Chair Whitehouse, Ranking Member Kennedy, and members of the subcommittee, thank you for the opportunity to submit this statement. The Project On Government Oversight (POGO) is pleased to endorse the Supreme Court Ethics, Recusal, and Transparency Act, S. 359. For many years, we have advocated for sensible ethics reform at the United States Supreme Court, which is the only court in the country without its own ethics code.

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.

We know that no government official — including a Supreme Court justice — is incorruptible. While a flurry of recent revelations about the conduct of Justice Clarence Thomas has brought new attention to this long-standing problem, no justice has been immune from questions about their ethical conduct.1 It is worth underscoring this important point: A demand for ethical constraints is not an attack on the Court or any single justice. It is simply common sense. Our nation’s most powerful court should not be its least accountable.

This bill provides what is long overdue: a specific code of conduct for the Court; disclosure obligations on par with those demanded of other high-level government offices; and clearer disqualification obligations. It also closes loopholes that permit justices to avoid accountability for wrongdoing by virtue of their position on the highest court in the land.

We particularly applaud the bill’s provisions to strengthen recusal decision-making at all levels of the federal judiciary. Under the current system, a judge or justice facing a motion to recuse based on a statutory disqualification is themself responsible for determining whether they must step aside.2 In a system predicated on the principle that nobody should be a judge in their own case, this is untenable.

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Act would improve this situation by clarifying conflicts that require recusal and by creating mechanisms for a review panel of other judges to weigh in on the necessity of recusal.

We have long argued that recusal reforms are particularly needed at the Supreme Court. As the justices’ April 2023 “Statement on Ethics Principles and Practices” indicates, and as the attached article explains, the justices have collectively distorted principles of fairness to justify participating in cases despite conflicts. The Supreme Court’s current practice, which undervalues recusal in favor of maintaining a full bench, is the justices’ own invention, unmoored from their statutory ethical responsibilities and from common law.

Against this backdrop, it is clear that congressional action is necessary. As POGO has testified previously, “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.”

The Supreme Court Ethics, Recusal, and Transparency Act is a reasonable, measured, and necessary step to protect the Court’s actual and perceived integrity and independence.

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A long-simmering ethics crisis at the U.S. Supreme Court has come to a boil. And while some may continue to hold out hope that the court will defuse the situation on its own by creating its own ethics rules, it is increasingly clear that such hope is entirely misplaced.

Last month, all nine justices took the unusual step of releasing a joint "Statement on Ethics Principles and Practices" that showed they have no interest in reform.

The statement as a whole has been widely and appropriately criticized for defending a status quo that has proven wholly inadequate for ensuring public faith in the court's integrity. In fact, the statement is a good illustration of the problem: A close read of a less prominent passage, one explaining how the justices handle recusals, shows how the court has twisted legal principles to put itself above the law.

Recusal is a bedrock safeguard of an impartial judiciary, a key way of ensuring that nobody is a judge in their own case. But if the public wants better safeguards and ethics reform on the Supreme Court, it shouldn't expect it from justices who make arguments like this.

Before parsing the justices' statement, it's important to remember that all federal judges, including Supreme Court justices, are already covered by a federal law — Title 28 of the U.S. Code, Section 455 — that defines the circumstances in which they must recuse themselves.

The law describes a number of situations that would pose impermissible conflicts of interest, such as having a personal or financial stake in the outcome of a case, having personal knowledge of or participation in the proceedings, or having a close family member involved in the case.

The law also requires recusal whenever a judge's impartiality might reasonably be questioned. This concern with apparent, in addition to actual, conflicts is no mere afterthought. It is addressed in the very first line of the statute. After all, the public's faith in the courts is the bedrock of their legitimacy.

In their statement, the justices pay lip service to federal recusal law, claiming that they "follow the same general principles and statutory standards as other federal judges." But the rest of their discussion of recusal then attempts to explain why the nine most powerful judges in the country actually hold themselves to a lower standard. As they tell it:

A recusal consideration uniquely present for Justices is the impairment of a full court in the event that one or more members withdraws from a case. Lower courts can freely substitute one district or circuit judge for another. The Supreme Court consists of nine Members who always sit together. Thus, Justices have a duty to sit that precludes withdrawal from a case as a matter of convenience or simply to avoid controversy. See United States v. Will, 449 U.S. 200, 217 (1980) (28 U.S.C. § 455 does not alter the rule of necessity).
At first read, this may seem reasonable. After all, it's true that the Supreme Court doesn't have a mechanism for temporarily replacing justices who cannot hear a case. But that fact does not support the claims that follow.

The core claim is that, since a Supreme Court recusal means fewer than all nine justices hear a case, recusals should be avoided. As a factual matter, this simply isn't accurate. The court is entirely capable of hearing a case with fewer than nine justices: A quorum is defined by statute as six justices.[4]

While atypical, the court has dealt with lengthy absences before. In recent years, the court managed with an eight-justice bench after the death of Justice Antonin Scalia and the refusal of the U.S. Senate to take up a confirmation of his successor until after the 2016 election. The longest vacancy in the court's history, in the 1840s, stretched over two years.[5]

Federal law also provides for disposing of cases when a quorum is absent: The case is held over for the next term, or — if doing so would not result in a quorum — the judgment of the lower court is affirmed. These solutions won't result in blockbuster opinions, but they're a perfectly rational way to handle these situations.

Some, including then-Justice William Rehnquist, have argued that the real harm would be that an equally divided court would be forced to affirm the decision below, depriving the Supreme Court of an opportunity to "establish the law for our jurisdiction."[6]

But that is ultimately a policy argument, which underestimates the damage done when a justice hears a case despite a conflict, and which must yield to the command of the recusal statute.

If the mere fact of a shorthanded court isn't an insurmountable problem, are there other factors to validate the justices' reluctance to recuse? The statement from the justices offers two: the duty to sit, and the rule of necessity. Neither holds water.

The duty to sit, simply stated, holds that a judge must hear a case if they are not otherwise disqualified. Judges cannot avoid cases that would be inconvenient or difficult for them to rule on.[7]

For instance, Canon 3(A)(2) of the Code of Conduct for United States Judges, which the justices profess to consult while denying that it binds them, says, "A judge should hear and decide matters assigned, unless disqualified."

But as this canon states, invoking the duty to sit in the context of recusal decisions misses the point, because recusal is the proper response to disqualifications based on conflicts of interest.

Recusal in such cases is not, as the justices write dismissively in their statement, "a matter of convenience" or an effort "simply to avoid controversy." It is a statutorily mandated action to avoid the appearance or existence of bias.

Instead of recognizing this fact, the justices seem to be subscribing instead to what one legal scholar has termed the pernicious version of the duty to sit, one that justices have invoked to avoid recusing despite actual or apparent conflicts.[8]
In this framing, largely developed by Justice Rehnquist in 1972, the irreplaceability of the justices is an independent factor that weighs against any recusal.[9] But that brings us back to the argument above: A single recusal does not deny a quorum, and even in the extreme case of four recusals, there is a process for addressing the absence of a quorum.

Justice Rehnquist conceded that the duty to sit "is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified."[10]

The justices' invocation of the rule of necessity is an even greater stretch, one that is undermined by the very case cited in the ethics statement. The rule of necessity holds that all litigants have a right to seek judicial redress, so in cases where every possible judge would be disqualified, one judge must necessarily step in to rule on the case.

This was the situation in U.S. v. Will in 1980, when a group of federal district judges sued the government over modifications to planned cost-of-living salary adjustments.

Since those modifications affected the judiciary so broadly that every judge had an interest in the outcome, the Supreme Court held that recusal would have denied the plaintiffs their day in court.

In the words of Chief Justice Warren Burger, "Far from promoting [a fair forum], failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum."[11]

Though this may be true, this reasoning simply does not apply to an individual justice's recusal decision making: A single recusal, or even three, does not prevent the Supreme Court from hearing a case. And the court's inability to hear any given case that comes before it via certiorari is not in itself a denial of process.

After all, the court's docket is now almost entirely discretionary, and the number of cases in which the court grants certiorari has been in steady decline. Last term, only 70 cases were argued before the court, out of nearly 5,000 filed.[12] Clearly, the justices do not mind choosing not to hear cases for any number of reasons.

Finally, it is worth noting what is missing from the recusal discussion. If the justices are genuinely concerned that a recusal undermines the functioning of the court, they should try harder to refrain from engaging in conduct that would warrant recusal in the first place.

An easy starting point would be to divest from individual stocks, ownership of which has led to a substantial number of recusals and missed recusals.

Avoiding appearances before ideologically aligned organizations — of whatever political persuasion — would also help. And a stronger commitment to financial disclosure would reassure the public that conflicts are being caught and addressed.

The justices' discussion of recusals reveals not only that they are satisfied with a status quo in which they are bound by fewer ethics rules than every other federal judge, but also that they have twisted the few rules that do apply to them to hold themselves to a lower standard.

The Supreme Court is the most powerful court in the country; its ethics rules should reflect that by being stronger, not weaker, than those of other courts. But don't count on the justices to get that message.
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