

Supreme Court Ethics Reform

The Need for an Ethics Code and Additional Transparency

By Johanna Kalb and Alicia Bannon PUBLISHED SEPTEMBER 24, 2019

Today, the nine justices on the Supreme Court are the only U.S. judges — state or federal — not governed by a code of ethical conduct. But that may be about to change. Justice Elena Kagan recently testified during a congressional budget hearing that Chief Justice John Roberts is exploring whether to develop an ethical code for the Court.¹ This was big news, given that the chief justice has previously rejected the need for a Supreme Court ethics code.²

In fact, however, the Supreme Court regularly faces challenging ethical questions,³ and because of their crucial and prominent role, the justices receive intense public scrutiny for their choices. Over the last two decades, almost all members of the Supreme Court have been criticized for engaging in behaviors that are forbidden to other federal court judges,⁴ including participating in partisan convenings or fundraisers,⁵ accepting expensive gifts⁶ or travel,⁷ making partisan comments at public events or in the media,⁸ or failing to recuse themselves from cases involving apparent conflicts of interest, either financial or personal.⁹ Congress has also taken notice of the problem. The For the People Act,¹⁰ which was passed in March 2019

by the House of Representatives, included the latest of a series of proposals by both Republican and Democratic legislators¹¹ to clarify the ethical standards that apply to the justices' behavior.

Much of the Supreme Court's power comes from the public's trust in the integrity and fairness of its members. Controversies over the justices' ethical choices threaten this trust at a time when faith in our democratic institutions is already low.¹² In this era of hyperpartisanship, when confidence in the Supreme Court is imperiled by the rancor of recent confirmation battles¹³ and ongoing criticism from the president,¹⁴ the Court's decision to adopt its own ethical reforms would send a clear and powerful message about the justices' commitment to institutional integrity and independence. Moreover, voluntarily adopting a code (rather than waiting for Congress to impose one) could actually enhance the Court's power by building the Court's credibility and legitimacy with the public, thereby earning support for its future decisions.¹⁵

This white paper provides a brief overview of the current judicial ethics framework and highlights three changes that the Court could adopt right now to bring

clarity and transparency to the ethical standards governing the nation's most powerful jurists:

- adopting its own Code of Conduct;
- establishing a regular practice of explaining its recusal decisions,¹⁶ and
- strengthening its rules governing gifts and financial disclosures.

The justices' embrace of these reforms would end the long-standing debate about why the nation's highest court lacks the kind of written ethical code that is increasingly ubiquitous, not only for government officials but also in schools,¹⁷ private corporations,¹⁸ and many other organizations. It would also reestablish the U.S. Supreme Court as a beacon of accountability and rule of law at a moment when these core democratic principles are under attack, domestically and around the world.

An Overview of Ethical Regulation of Federal Judges

The cornerstone of judicial ethics is the Code of Conduct for U.S. Judges. Adopted in 1973, the code applies to all federal judges except the justices of the Supreme Court.¹⁹ The code has five canons, which require that federal judges:

1. “uphold the integrity and independence of the judiciary”;
2. “avoid impropriety and the appearance of impropriety in all activities”;
3. “perform the duties of the office fairly, impartially and diligently”;
4. “engage [only] in extrajudicial activities that are consistent with the obligations of judicial office”; and
5. “refrain from political activity.”²⁰

Some of the canons further describe specific behaviors that are permissible, such as teaching law, or that should be avoided, like commenting on a pending case. The commentary to the canons provides additional interpretative guidance. Although the canons are written broadly, a judge facing a tricky ethical situation may request an advisory opinion from the Judicial Conference of the United States’s Committee on Codes of Conduct.

The Code of Conduct does not itself have the force of law, but violations of its provisions may lead to investigation or sanction under the Judicial Conduct and Disability Act of 1980.²¹ Like the code, this act does not apply to the justices of the Supreme Court.²² It allows anyone to file a complaint alleging that a judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”²³ These complaints are reviewed first by the chief judge of the judicial circuit where the complaint is filed and then, if necessary, by a committee of district and circuit court judges appointed by the chief judge.²⁴

Following an investigation, the committee submits a written report to the circuit’s judicial council, a panel of judges charged with making administrative decisions for the circuit.²⁵ The council then may choose whether to dismiss the complaint, conduct its own investigation, or sanction the judge.²⁶ Possible sanctions include censure, an order directing that the judge receive no further cases, or even a request that the judge retire.²⁷ In extreme cases, the circuit council may refer the matter to the Judicial Conference, which can recommend impeachment.²⁸

The standards in the Code of Conduct are supplemented by statutes governing recusal, financial disclosure, outside employment, and gifts. Some of these rules do apply to the Supreme Court. By statute, a Supreme Court justice must recuse from deciding cases “in any proceeding in which his impartiality might reasonably

be questioned,” as well as for “bias or prejudice.”²⁹ The justice must also recuse if she has personal knowledge of, a family connection to, or a financial interest in the case.³⁰ Consistent with the requirements for other senior federal officials,³¹ the justices are required to file annual financial disclosures with the Judicial Conference, and they are subject to referral to the attorney general for civil and criminal penalties for falsifying or willfully failing to file a report.³² Finally, the justices may not engage in most outside employment, accept honoraria for speeches, or accept gifts from anyone with substantial interests that may be impacted by the Court’s work.³³

These limited statutory provisions represent most of the formal ethical limits on the U.S. Supreme Court. While several justices have indicated that they follow the Code of Conduct voluntarily,³⁴ it has not been adopted as the Supreme Court’s “definitive source of ethical guidance.”³⁵ Moreover, as Chief Justice Roberts has explained, the existing code “does not adequately answer some of the ethical considerations unique to the Supreme Court.”³⁶ Thus, at present, the public has no way of knowing whether and when the justices follow the code, especially since they rarely explain their ethical decisions. Public oversight is further complicated by the fact that the mandated financial disclosures happen only once annually and are not available online.³⁷

Recommendations

The Supreme Court should take action immediately to improve its accountability and transparency.³⁸ Adopting the following commonsense reforms would be important steps toward building the public's confidence in the Court's independence and integrity at this crucial moment.

1. Adopt a Code of Conduct

An obvious step the Court should take is the adoption of its own public code of ethical conduct. Although the Court is notoriously secretive about its internal operations, the justices have, on occasion, indicated that they have agreed on standards to govern their behavior.³⁹ By accepting and publicizing a more complete ethical code, the justices would reaffirm and model a commitment to transparency, accountability, and the rule of law.

The case for an ethical code is clear, and it is one that the justices themselves have recognized in other circumstances. In 1993, the Court published a recusal policy governing cases involving the legal practices of justices' spouses, children, and other close relatives.⁴⁰ As the Court explained in its memo, publicly setting out these standards in advance was intended to make clear that future recusal decisions were "unaffected by irrelevant circumstances of the particular case" and to provide guidance to the justices' "relatives and the firms to which they belong."⁴¹ Adopting an ethical code modeled on the Code of Conduct for U.S. Judges would have a similar effect of allaying concerns about the justices' behavior in individual cases and providing needed guidance to the Court, the parties, and the public about how particular ethical questions will be resolved.

In developing a Supreme Court ethics code, the justices can and should look to the Code of Conduct, which they are reportedly already using to assess their ethical obligations.⁴² At their core, the five canons require federal judges to commit to the principles of independence and impartiality and to refrain from engaging in behaviors that might compromise their integrity in the eyes of the public. All of the sitting justices have indicated their commitment to these values during their confirmation hearings and on other occasions.⁴³ Formally and publicly adopting them should not be controversial.

The code provides specific guidance as to whether particular activities violate these broad principles. Much of this guidance should also be noncontroversial. For example, like every other federal judge, Supreme Court justices should not be members of organizations that discriminate on the basis of race, sex, religion, or national origin.⁴⁴ Nor should the justices serve as officers or trustees of organizations that regularly engage in litigation.⁴⁵ They should agree, like all other federal judges, that

they will treat litigants with respect⁴⁶ and avoid publicly endorsing candidates for political office.⁴⁷ They should also publicly commit to following the code's newest provisions, which prohibit judges from participating in or tolerating harassing and abusive behavior in the workplace and forbid retaliation against employees who report it.⁴⁸

Yet the code may also require some modifications to address circumstances that are unique to the nation's highest court.⁴⁹ For example, Chief Justice Roberts has indicated that the Supreme Court requires somewhat different standards for recusal,⁵⁰ given that the justices, unlike all other federal judges, cannot be replaced.⁵¹ Canon 3(c) of the Code of Conduct, which provides guidance on when judges should disqualify themselves from hearing a case, could be refined to address this concern. For the same reason, the justices should also take special steps to avoid conflicts of interest in the first place. For example, they could adopt a more stringent rule prohibiting their ownership of individual stocks. This would substantially reduce the number of recusals based on financial conflicts of interest and therefore the number of cases decided by less than the full court.⁵²

In developing their own code, the justices could also look to the 2007 American Bar Association Model Code of Judicial Conduct for appropriate ways to address some of the ethical situations that have prompted public criticism of the Court.⁵³ Over the last several years, questions have been raised about the propriety of the justices' regular attendance at conferences and fundraisers for partisan legal-interest groups and at events whose participants or sponsors are involved, either as parties or as amici, in litigation pending before the Court.⁵⁴

Canon 4 of the Code of Conduct currently allows judges "to speak, write, lecture, [and] teach"⁵⁵ on topics related to law and legal reform and to assist in fundraising for nonprofit organizations, including those engaged in legal advocacy.⁵⁶ But, given the growing frequency with which the justices are making public appearances,⁵⁷ the Court might want to adopt more specific ethical standards around speeches and events. The 2007 Model Code attempts to provide more guidance in this area, authorizing and encouraging valuable engagement with the legal community and the public⁵⁸ while drawing clearer lines to avoid the appearance of bias or partisanship. For example, it clarifies that "even for law-related organizations, a judge should consider whether the membership

and purposes of an organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.⁵⁹

To be sure, a code would not provide clear answers to all ethical questions that the justices face, nor could it, on its own, eliminate misbehavior. Because the justices cannot be disciplined except through impeachment, the code would be primarily self-enforcing.⁶⁰ Yet, as ethics experts Charles Geyh and Stephen Gillers have explained, there are reasons to believe that even a voluntary code would have "great value."⁶¹ Were the Court to formally adopt its own ethical code, that commitment would be meaningful, reshaping both the justices' understanding of their discretion and the public's response to their ethical decisions. The justices could no longer satisfy their obligations simply by "consulting a code" that they are "free to disregard,"⁶² and the public "could assume that a justice who vows to abide by ethics rules that the Court itself adopted will do so."⁶³

2. Provide Reasons for Recusal Decisions

In addition to clarifying the principles governing recusal, the Court should adopt a practice of explaining recusal decisions. At present, each justice decides individually whether and when to recuse, pursuant to the statutory standard — and they usually do so without explanation.⁶⁴ Given that the loss of even a single justice can shift the outcome in significant and controversial cases, the public deserves to understand the reason for a justice's absence.⁶⁵

At present, recusal decisions are noted without further comment in the Court's orders, leaving court watchers to guess as to the reasons.⁶⁶ Instead, the Court should provide a public explanation when a justice independently determines that recusal is warranted. As the Project on Government Oversight has explained, "Publicizing recusal explanations would serve the public by offering insight into these often-consequential decisions, while also guiding other judges' and justices' decisions by providing a clear record of what does (or doesn't) constitute a compelling reason to recuse."⁶⁷ Providing short recusal explanations would also be consistent with the Court's historical practice in the late 19th and early 20th centuries.⁶⁸

In addition, when parties appearing before the Court file a formal motion seeking a justice's recusal, the Court should commit to responding in a written opinion. Again, this reform would not be unprecedented. Justice Antonin Scalia wrote a detailed opinion explaining his decision not to recuse in a case involving then vice president Dick Cheney following a hunting trip in which both men participated.⁶⁹ While the written opinion did not end the controversy over his decision, it provided a clear state-

ment of his reasons, which allowed public analysis and critique.⁷⁰ As the Court itself has explained, judicial legitimacy is linked to the Court's willingness to justify its decisions: "A public statement of . . . reasons helps provide the public with the assurance that creates the trust."⁷¹ Recusal motions question the impartiality and independence of the Court; the justices should respond in written opinions to illuminate their reasoning, promote consistency and fairness in their decision-making, and build the public's trust in their judgments.

3. Refine Gift Rules and Enhance Disclosures

Finally, the justices should strengthen the rules governing their acceptance and disclosure of gifts. By statute, the justices may not accept gifts from anyone "whose interests may be substantially affected" by decisions of the Court. In 1991, the Court also voluntarily agreed to follow the rules set by the Judicial Conference,⁷² which prevent judges from accepting gifts that create the appearance of conflict.⁷³

In recent years, however, many of the justices have been criticized for accepting expensive memberships and memorabilia, donations to causes they support, and lavish international trips. The Court should act to allay concerns about undue influence by adopting stricter gift policies, in line with those governing senior government officials.⁷⁴ For example, members of Congress may only accept gifts valued at under \$50, including "services, training, transportation, lobbying, and meals whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred."⁷⁵ While exact parity between the branches may not be necessary or appropriate, the justices should agree to clear limits on gifts in order to avoid the appearance of impropriety.

In addition, the justices should promote increased transparency by agreeing to more-regular online financial disclosures.⁷⁶ Right now, the justices are alone among top government officials in that they provide disclosures only once a year,⁷⁷ and they are the only high-level government officials whose financial disclosures are not available online.⁷⁸ Interested parties must fax a request and then wait several weeks for the preparation of a report that can then be picked up at an office building in Washington or mailed.⁷⁹ Such delays detract substantially from the usefulness of these disclosures as a tool of public accountability. The justices should agree to the same level of oversight required of senior officials in the other branches.⁸⁰

Conclusion

In closing his 2011 year-end report, Chief Justice Roberts noted that the federal judiciary has long bolstered public confidence in the courts “by articulating ethical standards” and that it “has continued to revisit and revise those standards to maintain the public’s trust in the integrity of its members.”⁸¹ This moment demands another such effort. The Supreme Court should voluntarily adopt these basic reforms to help restore the public’s trust in its integrity and to model commitment to the rule of law.

Endnotes

- 1 Robert Barnes, "Supreme Court Justices Tell Congress They Are Not Considering Televised Hearings," *Washington Post*, March 7, 2019, www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html. See also "Supreme Court Fiscal Year 2020 Budget Request," C-SPAN, March 7, 2019, www.c-span.org/video/?458421-1/justices-alito-kagan-testify-supreme-courts-budget&live.
- 2 See "2011 Year-End Report on the Federal Judiciary," December 31, 2011, www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf, 5, 10.
- 3 Steven Lubet, "Why Won't John Roberts Accept an Ethics Code for Supreme Court Justices?," *Slate*, January 16, 2019, <https://slate.com/news-and-politics/2019/01/supreme-court-ethics-code-judge-john-roberts.html>.
- 4 Justice Kavanaugh's confirmation process also drew attention to the lack of ethical standards for Supreme Court justices. Over 80 ethics complaints were filed against then Judge Kavanaugh during his Supreme Court confirmation process. Christal Hayes, "More Than 80 Ethics Complaints Against Brett Kavanaugh Dismissed Because He's Now a Justice," *USA Today*, December 18, 2018, www.usatoday.com/story/news/politics/2018/12/18/brett-kavanaugh-complaints-dismissed-since-hes-now-supreme-court/2354328002/. Shortly after his swearing in as a justice, however, a federal judicial review panel summarily dismissed all of them. See Order, *In Re: Complaints Under the Judicial Conduct and Disability Act* (Judicial Council of the 10th Cir. 2018), www.uscourts.gov/courts/ca10/10-18-90038-et-al.O.pdf. As the panel's order explained, the allegations against Kavanaugh were serious, but his confirmation meant that the review panel lacked jurisdiction to respond to them.
- 5 Justice Gorsuch gave the keynote speech for an organization funded by anti-labor donors while the court was considering *Janus v. AFSCME*, and Justices Thomas and Scalia reportedly attended a gathering of Republican donors organized by Charles Koch. See Elizabeth Warren, "The Supreme Court Has an Ethics Problem," *Politico*, November 1, 2017, www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772. Justice Gorsuch traveled with Senator Mitch McConnell to give a speech at the University of Louisville. See Robert Barnes, "Gorsuch's Speeches Raise Questions of Independence, Critics Say," *Washington Post*, September 27, 2017, www.washingtonpost.com/politics/courts_law/gorsuchs-speeches-raise-questions-of-independence-critics-say/2017/09/27/5accdb3c-a230-11e7-b14f-f1773cd5a14_story.html. Justices Thomas and Scalia attended a Federalist Society fundraiser. See Andrew Rosenthal, "Step Right Up. Buy Dinner with a Justice," *Taking Note* (blog), *New York Times*, November 20, 2011, <https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice/>.
- 6 Justice Thomas has accepted significant gifts and donations to causes he supports from Harlan Crow, a major conservative donor. See Mike McIntire, "Friendship of Justice and Magnate Puts Focus on Ethics," *New York Times*, June 18, 2011, www.nytimes.com/2011/06/19/us/politics/19thomas.html. Justice Ginsburg has reportedly received a number of large monetary awards during her tenure on the Court; for example, the Kaul Foundation gave her \$100,000 in 1996, which she "distributed . . . among 26 charities and nonprofits, including law schools, women's organizations, and theatrical companies." Several of the justices also accept free memberships to Washington-area clubs. The ABA has previously called for the adoption of stricter rules governing the justices' acceptance of gifts. See David G. Savage and Richard A. Serrano, "Thomas Ranks Supreme Among Court's Gift Takers," *Seattle Times*, December 31, 2004, www.seattletimes.com/nation-world/thomas-ranks-supreme-among-courts-gift-takers/.
- 7 Justices Breyer, Ginsburg, and Sotomayor made international trips paid for by allegedly left-leaning organizations. See "The Justices' Junkets," *Washington Post*, February 20, 2011, www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002961.html. A 2015 report, which excluded recently deceased Justice Scalia, showed that all eight sitting justices had taken privately funded international trips, some of which appear to have been quite lavish. See Adam Liptak, "Justices Disclose Privately Paid Trips and Gifts," *New York Times*, June 22, 2016, www.nytimes.com/2016/06/23/us/politics/justices-disclose-privately-paid-trips-and-gifts.html.
- 8 Justice Alito visibly demonstrated his disagreement with President Obama's statements about the Court during the State of the Union address, and Justice Ginsburg has made a variety of comments about the Republican Congress and the Trump election. See Jonathan Turley, "With Ginsburg Apology, Congress Should Look at the Real Problem," *Chicago Tribune*, July 15, 2016, www.chicagotribune.com/news/opinion/commentary/ct-ginsburg-trump-ethics-supreme-court-perspec-0717-jm-20160715-story.html. Justice Kavanaugh was the subject of a number of ethics complaints related to comments he made during his confirmation hearings. Hayes, "Ethics Complaints."
- 9 Chief Justice Roberts refused to recuse from *ABC v. Aereo*, despite owning as much as \$500,000 worth of stock in Time Warner, which had filed an amicus brief siding with ABC in the case. See Warren, "Supreme Court." Justice Thomas refused to recuse from the *Affordable Care Act* challenge despite his wife's activism against the law. See Lisa Graves, "Supremely Unseemly Conduct by Supreme Court Justices Spurs Call for Mandatory Ethics Rules," *PR Watch*, January 9, 2012, www.prwatch.org/news/2012/01/11226/supremely-unseemly-conduct-supreme-court-justices-spurs-call-mandatory-ethics-rul. Justice Scalia declined to recuse in a case against Dick Cheney after accepting a plane ride on Air Force Two to go duck hunting in Louisiana with the then vice president. See Savage and Serrano, "Thomas Ranks Supreme."
- 10 For the People Act of 2019, H.R. 1, 116th Cong. (2019–2020), www.congress.gov/bill/116th-congress/house-bill/1/text.
- 11 In 2011, then representative Christopher Murphy introduced the Supreme Court Transparency and Disclosure Act, which would have extended the Code of Conduct to the justices. See Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011). For an extensive discussion of the act and the debate it prompted, see Amanda Frost, "Judicial Ethics and Supreme Court Exceptionalism," *Georgetown Journal of Legal Ethics* 26 (2013): 449. A few years later, Murphy introduced a similar bill in the Senate, and Democratic Representative Louise Slaughter introduced a parallel bill in the House, which attracted 129 cosponsors. See Rich Gardella, "Why Don't Supreme Court Justices Have an Ethics Code?," NBC News, April 11, 2017, www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236. In 2017, Senator Murphy tried again. See Supreme Court Ethics Act of 2017, S. 835, 115th Cong. (2017–2018), www.congress.gov/bill/115th-congress/senate-bill/835/text. That year, Republican Representative Darrell Issa also introduced a bill that would have required the Judicial Conference to adopt a code of conduct that would extend to the justices. See Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (2017–2018), www.congress.gov/bill/115th-congress/house-bill/6755/text#toc-HAA24CD82CA414ADB9C2A619F140F6ED9. Senator Elizabeth Warren's Anti-Corruption and Public Integrity Act would also have extended the ethical code to the justices and created an enforcement mechanism for violations. See Anti-Corruption and Public Integrity Act, S. 3357, § 403, 115th Cong. (2017–2018). Some of these proposals raise constitutional questions. See Frost, "Judicial Ethics," 455–462.
- 12 Michael J. Nelson and Alicia Uribe-McGuire, "Confidence in the

US Supreme Court Is Declining, and That Puts Its Decisions at Risk from Congress,” *LSE United States Centre*, July 24, 2018, <http://bit.ly/2A5hIDb>. Nelson and Uribe-McGuire describe falling public confidence in the courts and other democratic institutions. Amelia Thomson-DeVeaux and Oliver Roeder, “Is the Supreme Court Facing a Legitimacy Crisis?,” *FiveThirtyEight*, October 1, 2018, <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/>.

13 See, for example, Zack Beauchamp, “The Supreme Court’s Legitimacy Crisis Is Here,” *Vox*, October 6, 2018, www.vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supreme-court-legitimacy.

14 See, for example, “In His Own Words: The President’s Attacks on the Courts,” Brennan Center for Justice, June 5, 2017, www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts.

15 See David Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” *Harvard Law Review* 127 (2013): 573–574. Pozen describes the significance of “self-binding” in theories of executive power.

16 We use the term *recusal* to refer to situations in which a justice independently decides not to participate in a case or when a party requests that a particular justice be disqualified.

17 A survey published in 2001 of 1,000 private and public universities found that 70 percent had ethical codes. Zabihollah Rezaee, Robert C. Elmore, and Joseph Z. Szendi, “Ethical Behavior in Higher Education Institutions: The Role of a Code of Conduct,” *Journal of Business Ethics* 30 (2001): 175.

18 “Most large companies have adopted their own codes of behavior: ninety percent of Fortune 500 companies and approximately half of all other companies have some type of code.” See “Note: The Good, The Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior,” *Harvard Law Review* 116 (2003): 2125.

19 The code was based on the American Bar Association’s 1972 Model Code for Judicial Conduct. The ABA’s Model Code and its revisions have also been adopted in the states, with the result that judicial ethics codes are largely similar across the state and federal systems. Tom Lininger, “Green Ethics for Judges,” *George Washington Law Review* 86 (2018): 719–721.

20 Code of Conduct for United States Judges, www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

21 *Ibid.*, 2–3, Canon 1, comment.

22 28 U.S.C. § 351(d)(1).

23 *Ibid.*, § 351(a).

24 *Ibid.*, § 352.

25 *Ibid.*, § 353.

26 *Ibid.*, § 354.

27 *Ibid.*

28 *Ibid.*

29 28 U.S.C. § 455 (1990).

30 *Ibid.*

31 5 U.S.C. app. 4 § 101(f)(11) (Westlaw through P.L. 116-5).

32 *Ibid.*, §104(a).

33 5 U.S.C. § 7353(a)(2) (Westlaw through P.L. 116-5).

34 Nina Totenberg, “Bill Puts Ethics Spotlight on Supreme Court Justices,” NPR, August 27, 2011, www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices.

35 “2011 Year-End Report,” 5.

36 *Ibid.*

37 Liptak, “Justices Disclose.”

38 Voluntary action by the Court would also avoid any separa-

tion-of-powers concerns that might be raised by congressional regulation of the justices’ ethics. See Frost, “Judicial Ethics.” (Frost argues that reforms like those in H.R. 1 would be within established congressional authority.) Such a step would send an important message about the Court’s ethical commitments. See Charles Geyh and Stephen Gillers, “SCOTUS Needs a Code of Ethics,” *Politico*, August 8, 2013, www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-095301. Russell R. Wheeler, “A Primer on Regulating Federal Judicial Ethics,” *Arizona Law Review* 56 (2014): 525–526.

39 5 U.S.C. § 7353(a)(2) (Westlaw through P.L. 116-5). Liptak, “Justices Disclose.” In fact, at a 2015 congressional hearing, Justice Kennedy indicated that the Court had agreed by resolution to be bound by the Code of Conduct. See “Supreme Court Fiscal Year 2016 Budget,” C-SPAN, March 23, 2015, www.c-span.org/video/?324970-1/supreme-court-budget-fiscal-year-2016&live. If the justices have formally agreed to adhere to the code, they could clarify their understanding of their ethical obligations by making this resolution public.

40 Supreme Court of the United States, “Statement of Recusal Policy,” November 1, 1993, http://eppc.org/docLib/20110106_RecusalPolicy23.pdf.

41 *Ibid.*

42 “2011 Year-End Report,” 5.

43 “Justice Thomas on Judging,” C-SPAN, September 10, 1991, www.c-span.org/video/?c4735995/justice-thomas-judging. Adam Liptak, “Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’” *New York Times*, November 21, 2018, www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html. “Kagan Pledges Judicial Independence,” CNN, June 30, 2010, www.cnn.com/2010/POLITICS/06/30/pol.senate.supreme.court/index.html. Peter Stevenson, “Video: Gorsuch Discusses Judicial Independence,” *Washington Post*, March 21, 2017, www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/video-gorsuch-discusses-judicial-independence/. “U.S. Top Court Nominee Kavanaugh Praises Judicial Independence in Case Against Nixon,” *Washington Post*, September 5, 2018, www.washingtonpost.com/video/politics/kavanaugh-praises-judicial-independence-in-case-against-nixon/2018/09/05/35803016-b113-11e8-8b53-50116768e499_video.html. Richard W. Stevenson and Neil A. Lewis, “Alito Says Judges Shouldn’t Bring Agenda to Cases,” *New York Times*, January 10, 2006, www.nytimes.com/2006/01/10/politics/politicsspecial1/alito-says-judges-shouldnt-bring-agenda-to-cases.html. Stephen G. Breyer, “Judicial Independence in the United States,” *St. Louis University Law Journal* 40 (1995–1996). Ruth Bader Ginsburg, “Judicial Independence: The Situation of the U.S. Federal Judiciary,” *Nebraska Law Review* 85 (2011). *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong. 59 (2009), www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-SOTOMAYOR.pdf.

44 Code of Conduct for United States Judges, Canon 2(C).

45 *Ibid.*, Canon 4(B)(1).

46 *Ibid.*, Canon 3(A)(3).

47 *Ibid.*, Canon 5(A)(3).

48 *Ibid.*, Canon 3(B)(4).

49 Professor Steven Lubet has highlighted some of the issues that the justices have confronted over the last several years, including whether they may speak to reporters about conference proceedings and whether they may rely on their clerks for assistance in writing memoirs and other books. See Lubet, “Why Won’t John Roberts.”

50 As previously explained, the recusal standard is defined by federal statute. See 28 U.S.C. § 455 (1990). The code of conduct fleshes out the broad language of the statute by identifying specific situations in which judges should recuse.

51 See “2011 Year-End Report,” 8–10. Steven Lubet and Claire Diegel have argued that recusal may be the only area where the ethical standards for the justices should differ from those of lower

court judges. Steven Lubet and Claire Diegel, “Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius,” *Valparaiso University Law Review* 47 (2014): 890.

52 See Fix the Court, “Stocks and Recusals,” <https://fixthecourt.com/fix/blind-trusts-and-recusals/>.

53 The Model Code was revised in 1990 and then again in 2007. A few small amendments were made in 2010 (see National Center for State Courts, “Model Code Anniversary,” March 21, 2017, <https://ncsjudicialethicsblog.org/category/new-codes-of-judicial-conduct/>), but the latest version is still referred to colloquially as the 2007 Model Code, reflecting the last significant revision. A majority of states have made changes to their judicial codes based on the 2007 ABA Model Code, and several more are considering whether to adopt it. See Lininger, “Green Ethics for Judges,” 719–720.

54 Warren, “Supreme Court”; Rosenthal, “Step Right Up.”

55 Canon 4(a)(1).

56 *Ibid.*, (4)(a)(3).

57 Joseph P. Williams, “Blurring Judicial Lines,” *U.S. News and World Report*, June 2, 2017, www.usnews.com/news/the-report/articles/2017-06-02/supreme-court-justices-blur-lines-with-political-speeches.

58 David Fontana, “The People’s Justice?,” *Yale Law Journal* 123 (2014), www.yalelawjournal.org/forum/the-peoples-justice#ftn-ref11. Fontana describes the reasons public communication might be important to the justices.

59 2007 ABA Model Code, 3.7, comment 2. The 2007 ABA Model Code also specifically authorizes judges to “initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice” but emphasizes that, in doing so, “the judge must act in a manner consistent with this Code.” 2007 ABA Model Code, 1.2 commentary. The code further acknowledges that “participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system” (ABA Model Code, 3.1, comment 2) but clarifies that “even for law-related organizations, a judge should consider whether the membership and purposes of an organization, or the nature of the judge’s participation in or association with the organization, would conflict with the judge’s obligation to refrain from activities that reflect adversely upon a judge’s independence, integrity, and impartiality.” ABA Model Code, 3.7, comment 2.

60 Lubet, “Why Won’t John Roberts.”

61 Geyh and Gillers, “SCOTUS.”

62 *Ibid.*

63 *Ibid.*

64 “The Supreme Court’s Recusal Problem,” *New York Times*, November 30, 2001, www.nytimes.com/2011/12/01/opinion/the-supreme-courts-recusal-problem.html.

65 Notably, the Code of Conduct requires judges both to recuse when recusal is warranted and to sit when it is not. See Code of Conduct, 3(A)(2) (“A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.”).

66 See, for example, 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>.

67 David Janovsky, “To Protect the Courts, Start Here,” POGO, June 18, 2019, www.pogo.org/analysis/2019/06/to-protect-the-courts-start-here/.

68 *Ibid.*, citing Roth, “Unexplained Recusals.” Concerns about privacy and security, for example, with respect to recusal motions based on the justices’ personal relationships, could be mediated by the use of a checklist. The justices could indicate which category or principle requires recusal without providing detailed explanations that could

implicate their privacy interests. Russell Wheeler and Malia Reddick, *Judicial Recusal Procedures: A Report on the IAALS Convening* (Institute for the Advancement of the American Legal System, July 2017), https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf, 33.

69 *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913 (2004).

70 Similarly, Justice Rehnquist responded in writing to his rejection of a recusal motion in *Laird v. Tatum*, 409 U.S. 824 (1972).

71 *Rita v. United States*, 551 U.S. 338, 356 (2007).

72 In 1991, the Court voluntarily adopted limits on gifts and outside income through an internal resolution. U.S. Supreme Court, “Resolution,” January 18, 1991, www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991-Resolution.pdf.

73 They require a judge to decline a gift “if a reasonable person would believe it was offered in return for being influenced in the performance of an official act.” *Guide to Judiciary Policy*, Vol. 2, Pt. C, Ch. 6, § 620.45, www.uscourts.gov/sites/default/files/vol02c-ch06.pdf. They also provide that judges may not accept gifts so frequently “that a reasonable person would believe that the public office is being used for private gain.”

74 See, for example, U.S. House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual*, 110th Congress, 2nd Session (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

75 *Ibid.*, 32.

76 Legal organizations Fix the Court and the Free Law Project have filed a formal request with the Judicial Conference of the U.S. Committee on Financial Disclosure asking that the disclosures of all federal Supreme Court justices, circuit court judges, and district court judges be made available online on the judiciary website. See Gabe Roth and Mike Lissner, letter to the Hon. Anthony J. Trenga, Fix the Court and Free Law Project, February 19, 2019, <https://fixthecourt.com/wp-content/uploads/2019/02/Online-disclosures-request-2.19.19.pdf>.

77 Liptak, “Justices Disclose.”

78 See Jack Maskell, *The STOCK Act, Insider Trading, and Public Financial Reporting by Federal Officials* (Congressional Research Service, April 18, 2013), 5–6, <https://fas.org/sgp/crs/misc/R42495.pdf>. Maskell describes the online disclosure requirements for the president, vice president, members of and candidates for Congress, and Senate-confirmed presidential employees under the STOCK Act.

79 See Fix the Court, “Financial Disclosures,” <https://fixthecourt.com/fix/financial-disclosures/>.

80 Concerns have been raised that the increased transparency would create security risks. See “Opening Statement of Congresswoman Martha Roby,” *The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency: Hearings Before the House Committee on the Judiciary*, 116th Cong., June 21, 2019, <https://judiciary.house.gov/legislation/hearings/federal-judiciary-21st-century-ideas-promoting-ethics-accountability-and>. As Charles Geyh has explained, requiring increased transparency in disclosures would not prevent the redaction of personal information. Testimony of Professor Charles Geyh, *The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency: Hearings before the House Committee on the Judiciary*, 116th Cong., June 21, 2019, <https://judiciary.house.gov/legislation/hearings/federal-judiciary-21st-century-ideas-promoting-ethics-accountability-and>.

81 “2011 Year-End Report,” 11.

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ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges Carnegie Corporation of New York, Democracy Alliance Partners, Ford Foundation, the JPB Foundation, Martin and Ruth Krall, Open Society Foundations, Piper Fund — a Proteus Fund initiative, and Rockefeller Brothers Fund for their generous support of our fair courts work. Arnold Ventures' founders, Laura and John Arnold, are donors to the Brennan Center for Justice. This is an independent Brennan Center publication; the views expressed are those of the authors and do not necessarily represent those of our supporters. The authors are grateful to their Brennan Center colleagues Wendy Weiser, Dorothy Samuels, Matt Menendez, Douglas Keith, Patrick Berry, Laila Robbins, and Josh Bell for their thoughtful comments. We are also grateful to Professor Charles Geyh and Professor David Pozen; the report benefited tremendously from their expertise.

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