to disclose certain things not currently in the law.

The Ethics in Government Act of 1978 requires justices to disclose financial assets like stocks. Despite this, there are examples of judges at all levels — including the Supreme Court — who presided over a case where evidence of a conflict later emerged.<sup>44</sup> The Act should be amended to require the justices to file periodic reports whenever they make securities transactions over \$1,000, bringing them in line with members of Congress and certain categories of executive

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members to add to it." Interview with Adam Liptak, March 26, 2020 (on file with authors), cited in *Above the Fray*, note 75 [see note 1].

<sup>40</sup> Justice Kagan's vote to uphold the Affordable Care Act also caused controversy, as she had served as solicitor general under the Obama administration before joining the court. Warren Richey, "Would Elena Kagan Bow Out of a Health-Care Reform Case?" *Christian Science Monitor*, July 15, 2012, <https://www.csmonitor.com/USA/Politics/2010/0715/Would-Elena-Kagan-bow-out-of-a-health-care-reform-case?msclkid=321f7584c4c811eca143a93b8ca0b24f>.

<sup>41</sup> In a widely reported incident in 2004, the late Justice Antonin Scalia participated in a hunting trip with then-Vice President Dick Cheney, mere weeks after the Supreme Court had agreed to hear a case that had been brought against the vice president. 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).

<sup>42</sup> In 2011, Common Cause requested then-Attorney General Eric Holder to investigate whether Justices Scalia and Thomas should have recused themselves from *Citizens United*, as both justices had attended private events hosted by Koch Industries, which stood to benefit financially from a decision favoring *Citizens United*. Sam Stein, "Justices Scalia and Thomas's Attendance at Koch Event Sparks Judicial Ethics Debate," *HuffPost*, October 20, 2010, [https://www.huffpost.com/entry/scalia-thomas-koch-industries\\_n\\_769843](https://www.huffpost.com/entry/scalia-thomas-koch-industries_n_769843).

<sup>43</sup> Hedtler-Gaudette, *Judicial Ethics and Transparency* [see note 1].

<sup>44</sup> For example, Justice Breyer participated in oral argument in *Federal Energy Regulatory Commission v. Electric Power Supply Association*, even though his wife owned stock in the defendant's company. After argument, a reporter asked Justice Breyer about the conflict; Justice Breyer's wife sold the stock, but Breyer did not recuse himself from the case. Tony Mauro, "Looking for Conflicts at High Court," *Law.com*, October 22, 2015, <https://www.law.com/2015/10/22/how-supreme-court-justices-check-for-conflicts-of-interest> (last accessed April 25, 2022); 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*, Sept. 28, 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>.

officials.<sup>45</sup> It should also be amended to require all financial disclosure documents to be available online.<sup>46</sup>

To minimize the likelihood of conflicts, a code of conduct should also direct justices to divest from individual stocks or place their assets in a blind trust.<sup>47</sup> Here, executive branch practices provide a useful model. It has been standard practice in recent decades for most presidents to use blind trusts or non-conflicting assets, and senior officials typically divest problematic assets.<sup>48</sup>

Because of the unique expectations of impeccable impartiality and even-handed judgment placed on judges, litigants and the public should also have access to certain non-financial information about the justices. Current processes for reporting public and private appearances by the justices are not adequate.<sup>49</sup> 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 are critical.<sup>50</sup>

Ethics reforms should include robust rules requiring timely disclosure of justices' appearances, regardless of their financial component; such rules would go a long way toward improving the public's awareness of the justices' actions, while also requiring judges and justices to scrutinize their extrajudicial conduct carefully so as to avoid the appearance of impropriety. Justices should also be required to disclose positions they hold in social and political groups, two categories of organizations currently exempted from the Ethics in Government Act's reporting requirements.<sup>51</sup>

Finally, because the integrity of the judicial process is the responsibility of everyone who participates, Congress should also strengthen the reporting rules for parties and amici who appear before the court. There have been multiple proposals, including in the 21st Century Courts Act,

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<sup>45</sup> Ethics in Government Act of 1978, 5 U.S.C. App., <https://www.govinfo.gov/app/details/USCODE-2010-title5/USCODE-2010-title5-app-ethicsing>; Hedtler-Gaudette, *Judicial Ethics and Transparency* [see note 1].

<sup>46</sup> The Courthouse Ethics and Transparency Act, H.R. 5720, 117th Cong. (2021), which the House passed late last year, would achieve both of these aims.

<sup>47</sup> 7 Canon 4(D)(3) of the "Code of Conduct for United States Judges" directs judges to "divest investments and other financial interests that might require frequent disqualification" [see note 9].

<sup>48</sup> Project On Government Oversight, *Above the Fray*, 17 [see note 1]; Walter Shaub, "Conflicts of Interest," in Brookings Institution, *If It's Broke, Fix It* (2021), 12, <https://www.brookings.edu/wp-content/uploads/2021/02/Brookings-Report-If-its-Broke-Fix-it.pdf>.

<sup>49</sup> Justices report some of these activities in their financial disclosures. But those disclosures are triggered not by the fact of the appearance, but by reimbursements for transportation, lodging, or meals. The rules for judicial financial disclosures require judges to report reimbursements from any single source that are individually worth more than \$166 and in aggregate worth more than \$415. 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>.

<sup>50</sup> Security concerns are often raised as a reason to disfavor this sort of disclosure. POGO has long advocated for a system that serves both the public's interest in transparency while making necessary accommodations for the justices' safety.

<sup>51</sup> 5 U.S.C. App. §102(a)(6)(A) (2022), [https://uscode.house.gov/view.xhtml?req=\(title%3a5a+section%3a102+edition%3aprelim\)&msckid=b344428fc4c911ec86f8b8158f801939](https://uscode.house.gov/view.xhtml?req=(title%3a5a+section%3a102+edition%3aprelim)&msckid=b344428fc4c911ec86f8b8158f801939).

to require amici to identify their major funders.<sup>52</sup> Such disclosures could help the court identify amici that would cause conflicts for justices, giving the court an opportunity to reject such briefs.

## **Conclusion**

The country relies on the Supreme Court as the apex of the judicial branch. That is why the public must be able to trust that the court's members are holding themselves to standards as high as the court's power is vast. The role of Supreme Court justices is not so unique that they can't be held accountable for the integrity of their public service. Public trust does not erode because we acknowledge the need for guardrails on the conduct of public servants; it erodes because of the *lack* of those guardrails.

After all, the worst judge of any person's conduct is that person, for we can never be truly objective about our own conduct.

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<sup>52</sup> 21st Century Courts Act, § 5 [see note 11].