



**Statement of the Project On Government Oversight
for the House Judiciary Subcommittee on Courts, Intellectual Property,
and the Internet
on “Protecting Supreme Court Impartiality Through Ethics Reform”
December 8, 2022**

Thank you, Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, for the opportunity to submit this testimony about the urgent need for a robust ethics program at the United States Supreme Court.

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 Constitution Project was founded in 1997 and joined POGO in 2017.

The Problem

No ethics regime should be based on the mere faith that those entrusted with enormous power will simply “do the right thing.” Of course, we hope that public servants will conduct themselves ethically, whether in their official capacity or in the private sphere. But trust alone is not a guardrail for our democracy.

This could not be more true than in the case of the Supreme Court of the United States. The federal judiciary is an institution — the only one in our democratic system — where individuals hold their positions for life. Certainly, lifetime tenure can be viewed as a mechanism to ensure the decisional independence of the Supreme Court. But possession of a job for life in our democracy without robust ethical guardrails on the individual in that position is a recipe for impunity, whether inadvertent or intentional. This is not an attack on the court; it is common sense. Our legal system is built on the principle that nobody should be a judge in their own case. Like anyone else, justices are not necessarily the best judges of their own conduct. And outside entities are more than willing to exploit ethics gaps to buy access to the justices.

It is folly to rely on faith alone, yet that is exactly what we have done with the public servants who occupy the roles of justices of the Supreme Court of the United States. State court judges and all other federal judges are bound by a code of conduct.¹ The only exceptions are the most visible and consequential jurists in the land — the justices of the Supreme Court.

¹ 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,

Many of you, including Chairman Johnson and Ranking Member Issa, have known this for some time and have supported the adoption of a Supreme Court code of conduct.² At POGO, we have long promoted a code of conduct and a more robust ethics program for the nine justices on the Supreme Court.

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.³ Our recommendations are drawn from the principles laid out in that report. Ethics reform is neither partisan nor personal. Ethical failures are not limited to justices who subscribe to a particular judicial philosophy or who 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.⁴

Over a decade ago, Chief Justice John Roberts wrote in his 2011 judicial report that he has “complete confidence in the capability of my colleagues to determine when recusal is warranted.”⁵ Today, such confidence is not warranted. Since the chief justice wrote that report, one of his colleagues on the bench has made remarks denouncing a 2016 candidate for president during the middle of a heated presidential campaign.⁶ Another threatened to exact revenge on

https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

² Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6755> (sponsored by Representative Issa); Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R. 7647, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/7647/text> (sponsored by Representative Johnson).

³ This testimony draws on several previous POGO testimonies and 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: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, 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/>; Sarah Turberville and David Janovsky, *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms*, 117th Cong. (April 27, 2022) (statement of Sarah Turberville and David Janovsky, The Constitution Project at POGO), <https://www.pogo.org/testimony/2022/04/building-confidence-in-the-supreme-court-through-ethics-and-recusal-reforms>.

⁴ 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 3].

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

⁶ 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>.

political rivals during his confirmation hearing.⁷ Yet another barred the press from a closed door speech to a partisan organization.⁸ And another has failed to recuse himself from any case involving the insurrection, despite the fact that his wife's conduct is the subject of an ongoing congressional investigation into the attack on the Capitol on January 6th.⁹

Numerous reports over the last several months have also underlined just how susceptible the Supreme Court is to improper influence in the absence of meaningful disclosure obligations. Several conservative justices were reportedly the targets of a decades-long and multi-million dollar effort, "Operation Higher Court," by an evangelical leader to "stiffen the resolve of the court's conservatives in taking uncompromising stances that could eventually lead to a reversal of Roe" and make "them more forthright in their views" on issues like gay marriage.¹⁰ This scheme arranged travel to Washington for dozens of supporters to meet with Justices Clarence Thomas, Samuel Alito, and Antonin Scalia.¹¹ Wealthy donors invited justices to dinners, vacation homes, and private clubs.¹² Allies to the effort were also advised to donate money to the Supreme Court Historical Society to cultivate access to the justices.¹³

The alleged effort appears to have paid off. Justices dined at the private homes of these donors and stayed at their vacation homes, and the donors attended private parties with the justices. Wittingly or not, the resolve of the conservative justices appeared stiffened, as they gutted the mandate for contraception coverage in federal law under the guise of religious freedom, dissented vigorously to oppose gay marriage, and eventually overturned *Roe v. Wade*.¹⁴

To make matters worse, the organization sponsoring the covert lobbying scheme, Faith and Action (now called Faith and Liberty), also filed friend of the court briefs with the Supreme Court.¹⁵

⁷ *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>.

⁸ Mark Sherman, "Media barred from Justice Gorsuch talk to Federalist Society," Associated Press, February 1, 2022, <https://apnews.com/article/coronavirus-pandemic-us-supreme-court-travel-health-ron-desantis-615d109c686464cbbd22b602ce58b27f>.

⁹ Luke Broadwater and Stephanie Lai, "Ginni Thomas Denied Discussing Election Subversion Efforts With Her Husband," *New York Times*, November 30, 2022, <https://www.nytimes.com/2022/09/29/us/politics/ginni-thomas-jan-6-committee.html>.

¹⁰ Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, November 19, 2022, <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>; Peter S. Canellos and Josh Gerstein, "'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court justices," *Politico*, July 8, 2022, <https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739>.

¹¹ Canellos and Gerstein, "Operation Higher Court" [see note 10].

¹² Kantor and Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach" [see note 10].

¹³ Kantor and Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach" [see note 10].

¹⁴ *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022).

¹⁵ Kara Voght and Tim Dickinson, "SCOTUS Justices 'Prayed With' Her — Then Cited Her Bosses to End Roe," *Rolling Stone*, July 6, 2022, <https://www.rollingstone.com/politics/politics-features/roe-supreme-court-justices-1378046/>.

Correlation is not causation. But after reports like these, the public is left wondering whether the court's decisions were based on the merits of the public arguments presented or due to the private access afforded to a limited, well-moneyed few.

The Solutions

Time and time again, the justices have shown they are unable to be objective about their own conduct. The cloistered court is unable to see what is plain to any reasonable observer: Ethics reform is obviously and urgently needed.

There are only a handful of statutes, case law, and norms that currently provide a basic and wholly 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."¹⁶ 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.¹⁷ 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.¹⁸

Lifetime tenure may assure the public that the court decides cases without fear, but ethics reform is needed to assure us that the court decides cases without favor.

A Supreme Court Code of Conduct

The seeming impunity of the justices of the Supreme Court comes into stark relief when compared to the ethics regime in place to guide the conduct of even the lowest level executive branch employee. A person whose job is to procure and manage contracts for a federal facility must receive ethics training after accepting the position and can face up to five years in prison if they so much as hold stock in a company that is involved in a solicitation or procurement at that federal facility.¹⁹

Meanwhile, justices of the Supreme Court — whose decisions can alter the lives of millions of Americans, reshape the American economy, even take lives — are held to minimal and predominately self-imposed limits. The court needs a code of conduct that addresses the unique circumstances that arise from service on the nation's highest court, including clear direction in recusal decision-making, limits on conduct that impede the impartiality of the court, and robust financial and non-financial disclosure obligations.

¹⁶ 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>.

¹⁷ 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).

¹⁸ Roberts, *2011 Year-End Report on the Federal Judiciary* [see note 5].

¹⁹ 5 CFR § 2638.304(b), <https://www.law.cornell.edu/cfr/text/5/2638.304>; 18 U.S.C. § 216, <https://www.law.cornell.edu/uscode/text/18/216>.

Recusals

Congress should 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 catchall provision, which requires recusal when a reasonable person would doubt a judge’s impartiality.²⁰ The Supreme Court Ethics, Recusal, and Transparency 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.²¹ Spousal conflicts are imputed to employees throughout the federal government — a minimal standard that the Supreme Court should meet.²²

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.²³ 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.

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

Prohibitions on Conduct

Having been entrusted with 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, given their stature and the impact of their decision-making. It is time for the justices to be bound by a code

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

²¹ Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R.7647 (117th Cong.), <https://www.congress.gov/bill/117th-congress/house-bill/7647>.

²² 18 U.S.C. §208(a) (2022), <https://www.law.cornell.edu/uscode/text/18/208>.

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

of conduct that accounts for the unique circumstances that accompany service on the nation's highest court.

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, even if the organizations are not legally defined as "political" in nature.²⁴ The code could mirror the example set by Chief Justice Roberts and Justice Elena Kagan, both of whom have avoided appearances before any such organizations, potentially due to the heavy partisan perception they create.²⁵

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,²⁶ private travel paid for by litigants before the court,²⁷ and participation in events funded by litigants and potential beneficiaries of the court's decision-making.²⁸

The perception of impartiality is just as important as the reality of it, which is why adopting a code of conduct for our nation's highest court is so important. Such a code of conduct would provide explicit guidance to the justices to carefully assess whether a public statement or event could be objectively perceived as undermining their impartiality, independence, or integrity. It would also give the public a better measurement of the propriety of the justices' ethical decision-making.

²⁴ *Above the Fray*, at 17; 37, n. 75 [see note 2]. The Judicial Conference attempted to address this issue in 2020 with its draft ethics opinion No. 117, which would have barred judges from being members of the American Constitution Society and Federalist Society ("reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests"). The proposal was abandoned after a group of judges objected to the ban on Federalist Society membership. See Letter to Robert Deyling, Assistant General Counsel, Administrative Office of the United States Courts, March 18, 2020,

<https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draftethics/53eaddfaf39912a26ae7/optimized/full.pdf>.

²⁵ *Above the Fray*, at n. 75 [see note 2].

²⁶ 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>.

²⁷ 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).

²⁸ 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.

Disclosures

The final component of any effective ethics framework is disclosure. Given what we now know about dubious and covert efforts to shape and influence the Supreme Court, the need for unambiguous disclosure requirements for the justices and those with business before the court is clear. As Justice Anthony Kennedy wrote in the court's *Citizens United* decision, a robust system of disclosures is vital to educated decision-making:

Prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."'²⁹

This exhortation is equally applicable to the Supreme Court to ensure the public and litigants can identify conflicts of interest and the justices can appropriately recuse. Unfortunately, the existing law fails to cover a range of circumstances that should require disclosure.

The Ethics in Government Act of 1978 requires justices to disclose financial assets like stocks.³⁰ Following the revelation that 131 federal judges had presided over cases where they had a financial conflict of interest, Congress enacted the Courthouse Ethics and Transparency Act of 2022, which requires judges and justices to file periodic reports whenever they make certain securities transactions and requires all financial disclosure documents to be available online.³¹ This is a moderate improvement, but it is only one component of a meaningful disclosure program.

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.³² 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.³³ The law should also require more detail from Supreme Court justices with regard to travel and gifts provided by third parties, including hospitality perks and the nature and details of events attended. Finally, to promote improved transparency for recusal decisions, Congress should require disclosure of any source of income paid to close family members of a justice, including spouses.

²⁹ *Citizens United v. FEC*, 558 U.S. 310, 370, quoting *McConnell v. FEC*, 540 U.S. 93, 259 (opinion of Scalia, J.).

³⁰ 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>.

³¹ 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>; Courthouse Ethics and Transparency Act of 2022, S. 3059, 117th Cong. (2022).

³² 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."

³³ *Above the Fray*, 17 [see note 2]; 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>.

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.³⁴ 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.

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.³⁵

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 Supreme Court Ethics, Recusal, and Transparency Act, to require amici to identify their major funders.³⁶ Such disclosures could help the court identify amici that would cause conflicts for justices, giving the court an opportunity to reject such briefs.

A Note on the Role of Congress

Since the founding, Congress has sought to protect the independence of the judiciary by refining ethical obligations on the justices and governing the court's form and function.³⁷ Article III explicitly grants Congress the power to regulate the scope and procedure for the Supreme Court's appellate jurisdiction.³⁸ Congress has also — without controversy — regulated other aspects of the court's functioning, including the size of the court, the precise day on which its

³⁴ 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>.

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

³⁶ Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R.7647 (117th Cong.).

³⁷ Congress's authority to structure the Supreme Court primarily flows from Article I, Sec. 8 of the Constitution, which empowers it "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

³⁸ U.S. Const. Art. III, cl. 2: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

term would begin, and the days on which justices would be required to appear in their assigned circuits.³⁹

Congress did not explicitly apply the disqualification statute, which had existed for district judges in various forms since 1792, to Supreme Court justices until it recodified Title 28 of the United States Code in 1948. When it did so, however, it was a deliberate change, and one made after a process that included extensive consultation with the bar, the federal judiciary, and Supreme Court justices themselves.⁴⁰ Today, Section 455 of Title 28 of the United States Code specifies when judges must recuse themselves from a proceeding.⁴¹ In addition to a blanket obligation to recuse “in any proceeding in which [their] impartiality might reasonably be questioned,” the law instructs judges to step aside when they have personal biases toward parties or knowledge of disputed facts; have previously been involved with a case as a lawyer, judge, or public servant; have a financial interest or a family member with a financial interest in the outcome; or when they or a family member are involved in or could be affected by the proceedings. This provision applies to “any justice, judge, or magistrate judge.”

Further, the Ethics in Government Act of 1978 requires all federal judges, including Supreme Court justices, to submit annual financial disclosures, and there are civil penalties for failure to comply and criminal penalties for falsifying their disclosure.⁴² The recently enacted Courthouse Ethics and Transparency Act of 2022, requiring that various financial disclosures of federal judges and justices be made publicly available, is the most recent iteration of Congress’s prerogative to regulate the form and function of the court.⁴³ Congress has — and should use — the power to ensure the court has a robust ethics framework, as it has done for much of the rest of the government.

³⁹ See Judiciary Act of 1789, 1st Cong., sess. 1, ch. 20, 1 Stat 73 (1789); Judiciary Act of 1802, 7th Cong., sess. 1, ch. 31, 2 Stat. 156 (1802).

⁴⁰ The recodification effort was aided by both a Judicial Conference Committee appointed by the chief justice and a Supreme Court committee comprised of Chief Justice Harlan Fiske Stone, Justice Felix Frankfurter, and Justice William O. Douglas. Revision of Titles 18 and 28 of the United States Code: Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong. 8 (1947) (statement of Representative Eugene Keogh), <https://catalog.hathitrust.org/Record/100953076>. Indeed, in the words of the lead congressional sponsor, the proposed recodification was circulated to “every United States attorney ... every member of the Federal judiciary ... [and] everyone who ever evidenced any interest in the work at all.” Revision of Titles 18 and 28 of the United States Code: Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong. 8 (1947) (statement of Representative Eugene Keogh), <https://catalog.hathitrust.org/Record/100953076>. The hearing record does not suggest there was any controversy about extending the disqualification law to the justices.

⁴¹ 28 U.S.C. § 455, <https://www.law.cornell.edu/uscode/text/28/455>.

⁴² 5 U.S.C. App. § 101(f)(11); 5 U.S.C. App. § 104(a); Judicial Conference of the United States, Guide to Judiciary Policy, Vol. 2D, 2018, <https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf> (Downloaded January 24, 2019). Members of the nation’s highest court are not, however, covered by the Judicial Conduct and Disability Act of 1980, which created a process for the filing and investigation of complaints, and for discipline of federal judges, based on misconduct or an inability to perform the job. 28 U.S.C. §§ 351-364.

⁴³ The Courthouse Ethics and Transparency Act of 2022, S. 3059, 117th Cong. (2022).

Conclusion

Clear and rigorous ethical obligations are a far more effective way to protect the court's decisional independence and impartiality than reliance on subjective and self-enforcing measures. A Supreme Court code of conduct and relevant new rules should, at minimum,

- Specify additional financial or work entanglements by justices or their families that require recusal;
- Require publication of an explanation of the justification for recusal;
- Prohibit justices from affiliating with organizations that cast doubt on the justices' impartiality, even if the organizations are not legally defined as "political" in nature;
- Require justices to divest from individual stocks or to place their assets in a qualified blind trust;
- Require more detail from justices with regard to travel and gifts provided by third parties, including hospitality perks and the nature and details of events attended;
- Require disclosure of any source of income paid to close family members of a justice, including spouses;
- Require disclosure and improved access to information about justices' extrajudicial engagements, regardless of their financial component; and
- Strengthen the reporting rules for parties and amici who appear before the court.

Like the Chief Justice, we, too, are "deeply committed to the common interest in preserving the court's vital role as an impartial tribunal governed by the rule of law."⁴⁴

But the public cannot trust that the court's decisions are issued without favor if there are no meaningful ethical limitations on the conduct of the justices. The most recent revelations detail escalating ethical failures by the justices, and they add new dimensions to the ethical dilemmas faced by the court. Congress should not wait any longer to help a court unwilling to help itself.

⁴⁴ Roberts, *2011 Year-End Report on the Federal Judiciary* [see note 5].