THE SUPREME COURT'S SPECIOUS CODE OF CONDUCT

James J. Sample†

Congressionally imposed ethics enforcement would enhance the Supreme Court's exercise of constitutional powers by reducing the interference of improper personal motives during its factual and legal determinations. The Court has long recognized the self-evident truth that "no man can be a judge in his own case." The Framers recognized the limits inherent in human nature: humans are not angels. Accordingly, the Constitutional scheme of separated powers, as elucidated by Madison, "[does] not mean that these departments ought to have no partial agency in, or no control over, the acts of each other." Congress rightly has the constitutional means and motive to promote due process by bolstering impartiality and the appearance thereof. It can do so while also strengthening the Court's proper constitutional role. Congress can and should enact an ethics enforcement mechanism that brings the Justices within a system that checks their individual interests. The Supreme Court's ersatz Code, in its present form, is manifestly insufficient. With permissive language and no meaningful enforcement mechanism, the Code serves only as a clever loophole, designed to suppress public scrutiny of the Court, without enacting real change.

TABLE OF CONTENTS

† Professor, Maurice A. Deane School of Law at Hofstra University. Thanks to Alexa Sabatini, Caitlin McDonough, Philip Daleo, and Connor Cruz for their keen minds and research assistance. Gratitude is also owed to the editors and staff of *Cardozo Law Review* for their exemplary professionalism. Any errors or shortcomings are mine.

INTRODUCTION[1]

The narrative around the Supreme Court and the Justices has long been that the bench upon which they sit is fundamentally different,

[1] This Article, along with a prior article, *The Supreme Court and the Limits of Human Impartiality*, published in the *Hofstra Law Review*, initially developed out of written and spoken testimony about Supreme Court ethics, transparency, and disclosure before the Senate Judiciary Subcommittee on Federal Courts, where Senator Sheldon Whitehouse proposed the Supreme Court Ethics, Recusal, and Transparency Act to impose and enforce a code of ethics for the Supreme Court. *Ensuring an Impartial Judiciary: Supreme Court Ethics, Recusal, and Transparency Act of 2023: Hearing on S. 359 Before the S. Comm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the Comm. on the Judiciary*, 118th Cong. 8–9, 29–46 (2023) (statement of James J. Sample, Professor of Law, Maurice A. Deane School of Law, Hofstra University). This hearing came in the wake of an investigative report by *ProPublica* that raised concerns about Justice Clarence Thomas's potential failure to meet financial disclosure requirements after he received trips and other valuable items from Republican billionaire donor Harlan Crow. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/6XCB-8D9P]. The *ProPublica* report triggered a nationwide discussion of Supreme Court ethics, prompting the Court to implement the very first Supreme Court Code of Conduct. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023). Owing to the timing of the prior Article's publication, relative to the Supreme Court's adoption of the inchoate Code of Conduct that serves as the major focal point for this Article, much of the pertinent context as to recusal law and historical practice is pertinent to both papers. This Article seeks to build on the prior one, particularly with an eye towards critiquing the political, judicial, and legal ramifications of the Court's unfortunately ersatz Code.

constitutionally unique.[2] By way of example, the constitutionally afforded life tenure Justices enjoy supports that narrative.[3] Indeed, life tenure is often thought to protect a Justice from the political whims of the time;[4] however, recent actions—and reactions—from members of the Court work to dramatically call this narrative into question.

For 235 years, since its very inception, the Supreme Court did not have any formal, binding ethics code that the Justices adhered to—making it the only court in the nation lacking one.[5] After significant criticism,[6] and record lows in public trust,[7] the Court released its very first Code of Conduct ("the Code") on November 13, 2023.[8]

On its face, the Code represents a step in the right direction. However, as the Justices have demonstrated time and time again in the short time since its release, the Code is more loophole than law. The permissive language, coupled with a complete lack of enforcement mechanism, allows the Justices to cherry-pick the language to fit their own narratives.

---

2 It is crucial to note that there are two narratives at play—the Supreme Court as an institution and the individuals within said institution. To assert that the issues raised are the fault of one or a few is a superficial, reductionist view of a complex issue. There are of course exceptions, but to discuss the individuals without the context of the system as a whole does a disservice to the conversation as a whole and neglects crucial context in which the lack of accountability for aforementioned individuals is created and upheld.

3 U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

4 THE FEDERALIST NO. 78 (Alexander Hamilton) ("[Life tenure is an] excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.").

5 In fact, the Supreme Court was (and arguably still is) "the only federal entity with no enforceable ethical code of conduct." Devon Ombres, *With Its Release of a New Nonbinding Code of Conduct, the Supreme Court Fails on Ethics Again*, CTR. FOR AM. PROGRESS (Nov. 15, 2023), https://www.americanprogress.org/article/with-its-release-of-a-new-nonbinding-code-of-conduct-the-supreme-court-fails-on-ethics-again [https://perma.cc/5GD7-F6MM].

6 *E.g.*, Natalie Venegas, *Thousands Sign Christian Petition Demanding Samuel Alito Resign: 'Unfit,'* NEWSWEEK (June 18, 2024, 7:37 AM), https://www.newsweek.com/thousands-sign-christian-petition-demanding-samuel-alito-resign-1913408 [https://perma.cc/5KMC-2PX3].

7 *See* Katherine Fung, *Republicans Lose Trust in Supreme Court*, NEWSWEEK (June 17, 2024, 9:37 AM), https://www.newsweek.com/republicans-lose-trust-supreme-court-1913603 [https://perma.cc/Z5K3-TS6M] ("Last year's Gallup survey found that views of the Supreme Court remain near record lows, with only 43 percent approval in September 2023. . . . [But in] Monday's poll from Ipsos . . . only 39 percent said they trusted the Supreme Court . . . ." (first citing Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx [https://perma.cc/R59U-FAUW]; and then citing IPSOS, POLITICO MAGAZINE TRUMP VERDICT SURVEY 1 (2024), https://www.ipsos.com/en-us/politico-magazine-ipsos-trump-hush-money-verdict (select "download") [https://perma.cc/4MQZ-K6JG])).

8 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

I. POLITICIZATION OF THE COURT

On February 13, 2016, mere hours after the official statement was released confirming the death of Justice Antonin Scalia, Republican Senate Majority Leader Mitch McConnell released a statement saying: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president."[9] McConnell's politically charged statement, released alongside other remarks by members of Congress offering condolences to Scalia's family, emphasizes exactly how political the bench and the Justices that sit on it have become.[10] Justice Scalia's seat remained empty for 442 days—setting the record for the longest that a seat on the bench has remained open.[11] McConnell refused to even offer a Judiciary Committee hearing to President Obama's appointment choice, Merrick Garland.[12] Justice Scalia's seat remained open for the rest of Democrat President Barack Obama's term and was filled after the election by Republican President Donald Trump.[13]

Contrast the statement made and congressional actions in 2016, with the reaction to Justice Ruth Bader Ginsburg's death in 2020.[14] Just six weeks before the presidential election, McConnell vowed to fill the empty seat on the bench with Republican President Trump's nominee.[15] President Trump nominated Amy Coney Barrett a mere thirty-five days

---

9 Press Release, Mitch McConnell, Majority Leader, Senate, Justice Antonin Scalia (Feb. 13, 2016); Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM), https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248 [https://perma.cc/D5L9-HJKC].

10 *See* Everett & Thrush, *supra* note 9.

11 The record was previously 389 days, following the resignation of Justice Abe Fortas. Alana Abramson, *Neil Gorsuch Confirmation Sets Record for Longest Vacancy on 9-Member Supreme Court*, TIME (Apr. 7, 2017, 12:20 PM), https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy [https://perma.cc/W58G-XZYB]. "There were longer vacancies;" however, this is the longest a seat has sat open since "Congress set the number of justices at nine." *Id.*

12 *Id.*

13 *Id.*

14 In a statement made just days before her death, Justice Ginsburg remarked, "My most fervent wish is that I will not be replaced until a new president is installed." Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/V3NT-XLDN].

15 *Compare* McConnell, *supra* note 9, *with* Patrice Taddonio, *In Wake of Ruth Bader Ginsburg's Death, McConnell Reverses Course on Supreme Court Vacancy; Vows Vote on Nominee*, PBS (Sept. 19, 2020), https://www.pbs.org/wgbh/frontline/article/ruth-bader-ginsburg-death-mcconnell-vote-supreme-court-vacancy [https://perma.cc/GE2U-386D].

before the election, an election which President Trump went on to lose.[16] Certainly not letting "[t]he American people . . . have a voice in the selection of their next Supreme Court Justice" this time around.[17]

The two opposing narratives, peddled by the exact same senator only four years apart, demonstrate just how politically charged the Court and Justices have become. The Supreme Court has long been divided along ideological lines, but the shift towards a dramatic divide along political party lines only further threatens the legitimacy of the Court.[18]

"Supreme Court appointments are [inherently] political by design"[19]—the President puts forth a nominee and the Senate confirms.[20] It only follows that a President will select an appointee that is aligned with his own ideological beliefs.[21] But, life tenure appointments are intended to remove the Justices from the political sphere, allowing them to vote on what the law is and just "call balls and strikes" as Chief Justice John G. Roberts put it,[22] rather than what would get them reappointed.[23] Recent years have marked a stark shift in this ideology. The predictability in the current Justices' voting record demonstrates just how much the head of the third branch of government operates as a political body.[24] This is only furthered by strategic retirement decisions made by the Justices to ensure a President aligned with their particular political ideology is afforded the nomination.[25]

Public perception of the Court is critical. There are rational, intelligent arguments that the Court has never been apolitical—and they very well may be correct.[26] But the fact of the matter is that the public is

---

16 166 CONG. REC. S5898 (daily ed. Sept. 29, 2020) (nomination of Amy Coney Barrett); FEC, FEDERAL ELECTIONS 2020: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 7 (Oct. 2022), https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf [https://perma.cc/X7CN-F2T3].

17 McConnell, *supra* note 9; Everett & Thrush, *supra* note 9.

18 *See* Rachel Reed, *Politics, the Court, and 'the Dangerous Place We Find Ourselves in Right Now,'* HARV. L. TODAY (Sept. 21, 2022), https://hls.harvard.edu/today/politics-the-court-and-the-dangerous-place-we-find-ourselves-in-right-now [https://perma.cc/6FN2-6G8X].

19 *Id.*

20 U.S. CONST. art. II, § 2.

21 *See* Reed, *supra* note 18.

22 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., nominee for Chief Justice of the United States Supreme Court).

23 *See* Reed, *supra* note 18.

24 *See id.*

25 *See id.*

26 *See* Joshua Zeitz, *The Supreme Court Has Never Been Apolitical*, POLITICO (Apr. 3, 2022, 7:01 AM), https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482 [https://perma.cc/Q5RT-9JTT].

becoming increasingly aware of how political the Court truly is, and that only further erodes trust in the Court.[27]

The flagrant use of the Court's docket to further the political agenda of President Donald J. Trump serves as another worrisome example of just how politically charged the bench has become. In the four years he was in office during his first term, Donald Trump's administration requested relief by the Court's "shadow docket" forty-one times[28]—"a full five times as often as the Bush and Obama Administrations *combined*."[29]

The "shadow docket," a phrase coined in 2015 by William Baude in a *New York University Law Review* article,[30] fundamentally refers to the line of cases by which the Court rules strictly on procedural questions, as opposed to meritorious claims.[31] The cases typically have a timing or element of emergency to them as well—prompting the Court to prioritize a speedy answer over the traditional lengthy oral argument and briefing process.[32] However, shadow docket usage has transformed over the past few years, issuing more significant rulings on contentious claims.[33]

Cases on the shadow docket receive neither formal hearings nor the substantial briefing that those on the traditional docket receive.[34] The holdings are accompanied by little, if any, explanation, and it is often

---

27 *See id.*

28 DEMOS, THE SHADOW DOCKET: SHEDDING LIGHT ON THE SUPREME COURT'S DANGEROUS USE OF ITS ORDERS LIST 3 (July 2023), https://www.demos.org/sites/default/files/2023-07/The%20Shadow%20Docket.pdf [https://perma.cc/BH3D-EVNU]. The Court granted relief to the Trump Administration in twenty-eight of those cases. *Id.*

29 *See* Alexis Denny, *Clarity in Light: Rejecting the Opacity of the Supreme Court's Shadow Docket*, 90 UMKC L. REV. 675, 685 (2022).

30 William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

31 *See* Harry Isaiah Black & Alicia Bannon, *The Supreme Court 'Shadow Docket,'* BRENNAN CTR. FOR JUST. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/38HL-EHHM].

32 *See* DEMOS, *supra* note 28, at 2.

33 *See, e.g.*, Ohio v. EPA, 603 U.S. 279 (2024) (staying the enforcement of new air quality standards); Biden v. Nebraska, 600 U.S. 477 (2023) (blocking student loan forgiveness on certiorari before judgment by the Court of Appeals); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022) (per curiam) (staying the enforcement of a COVID–19 vaccine mandate); Trump v. Sierra Club, 140 S. Ct. 2620 (2020) (mem.) (continuing a stay against a district court injunction, 140 S. Ct. 1 (2019) (mem.), allowing border-wall construction to continue). It is worth noting that the precedential value of the shadow docket cases is unclear. The Court has sent mixed messages, sometimes rebuking the circuit courts for not following shadow docket holdings, while simultaneously implying that the holdings are of "little precedential value." Black & Bannon, *supra* note 31.

34 Typically, cases on the shadow docket receive only one round of briefing, if any at all. *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 72 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

unclear which Justices fall in the majority.[35] Opinions are even released in the middle of the night, further adding to the secrecy and mystery.[36] All of which, if the cases were merely procedural questions of due dates and timing, would be perfectly reasonable. However, other shadow docket questions, such as requests to halt a lower court's order, can have significant implications.[37] Given the unique position of the Supreme Court in the judiciary system, every action has definitive and entirely unreviewable consequences.[38] By way of example, a refusal to reinstate a lower court's order means a law may be reinstated.[39]

Not only has the significance of the holdings from the shadow docket increased, but the sheer volume has as well.[40] In 2021, the Justices issued shadow docket cases twice as often as they did only a few years prior.[41] Professor Stephen Vladeck has referred to 2017 as the "inflection point" for use of the shadow docket, citing to the Trump administration's use and overuse of emergency rulings.[42] It stands to reason that the increasing use of the shadow docket for meritorious, nonemergency claims coinciding with the six-three conservative supermajority after the retirement of Justice Anthony Kennedy and the death of Justice Ginsburg is more than mere coincidence.[43]

None of this is to say that the shadow docket should be abolished in its entirety. The docket serves a legitimate purpose for procedural emergency claims. It is the ever-increasing overuse of the docket for meritorious claims by a political administration to execute its own political agenda that raises cause for concern.

---

35 *See* Black & Bannon, *supra* note 31.

36 *See id.*

37 *See id.*

38 *See* U.S. CONST. art. III, §§ 1–2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (per curiam) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution.").

39 DEMOS, *supra* note 28, at 3 ("During a single four-year term, the Trump administration banned travel from several majority-Muslim countries, blocked migrants from asylum eligibility, and created the 'Remain in Mexico' policy that illegally prevented asylum seekers from entering the country while waiting for a hearing in U.S. immigration court. In all three examples, lower courts blocked the harmful policies, citing their capriciousness and cruelty—only for the Supreme Court to overturn the rulings [via] the shadow docket.").

40 Statement of Vladeck, *supra* note 34, at 75–76.

41 *Id.* at 78.

42 Stephen I. Vladeck, *The Business of the Supreme Court: How We Do, Don't, and Should Talk About SCOTUS*, 67 ST. LOUIS U. L.J. 571, 585 (2023); *see also* DEMOS, *supra* note 28, at 3.

43 *See generally* Statement of Vladeck, *supra* note 34.

II. POLITICAL INVOLVEMENT BY THE JUSTICES

In 2015, the late Justice Ginsburg was heavily criticized for commenting on then-presumptive Republican presidential nominee Donald Trump.[44] In three separate media interviews, Justice Ginsburg referred to Trump as a "faker" and stated that she "could not really imagine what it would be like if he became president."[45] The Justice walked back her comments in a brief statement issued by the Court, admitting that she made a mistake and stating that "[j]udges should avoid commenting on a candidate for public office."[46] Her comments represented an instance where actions taken by a Supreme Court Justice raised serious ethical questions. It is worth noting here that the judicial code binding the lower federal courts prohibits judges from endorsing or speaking about political candidates.[47] The new Supreme Court Code of Conduct Canon Five encourages (but does not mandate) that "A Justice Should Refrain from Political Activity."[48]

It is possible that the Chief Justice resisted implementing a code of conduct for the Court due to concerns about his own ethical issues, even if they were less apparent than those of his colleagues. Reports suggest that Chief Justice Roberts's wife, Jane Roberts, has received over $10 million from multiple law firms,[49] one of which had previously presented a case before the Supreme Court after already compensating her with

---

44 Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES (July 14, 2016), https://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html [https://web.archive.org/web/20250225222213/https://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html].

45 *Id.*; Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html [https://perma.cc/XFB9-Z29Z].

46 Shear, *supra* note 44.

47 Robert Barnes, *Ginsburg Expresses 'Regret' For Remarks Criticizing Trump*, WASH. POST (July 14, 2016, 10:49 AM), https://www.washingtonpost.com/politics/ginsburg-expresses-regret-over-remarks-criticizing-trump/2016/07/14/f53687bc-49cc-11e6-bdb9-701687974517_story.html [https://web.archive.org/web/20221206120300/https://www.washingtonpost.com/politics/ginsburg-expresses-regret-over-remarks-criticizing-trump/2016/07/14/f53687bc-49cc-11e6-bdb9-701687974517_story.html].

48 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 5, 8 (U.S. 2023).

49 Legal headhunting firms typically receive a percentage of the partner's projected compensation as a fee. A large portion of that fee is paid directly to the individual who made the connection. In Price's sworn affidavit, an internal financial spreadsheet from Major, Lindsay & Africa shows that Jane Roberts's "attributed revenue" totaled $13,309,433 between 2007 and 2014, and her "commissions" totaled $10,323,842.70. Mattathias Schwartz, *Jane Roberts, Who Is Married to Chief Justice John Roberts, Made $10.3 Million in Commissions from Elite Law Firms, Whistleblower Documents Show*, BUS. INSIDER (Apr. 28, 2023, 2:17 PM), https://www.businessinsider.com/jane-roberts-chief-justice-wife-10-million-commissions-2023-4 [https://perma.cc/4KAU-X3Q9].

substantial sums.[50] Jane Roberts is the managing partner for the Washington office of the recruiting company Major, Lindsay & Africa, where she matches attorneys with law firms.[51] When Roberts joined the Court, Jane Roberts left her position as partner in a law firm to alleviate any potential conflicts of interest, stating that her husband's job made it "awkward to practice law in the firm."[52] Her former colleague at Major, Lindsay & Africa, Kendal Price, submitted a complaint to the Department of Justice and Congress in December of 2022, arguing that Ms. Roberts's high commission payments were largely due to her husband's role as Chief Justice.[53]

A spokesperson for the Court stated that Roberts "complied with financial disclosure laws . . . [and] had also consulted the code of conduct for federal judges . . . including a 2009 advisory opinion,"[54] which states:

> [A] judge whose spouse owned and operated a legal or executive recruitment business need not recuse merely because a law firm appearing before the judge engaged the judge's spouse, either currently or in the past, to recruit an additional lawyer, or because the spouse made preliminary overtures to recruit attorneys but no contract or employment negotiations resulted.[55]

It should be noted, however, that "[o]ther advisory opinions have held that when a judge's spouse is actively recruiting for a firm appearing before that judge, or when a spouse has personally done 'high level'

---

50 Tori Otten, *Elena Kagan Hits Back at Samuel Alito, Endorses Supreme Court Ethics Reform*, NEW REPUBLIC (Aug. 4, 2023, 1:26 PM), https://newrepublic.com/post/174851/elena-kagan-hits-back-samuel-alito-endorses-supreme-courrt-ethics-reform [https://perma.cc/59AT-KSJ4].

51 Steve Eder, *At the Supreme Court, Ethics Questions over a Spouse's Business Ties*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html [https://web.archive.org/web/20250306070003/https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html].

52 *Id.* A managing partner at her former firm said it hired her, in part, because they "hop[ed] it would benefit from her being the [C]hief [J]ustice's wife . . . . Roberts lists his wife's company on his ethics form, but not which lawyers and law firms hire her as a recruiter." Hailey Fuchs, Josh Gerstein & Peter S. Canellos, *Justices Shield Spouses' Work from Potential Conflict of Interest Disclosures*, POLITICO (Sept. 29, 2022, 3:09 PM), https://www.politico.com/news/2022/09/29/justices-spouses-conflict-of-interest-disclosures-00059549 [https://web.archive.org/web/20250130172158/https://www.politico.com/news/2022/09/29/justices-spouses-conflict-of-interest-disclosures-00059549].

53 Nicholas Reimann, *Chief Justice John Roberts' Wife Made over $10 Million as Legal Consultant, Report Says*, FORBES (Apr. 28, 2023, 5:40 PM), https://www.forbes.com/sites/nicholasreimann/2023/04/28/chief-justice-john-roberts-wife-made-over-10-million-as-legal-consultant-report-says [https://perma.cc/2A5S-T2L4]. Roberts reported his wife's earnings as "salary," rather than "commission," in his financial disclosure docs. *Id.*

54 Eder, *supra* note 51.

55 2 GUIDE TO JUDICIARY POLICY, pt. B, ch. 3, at 204 (COMM. ON CODES OF CONDUCT 2019).

recruitment work that generated 'substantial fees,' recusal would be appropriate."[56]

Justice Samuel Alito recently garnered media attention and criticism for images showing an upside down flag flying outside his Virginia home in the weeks following the 2020 election.[57] The inverted flag was seen on January 17, 2021, at Justice Alito's home in Alexandria, Virginia—eleven days after the January 6 attack on the U.S. Capitol and three days before President Biden's inauguration.[58] The Alitos' neighbors say the inverted flag had been put up several days earlier.[59] The upside-down flag became a symbol of the "Stop the Steal" movement in the weeks and months following the election, in which Trump's supporters falsely claimed that Biden's win was illegitimate due to widespread fraud.[60] The inverted flag was widely seen during the January 6 insurrection, becoming synonymous with the movement.[61]

In response to media outrage, in an email to the *New York Times*, Alito said, "I had no involvement whatsoever in the flying of the flag. . . . It was briefly placed by Mrs. Alito in response to a neighbor's use of objectionable and personally insulting language on yard signs."[62] Neighbors said Mrs. Alito had been in a dispute with another family on the block because they had put up an anti-Trump sign with an expletive.[63]

Two years later, another politically charged flag was seen flying outside an Alito property—this time the Alitos' vacation home in New Jersey.[64] Much like the inverted American flag, the "Appeal to Heaven" flag was seen carried by rioters at the Capitol on January 6, however, this flag has overt religious implications, advocating for a remake of the

---

56 Schwartz, *supra* note 49.

57 Jodi Kantor, *At Supreme Court Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html [https://web.archive.org/web/20250306081418/https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html].

58 *Id.*

59 *Id.*

60 *Id.* A flood of social media posts exhorted Trump supporters to flip over their flags. The inverted flag is to be used only as a signal of dire distress in instances of extreme danger to life or property. *Id.*

61 John Fritz, *New York Times: Upside-Down US Flag Flew at Home of Justice Samuel Alito After 2020 Election*, CNN (May 17, 2024, 9:10 AM), https://www.cnn.com/2024/05/16/politics/alito-upside-down-american-flag-house/index.html [https://perma.cc/JUZ2-LMHZ].

62 Kantor, *supra* note 57.

63 *Id.*

64 Jodi Kantor, Aric Toler & Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html [https://web.archive.org/web/20250313161554/https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html].

American government in Christian terms.[65] Although less direct than Justice Ginsburg's aforementioned comments, one could make a reasonable and convincing argument that the flags also violate Canon Five of the new Code of Conduct.[66]

In May of 2024, at the Eleventh Circuit Judicial Conference in Point Clear, Alabama, Justice Clarence Thomas, who has continuously been under scrutiny for his lack of disclosure for lavish gifts and his wife's involvements, among other things, pushed back against his critics.[67] He lamented what he described as the "nastiness" and "lies" directed at him and his wife, Virginia "Ginni" Thomas, and calling Washington a "hideous place."[68] In his address, Thomas stated: "Being in Washington, you have to get used to particularly people who are reckless . . . . They don't bomb you, necessarily, but they bomb your reputation or your good name or your honor. And that's not a crime but they can do as much harm that way."[69] Ironically, some of the lack of disclosure and lavish gift issues raised about Thomas over the past year, discussed in further depth later in this Article, may *actually* constitute criminal activity.[70]

Recently, Thomas failed to recuse—or provide any insight as to his lack of recusal—in the case brought by President Trump in which he was removed from the ballot due to his involvement in the January 6 insurrection.[71] Ginni Thomas played a peacemaking role between feuding factions of rally organizers "so that there wouldn't be any division around

---

65 *Id.* Also known as the "Pine Tree flag," the Appeal to Heaven flag dates back to the Revolutionary War, but fell into obscurity until it was resurrected by Donald Trump as a religious section of the "Stop the Steal" movement, used to campaign for a remake of the American Government on Christian ideology. *Id.*

66 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 5 (U.S. 2023).

67 John Fritze, *Justice Clarence Thomas Decries Washington as 'Hideous' and Pushes Back on 'Nastiness' of Critics*, CNN (May 10, 2024, 7:25 PM), https://www.cnn.com/2024/05/10/politics/clarence-thomas-pushes-back-critics/index.html [https://perma.cc/7L68-E9X5].

68 *Id.*

69 *Id.*

70 *See infra* Section V.B.5; Julie A. Werner-Simon, *Justice Clarence Thomas' Omissions Are Criminal; Thomas Has Deprived the Public of Honest Services, and of What Alexander Hamilton Called "The Good Behavior" Required of Federally Appointed Judges*, AM. CONST. SOC.: EXPERT F. (July 5, 2023), https://www.acslaw.org/expertforum/justice-clarence-thomas-omissions-are-criminal-thomas-has-deprived-the-public-of-honest-services-and-of-what-alexander-hamilton-called-the-good-behavior-required-of-federa [https://perma.cc/BC32-TRMB].

71 Thomas did recuse himself in one January 6-related case prior to Trump's appeal (an appeal by John Eastman related to his efforts to help Trump block certification of the 2020 election), but provided no reasoning behind his decision. Tobi Raji, *Some Want Justice Thomas to Skip Trump's Ballot Case. He Doesn't Plan to*, WASH. POST (Feb. 6, 2024, 6:09 AM), https://www.washingtonpost.com/politics/2024/02/06/justice-clarence-thomas-supreme-court-trump-ballot [https://web.archive.org/web/20240208164535/https://www.washingtonpost.com/politics/2024/02/06/justice-clarence-thomas-supreme-court-trump-ballot]. However, Eastman is also a close personal friend and former law clerk of Justice Thomas. *Id.*

January 6th."[72] Thomas subsequently faced calls from media and members of Congress to recuse, and non-recusal was almost definitely a violation of the newly minted Supreme Court Code of Conduct.[73]

Criticism of Justice Thomas's decision to rule on these issues has arisen due to his wife, Ginni Thomas, playing an active role in advancing the "stolen election" narrative.[74] Mrs. Thomas not only expressed solidarity with the January 6 rioters, but also lobbied Arizona legislators and the White House Chief of Staff to aid in overturning Biden's electoral victory.[75] In November 2022, Justice Thomas cast a vote to prevent a subpoena for the Arizona Republican Party chair's phone records, which had the potential to implicate his wife.[76]

None of the above intends to assert that the Justices' spouses are not free to have their own careers, or that those careers may not involve political activity. That is not the issue at hand. Rather, when Justices spouses' cross paths with the Justices' work on the bench, it raises questions of impartiality and issues of recusal, exactly as discussed in the new Code; however, the distinct lack of any meaningful enforcement

---

72 Dani Hakim & Jo Becker, *The Long Crusade of Clarence and Ginni Thomas*, N.Y. TIMES (Sept. 1, 2022), https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html [https://web.archive.org/web/20250306102935/https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html].

73 *See* Raji, *supra* note 71; *see also* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 3 (U.S. 2023) (suggesting recusal if a Justice or their spouse has "an interest that could be substantially affected by the outcome of the proceeding" or is "likely to be a material witness in the proceeding").

74 Emma Brown, *Ginni Thomas, Wife of Supreme Court Justice, Pressed Ariz. Lawmakers to Help Reverse Trump's Loss, Emails Show*, WASH. POST (May 20, 2022, 2:36 PM), https://www.washingtonpost.com/investigations/2022/05/20/ginni-thomas-arizona-election-emails [https://web.archive.org/web/20240731090032/https://www.washingtonpost.com/investigations/2022/05/20/ginni-thomas-arizona-election-emails].

75 *Id.*

76 Ward v. Thompson, 143 S. Ct. 439 (2022) (mem.). Amy Howe, writing for *SCOTUSblog*, described the issue in *Ward*:

> Thomas' wife, Ginni Thomas, lobbied Arizona lawmakers in November 2020 to set aside the victory by then-President-elect Joe Biden and choose a 'clean slate of Electors.' According to The Washington Post, which first reported on Thomas' efforts, Ginni Thomas sent emails to two members of the Arizona legislature through an online platform 'designed to make it easy to send prewritten form emails to multiple elected officials.'

Amy Howe, *Court Allows Jan. 6 Committee to Obtain Phone Records of Arizona GOP Chair*, SCOTUSBLOG (Nov. 14, 2022, 12:13 PM), https://www.scotusblog.com/2022/11/court-allows-jan-6-committee-to-obtain-phone-records-of-arizona-gop-chair [https://perma.cc/28LG-VNLH].

mechanism means the Justices face no repercussions for failure to recuse.[77]

III. THE 2023 SCOTUS CODE OF CONDUCT

After years of conflicting reports from the Justices themselves,[78] on November 13, 2023, the Supreme Court issued a Code of Conduct.[79] The Court issued a statement along with the Code, highlighting that "[f]or the most part these rules and principles are not new," and that it is only the "misunderstanding" of the public that necessitates the publishing of this nonenforceable code.[80]

Along with the haughty statement, the Court provided the misunderstanding public with five Canons the Justices are supposed to follow:

1. A Justice Should Uphold the Integrity and Independence of the Judiciary.
2. A Justice Should Avoid Impropriety and the Appearance of Impropriety in All Activities.
3. A Justice Should Perform the Duties of Office Fairly, Impartially, and Diligently.
4. A Justice May Engage in Extrajudicial Activities that Are Consistent with the Obligations of the Judicial Office.
5. A Justice Should Refrain from Political Activity.[81]

Perhaps the most controversial, and most pertinent to this Article, is the disqualification section, which begins by emphasizing that "[a]

---

77 *See* Michael Waldman, *New Supreme Court Ethics Code Is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail [https://perma.cc/AAZ3-R6F7].

78 *See* Otten, *supra* note 50; Robert Barnes & Ann E. Marimow, *Supreme Court Justices Discussed, but Did Not Agree on, Code of Conduct*, WASH. POST (Feb. 9, 2023, 3:19 PM), https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code [https://perma.cc/S58W-PY4Q]; Tobi Raji, Theodoric Meyer & Leigh Ann Cladwell, *Documents Reveal Justices' Long-Running Tensions over Ethics*, WASH. POST (June 26, 2023, 6:03 AM), https://www.washingtonpost.com/politics/2023/06/26/documents-reveal-justices-long-running-tensions-over-ethics [https://perma.cc/V4VB-NRZB]; JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/53XH-9HDC].

79 *Statement of the Court* of CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

80 *Id.*

81 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

Justice is presumed impartial and has an obligation to sit unless disqualified."[82]

The accompanying commentary expands on these Canons, and in many ways undermines them. It begins by explaining that the commentary is largely derived from the Code of Conduct for lower federal court judges, but is adapted to the "unique institutional setting of the Supreme Court."[83]

However, the Code, and the ways in which Justices have operated under it, has faced massive scrutiny in the wake of its implementation.[84] All five of the Canons have permissive language, using "should" and "may" rather than mandatory language, allowing the Justices to exercise entirely their own discretion in decision-making.[85] Essentially, the Code functions more as a loophole for the Justices, rather than law they need to abide by.

It is worth mentioning, however, that the presence of a code has created one modest change. Over the past term, some Justices have begun publishing the reasoning informing their recusal decisions. This practice is not new—in fact it dates back to the earliest days of the Court; however, it remains all too rare. Refusing to acknowledge recusal, and more importantly *lack* of recusal, particularly in cases where a Justice has faced calls to recuse, further shrouds the Court in secrecy away from the eyes of the American public.

---

82 *Id.* canon 3B(1).

83 *Id.* at 10.

84 *E.g.*, *Developments in the Law—Judicial Ethics*, 137 HARV. L. REV. 1677, 1689 (2024) ("[T]he Code's lack of an enforcement mechanism leaves the bottom line where it has always been: Who will judge the Justices?"); Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress In Enforcing Supreme Court Ethics*, 52 HOFSTRA L. REV. 557, 560 (2024) ("The Supreme Court's recent adoption of a 'code of conduct' demonstrates that, even with its best efforts, the Court is not capable of creating a sufficient system for itself; the system remains, exactly as it was before, entirely self-regulated, with each Justice policing their own ethics, largely outside the public eye and without any sense of how the Justices consider these issues." (footnote omitted)); Brie Sparkman Binder & Debra Perlin, *Americans and the Court: How Public Outcry Has Influenced the Court to Address Judicial Ethics Crises*, 52 HOFSTRA L. REV. 631, 653–54 (2024) ("[T]he new Code is riddled with the lower court code's permissive ("should") rather than mandatory ("shall") language. . . . [T]here is no enforcement framework. . . . [T]here is no place that the public can go to file misconduct complaints. . . . The new Code is so full of loopholes that it seems to still permit some of the scandalous actions that Justice Thomas did in the first instance that led to the Code's adoption."); James J. Sample, *The Supreme Court and the Limits of Human Impartiality*, 52 HOFSTRA L. REV. 579, 609 (2024) ("The new Code does virtually nothing to quell these fears, continuing the 'trust us' rationale and allowing Justices to determine their own fate in situations with questionable ethical concerns, with no avenue for reporting misconduct or enforcement.").

85 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

For example, Chief Justice William Rehnquist published his decision not to recuse in the 2000 case *United States v. Microsoft*,[86] after facing calls to recuse. Similarly, starting in the 2023 term, Justices Kagan and Jackson began providing explanations for their recusals in more routine and less contentious cases.[87] Of course, the Code in no way *mandates* Justices publish their recusal decisions, but it offers (should they choose to apply the unenforceable Code) some level of concrete reasoning for Justices to recuse.[88]

The Code has also resulted in more thorough and in-depth financial disclosures from *some* of the Justices, however, as discussed further in this Article, the financial disclosure guidelines (and lack of enforcement) remain virtually identical to the pre-Code standards and it remains up to the individual Justice to determine what to disclose.[89]

IV. HISTORY AS EXAMPLE

A. *Justice William O. Douglas*

In 1970, Justice Douglas faced an inquiry by a special subcommittee of the Judiciary Committee into his conduct, forcing Congress to inquire into grounds for impeaching a Justice and defining the standard for disqualification set forth in 28 U.S.C. § 455.[90]

---

86 530 U.S. 1301, 1301 (2000). In *Microsoft*, the Justice Department and twenty State Attorneys General filed a major antitrust lawsuit against the software giant, claiming Microsoft had a monopoly over the personal computer business. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.D.C. 2000), *aff'd in part, rev'd in part and remanded*, 253 F.3d 34 (D.C. Cir. 2001).

87 Zach Schonfeld, *Why Alito, Kagan Recusal Decisions at Supreme Court Raised Eyebrows*, HILL (June 1, 2023, 6:00 AM), https://thehill.com/regulation/court-battles/4029010-why-supreme-court-recusals-are-attracting-newfound-attention [https://web.archive.org/web/20230608085414/https://thehill.com/regulation/court-battles/4029010-why-supreme-court-recusals-are-attracting-newfound-attention]; Philip Allen Lacovara, *Kagan Takes Small but Real Step Toward High Court Transparency*, BLOOMBERG (May 24, 2023, 1:00 PM), https://news.bloomberglaw.com/us-law-week/kagan-takes-small-but-real-step-toward-high-court-transparency [https://web.archive.org/web/20241121163639/https://news.bloomberglaw.com/us-law-week/kagan-takes-small-but-real-step-toward-high-court-transparency]; Jordan Rubin, *Supreme Court Justices' Recusal Explanations Fall Along Party Lines*, MSNBC (Feb. 20, 2024, 3:20 PM), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/supreme-court-justices-recusal-explanations-rcna139617 [https://perma.cc/EYG4-TS4G].

88 Jack Karp, *Justice Kagan Cites Ethics Code for 1st Time in Recusal*, LAW360 (Jan. 8, 2024, 4:30 PM), https://www.law360.com/articles/1783340/justice-kagan-cites-ethics-code-for-1st-time-in-recusal [https://perma.cc/XM3J-UPA6].

89 *See infra* Section V.A.

90 *See* Kimberly Wehle, *How to Impeach a Supreme Court Justice*, POLITICO (Mar. 30, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/03/30/impeach-supreme-court-justice-clarence-thomas-00021480 [https://perma.cc/PG28-VDPB].

Douglas faced an investigation after then-Republican House Minority Leader Gerald Ford called for one, and, if warranted, his impeachment, alleging conflicts of interest.[91] Ford proposed four charges that he believed constituted impeachable offenses, and famously uttered that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."[92] First, Ford cited an example where Douglas had sold an article to a magazine that was later sued for libel in a case that eventually went to the Supreme Court.[93] Despite receiving income from the publication, Douglas did not recuse from the case, and instead joined a dissent, which argued for a grant of certiorari and would have sided with the magazine and reversed the jury's verdict against it.[94] Ford then pointed to Justice Douglas's service as the sole director of the Parvin Foundation, from which he received over $96,000 during the course of his ten-year tenure, and the namesake of the foundation had links to organized crime.[95]

The last two charges Ford asserted dealt with Douglas's political activity while on the bench—the first being his alleged association with "the New Left" and "militant" leftists of the Center for the Study of Democratic Institutions,[96] and the second being the contents of Douglas's book *Points of Rebellion*,[97] which Ford claimed "fanned the fires of unrest, rebellion, and revolution."[98]

While the investigation did not result in an impeachment, it did produce a lengthy congressional report that clarified removal standards for both lower federal judges and Supreme Court Justices,[99] and perhaps more poignantly, it provides an example of the inter branch checks and balances that are so crucial to this democracy and that could help legitimize the facade of an ethics code that the current Court recently released.

---

91 *Id.*

92 116 CONG. REC. 11913 (1970) (statement of Rep. Gerald R. Ford); *see also* Will Fassuliotis, *Impeachment Stories: Congressman Gerald Ford's Attempt to Remove Justice William O. Douglas*, VA. L. WEEKLY (Apr. 11, 2019), https://www.lawweekly.org/col/2019/4/11/impeachment-stories-congressman-gerald-fords-attempt-to-remove-justice-william-o-douglas [https://perma.cc/H4P7-4MRN].

93 *See* 116 CONG. REC. 11914; Fassuliotis, *supra* note 92.

94 *See id.*; Fassuliotis, *supra* note 92.

95 *See* 116 CONG. REC. 11916–17; Fassuliotis, *supra* note 92.

96 116 CONG. REC. 11918; *see* Fassuliotis, *supra* note 92.

97 116 CONG. REC. 11915; *see* Fassuliotis, *supra* note 92.

98 116 CONG. REC. 11931; *see* Fassuliotis, *supra* note 92.

99 *See* Fassuliotis, *supra* note 92; Brett Bethune, *Ethically Ignoring Impeacment Efforts*, 35 GEO. J. OF LEGAL ETHICS 529, 541 (2022).

B. *Justice Abraham Fortas*

The cautionary tale of former Associate Justice Abraham "Abe" Fortas serves not only as a comparison to the current ethical lapses seen across the bench, but perhaps also as a warning to the current bench. Appointed to the Court by President Lyndon B. Johnson in 1965, just two years after his unanimous win as an attorney in *Gideon v. Wainwright*,[100] Fortas was almost immediately nominated to become Chief Justice by the President, replacing Chief Justice Earl Warren after his retirement in 1968.[101] The nomination then required Senate approval, revealing a series of ethical lapses and Fortas voluntarily stepping down from the bench.[102]

Fortas was long known for his close personal relationship with President Lyndon B. Johnson, but the relationship had not received high levels of public scrutiny until his confirmation hearing to become Chief Justice.[103] As the Senate Historical Office has revealed, "As a sitting justice, he regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam."[104] The hearing also revealed that Fortas's former law partner had set up a summer position for the Justice, teaching at American University.[105] The teaching arrangement itself would ordinarily not be of particular controversy. However, the position was not paid for by American University, but instead by his former firm's clients, many of whom had interests before the Court the following term.[106] Fortas made forty percent of the salary he ordinarily made as an Associate Justice—$15,000.[107]

Following these revelations, conservative senators filibustered the Chief Justice nomination until Fortas was forced to withdraw his

---

100 372 U.S. 335 (1963).

101 *See* Ciara Torres-Spelliscy, *The Cautionary Tale of Abe Fortas*, BRENNAN CTR. (Feb. 6, 2018), https://www.brennancenter.org/our-work/analysis-opinion/cautionary-tale-abe-fortas [https://perma.cc/NFK7-FKTB]; *Looking Back: A New Justice Replaces a Filibustered Candidate*, NAT'L CONST. CTR. (May 12, 2024), https://constitutioncenter.org/blog/looking-back-a-new-justice-replaces-a-filibustered-candidate [https://perma.cc/Q3FT-7R8L].

102 *See* Torres-Spelliscy, *supra* note 101.

103 *See id.*

104 *Filibuster Derails Supreme Court Appointment: October 1, 1968*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/nominations/filibuster-derails-supreme-court-appointment.htm [https://perma.cc/LDT8-7287].

105 *See* Torres-Spelliscy, *supra* note 101; *Nominations of Abe Fortas & Homer Thornberry Before the U.S. S. Comm. on the Judiciary*, 90th Cong. (1968).

106 *See* Torres-Spelliscy, *supra* note 101.

107 *Id.*

name,[108] but he remained on the Court as an Associate Justice for an additional year until another financial scandal broke, forcing his resignation under threat of impeachment.[109] It was revealed that Fortas had accepted (and later returned) an annual sum of $20,000 from the family foundation of Louis Wolfson, who faced indictment for securities fraud, in exchange for unspecified advice.[110] Fortas later commented that "he 'resigned to save [Justice William O.] Douglas,' another associate Justice being investigated for a similar financial scandal at the time."[111]

Fortas's voluntary resignation presents a stark contrast to the narrative purported by the current Justices, who, when presented with shockingly similar scenarios, continue to double down with adamant denials of wrongdoing and farcical defenses. Imagine in our contemporary, polarized times, Justice Thomas or Justice Alito voluntarily stepping down under a cloud of controversy during a Biden presidency—it is unthinkable—and therein lies the illustration of the erosion of our norms.

V. THE NEW CODE OF CONDUCT AS APPLIED

Ethical concerns about conflicts of interest in the United States stretch back at least to *Marbury v. Madison*,[112] where Justice John Marshall authored the majority opinion in a case that had significant financial implications for both him and his brother.[113] More than 220 years later, despite the introduction of a new Code of Conduct,[114] the fundamental issue persists: Supreme Court Justices continue to have the

---

108 *See id. See generally* 114 CONG. REC. 28926–34 (1968).

109 *See* Torres-Spelliscy, *supra* note 101; Andrew Glass, *Abe Fortas Resigns from Supreme Court, May 15, 1969*, POLITICO (May 14, 2017, 11:43 PM), https://www.politico.com/story/2017/05/14/abe-fortas-resigns-from-supreme-court-may-15-1969-238228 [https://perma.cc/F5HZ-YNJ8].

110 *See* Torres-Spelliscy, *supra* note 101; Adam Cohen, *54 Years Ago, a Supreme Court Justice Was Forced to Quit for Behavior Arguably Less Egregious than Thomas's*, N.Y. TIMES (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/opinion/clarence-thomas-supreme-court-abe-fortas.html [https://web.archive.org/web/20250224120803/https://www.nytimes.com/2023/04/11/opinion/clarence-thomas-supreme-court-abe-fortas.html].

111 Glass, *supra* note 109 (alteration in original).

112 5 U.S. (1 Cranch) 137 (1803). For a more in-depth analysis of historical Supreme Court cases that raised questions about recusal, see James Sample, *Supreme Court Recusal: From* Marbury *to Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 104 (2013); see also Sample, *supra* note 84, at 591.

113 *See* Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, 48 FED. L. 45, 45 (2001).

114 *Marbury*, 5 U.S. (1 Cranch) 137; CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

sole authority to assess their own cases, with no external oversight or accountability.

With the surge in ethical concerns, scandals that were once deemed career-ending catastrophes now seem to surface almost weekly. Ethical breaches and issues with transparency from the acceptance of lavish, undisclosed vacations to failures to recuse when those with close personal and professional relationships appear before the Court are not confined to any single ideology or Justice. Instead, they stem from a haphazardly applied, to-each-their-own approach to ethical standards, which is an approach the New Code perpetuates, allowing the problem to persist.

A. *Transparency and Disclosure Issues*

The new Code has not substantially increased the burden of disclosure on the Justices. In fact, practically speaking, the new Code has not changed the financial disclosure requirements *at all*.[115]

In April of 2023, *Politico* reported that Justice Neil Gorsuch had failed to disclose that the identity of the purchaser of his Colorado property was a leading attorney at Greenberg Traurig, a firm with extensive business before the Supreme Court.[116] Gorsuch had reported on his 2017 disclosure form that he had sold his stake in the Walden Group, LLC, an entity that he and his partners had formed to buy the property.[117]

In the same month, *ProPublica* broke news of multiple transactions between Supreme Court Justice Clarence Thomas and Republican billionaire and "megadonor" Harlan Crow.[118] The scandal, which uncovered favors and gifts including private jet travel, luxury accommodations, real estate transactions, and tuition payments, made to the Justice, entirely undisclosed and unbeknownst to the public, reinvigorated calls for some form of ethical guidelines for the nation's highest court.[119]

---

115 *See* Waldman, *supra* note 77.

116 Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579 [https://perma.cc/LDS5-UMCQ].

117 *Id.*

118 Kaplan et al., *supra* note 1. The exact details of the aforementioned gifts are discussed in depth *infra* Part VI.

119 The topic of Supreme Court ethics has ebbed and flowed throughout history, and the Justices and offenses discussed in this Article are by no means a complete list. Instead, the instances are an example of the rampant and alarming uptick in frequency that these scandals appear to occur. What

Financial disclosure laws imposed on federal officials stem from the Ethics in Government Act of 1978,[120] which established, in relevant part, financial interest reporting requirements on high-ranking federal officials, technically including members of the Supreme Court. The disclosure requirements are, in many ways, relatively straightforward, requiring Justices to report income, dividends, most capital gains, significant debts, the purchase or sale or both of land, and gifts.[121] However, the aforementioned "gifts" has a rather significant exception. The "personal hospitality clause" allows an official—in this case a Justice—to exclude gifts of "food, lodging, or entertainment received as personal hospitality of an individual."[122]

Congress also designated the Judicial Conference as the administrative body responsible for obtaining, reviewing, and publishing financial disclosure documents of justices and judges, and for promulgating specific interpretations of the statute.[123] The massive caveat to this being that the Judicial Conference regulations do not apply to the Supreme Court; instead, they explicitly delegate administration and enforcement authority for the Supreme Court to the Chief Justice.[124]

This delegation, coupled with the aforementioned personal hospitality clause (sometimes referred to as the "personal hospitality loophole"[125]) affords the Justices with a nearly perfect "get out of jail

---

were once considered catastrophic, career ending scandals now permeate the media on a seemingly weekly basis. *See, e.g.*, Sample, *supra* note 112, at 104; *see also* Sample, *supra* note 84, at 600–01.

120 The Ethics in Government Act developed as a result of the Watergate scandal during the Nixon administration. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 308(9), 92 Stat. 1824, 1861 (codified as amended at 5 U.S.C. § 13101(10)); Benjamin R. Civiletti, Attorney Gen. of U.S., Dep't of Just., Post-Watergate Legislation in Retrospect at the Alfred P. Murrah Lecture on the Administration of Justice at Southern Methodist University (Oct. 31, 1980), https://www.ojp.gov/ncjrs/virtual-library/abstracts/post-watergate-legislation-retrospect [https://perma.cc/M9VD-XTRH]. *See* 5 U.S.C. § 13101(10); Jennifer Ahearn & Beatrice Frum, *What Gifts Must Supreme Court Justices Disclose?*, BRENNAN CTR. FOR JUST. (Aug. 11, 2023), https://www.brennancenter.org/our-work/research-reports/what-gifts-must-supreme-court-justices-disclose [https://perma.cc/4LSZ-UG2B].

121 *See* 5 U.S.C. § 13104; Ahearn & Frum, *supra* note 120.

122 5 U.S.C. § 13104(a)(2)(A); *see also* 2 JUD. CONF., GUIDE TO JUDICIARY POLICY § 620 (2021) (providing specific limitations on this exception and an enforcement mechanism, should a federal judicial officer or employee exceed or abuse the exception).

123 5 U.S.C. § 7353(b)(1) ("Each supervising ethics office is authorized to issue rules or regulations implementing the provisions of this section and providing for such reasonable exceptions as may be appropriate."); *id.* § 7353(d)(1)(C) (designating the Judicial Conference as a "supervising ethics office . . . for judges and judicial branch officers and employees").

124 JUD. CONF., *supra* note 122, § 620.65 ("[T]he Judicial Conference has delegated its administrative and enforcement authority under the Act for officers and employees of the Supreme Court of the United States to the Chief Justice of the United States . . . .").

125 Ahearn & Frum, *supra* note 120.

free card." This "card" was used by Justice Thomas when discussing his lack of disclosure history with Harlan Crow.[126] Justice Thomas stated that "he had been advised 'by colleagues and others in the judiciary' that luxury trips financed by a billionaire friend and conservative activist was 'personal hospitality' that did not have to be disclosed."[127]

While a Justice's position on the highest court in the land should require more candor, not less, in reporting the kind of relationships the Ethics in Government Act requires be made public, the newly implemented Code fails to enhance or strengthen the disclosure rules set by the Ethics in Government Act.[128] The relevant sections on financial activity and reporting read:

> A Justice should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Regulations on Gifts now in effect. A Justice should endeavor to prevent any member of the Justice's family residing in the household from soliciting or accepting a gift except to the extent that a Justice would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the Justice's family" means any relative of a Justice by blood, adoption, or marriage, or any person treated by a Justice as a member of the Justice's family.[129]

> For some time, all Justices have agreed to comply with the statute governing financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment.[130]

In relying solely on the same financial guidelines from the Judicial Conference, while maintaining the delegation and complete lack of oversight, the new Code only offers another arrow in the metaphorical quiver for the Justices.

By way of example, in the summer of 2023, *ProPublica* reported that Justice Alito took a fishing trip with hedge fund billionaire Paul

---

126 Robert Barnes, Ann E. Marimow & Amy B. Wang, *Justice Thomas: Advisers Said No Need to Report Travel with GOP Donor*, WASH. POST (Apr. 7, 2023, 6:26 PM), https://www.washingtonpost.com/politics/2023/04/07/clarence-thomas-trips-crow-propublica [https://web.archive.org/web/20230409014838/https://www.washingtonpost.com/politics/2023/04/07/clarence-thomas-trips-crow-propublica].

127 *Id.*

128 Ethics in Government Act of 1978, Pub. L. No. 95-521, § 308(9), 92 Stat. 1824, 1861 (codified as amended at 5 U.S.C. § 13101(10)).

129 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 4D(3) (U.S. 2023).

130 *Id.* canon 4H.

Singer in 2008.[131] The Alaskan resort charged over $1,000 per day, and the private plane—had Alito chartered it himself—could have cost over $100,000 one way.[132] None of this appeared in the Justice's 2008 financial disclosures.[133]

Alito then took an unprecedented step, responding to the report with an opinion piece in the *Wall Street Journal*, where he fervently asserted he had done nothing wrong.[134] Notwithstanding the recusal issues discussed in the following Section of this Article, the lack of disclosure would constitute a violation of federal law by *any* other public official in the United States.[135] In fact, it likely *still* constitutes a violation of federal law.[136]

Justice Thomas also came under fire recently for failing to disclose lavish gifts, trips, and income on his tax returns.[137] In 2023, *ProPublica* reported that for more than 20 years, Justice Thomas regularly accepted numerous luxury vacations virtually every year from Harlan Crow, a prominent Republican "megadonor"—none of which were disclosed on the Justice's financial disclosure forms.[138] At the time, Justice Thomas asserted he did not need to disclose such gifts,[139] however, in a filing released in May 2024, Justice Thomas appears to have amended his 2019 disclosures, writing that he "inadvertently omitted" the trips from his prior reports.[140] This is not the first time the Justice amended his financial

---

131 Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/A9TA-3DDR].

132 *Id.*

133 *Id.*

134 Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://web.archive.org/web/20250304042817/https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda].

135 *See infra* Section V.B; Elliott et al., *supra* note 131.

136 *See* Elliott et al., *supra* note 131.

137 *See* Kaplan et al., *supra* note 1.

138 *Id.*

139 A statement by an attorney Thomas hired to address his financial disclosures in the wake of the *ProPublica* reports provides, "Justice Thomas's critics allege that he failed to report gifts from wealthy friends. Untrue. He has never accepted a gift from anyone with business before the Court." Press Release, Elliot S. Berke, Berke Farah LLP, Statement on Behalf of Associate Justice of the Supreme Court of the United States Clarence Thomas (Aug. 31, 2023), https://www.berkefarah.com/news/2023/8/31/elliot-s-berke-releases-statement-on-behalf-of-client-justice-clarence-thomas [https://perma.cc/YZ2M-8TYK].

140 Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Justice Clarence Thomas Acknowledges He Should Have Disclosed Free Trips from Billionaire Donor*, PROPUBLICA (June 7, 2024, 1:32 PM),

disclosure forms to reflect "inadvertent" mistakes.[141] In the summer of 2023, Thomas amended his 2014 disclosures to reflect a real estate deal with Crow, again seemingly in response to a *ProPublica* report on the transaction.[142] As journalists and congressional investigators keep digging for "inadvertent" omissions, these previously "undisclosed travel boondoggles" gifted to Thomas continue to appear.[143] In August 2024, a report showed that Justice Thomas failed, yet again, in his 2010 disclosures to report free private jet travel for him and his wife generously gifted to him by Crow.[144] "It's a serious problem when one of the nation's top judicial officials is apparently committed to something other than the whole truth and nothing but the truth."[145]

B. *Recusal Issues*

The new Code advises Justices to recuse in cases where their impartiality might reasonably be questioned. Unlike § 455, which mandates judges to recuse,[146] the Code merely *advises* Justices to recuse, and the Justices themselves make their own, entirely unreviewable, recusal decisions. The Code adds further fuel to the fire by stating in the commentary that "[t]he rule of necessity may override the rule of disqualification."[147] The rule of necessity further implies more directly that "where all [of the Justices] are disqualified, none are disqualified," emphasizing that the imperative for judicial review outweighs concerns of disqualification.[148]

The Justices and critics of the Code often cite the Justices' "duty to sit" as justification for hearing cases in which there is a potential

---

https://www.propublica.org/article/clarence-thomas-gift-disclosures-harlan-crow [https://perma.cc/T95F-W88A].

141 *Id.*

142 *Id.* "At the time, he wrote that he 'inadvertently failed to realize' that the deal needed to be publicly reported and said he 'continues to work' with judiciary staff to determine 'whether he should further amend his reports from any prior years.'" *Id.*

143 *See, e.g.*, Dennis Aftergut, *Clarence Thomas Oopsies Again: Yet Another Trip He Failed to Report*, BULWARK (Aug. 6, 2024), https://www.thebulwark.com/p/clarence-thomas-oopsies-crow-ethics-disclosure [https://perma.cc/865B-NY7M].

144 *Id.*

145 *Id.*

146 28 U.S.C. § 455.

147 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 3B(3) (U.S. 2023).

148 CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 16 (Kris Markarian ed., 3d ed. 2018).

conflict,[149] however, the duty to sit is often overhyped. The duty to sit doctrine, at its core, calls for Justices to disqualify themselves only in cases where it is essentially indisputable that they have a bias, as there is no replacement for a Supreme Court Justice.[150] Hypothetically, if the Court had an even number of Justices, a tie vote would reaffirm a lower court's holding—without any form of further review.[151]

Notwithstanding the conversations in academia surrounding options for replacing a conflicted Justice, the duty to sit can present a difficult situation. But practically speaking, the quorum is set at six Justices, and the current Court, along with every Court prior, has issued decisions when one or more Justices has recused themselves.[152] Further, if the Justices, via the new Code, are going to override potential conflicts to ensure nine are sitting for a case, does it not follow that the Code should provide some mechanism for replacing a conflicted Justice, if preventing a tie vote is truly that important?

The following case studies demonstrate instances in which lack of recusal presented an issue. The concerns outlined here are certainly not comprehensive and, realistically (though pessimistically), likely represent only a small fraction of the broader ethical issues at play. The well-documented public violations discussed below pose an unavoidable question: What else is transpiring behind closed doors, unbeknownst to the American public?

1. Justice Antonin Scalia

Justice Antonin Scalia faced calls to recuse from the 2004 case *Cheney v. United States District Court for the District of Columbia*, where his personal friend, then-Vice President Dick Cheney, was a party.[153] Calls for his recusal in *Cheney* were further amplified after

---

149 *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 3B(3) (U.S. 2023); Donald K. Sherman, Marco A. White & Virginia Canter, *The Law of Disqualification and Problems with the Supreme Court Code of Conduct*, 3 FORDHAM L. VOTING RTS. & DEMOCRACY F. 185 (2025).

150 *See* Hassan Kanu, *U.S. Supreme Court's 'Duty to Sit' in New Ethics Code Could Strengthen Shield for Misconduct*, REUTERS (Nov. 16, 2023, 2:31 PM), https://www.reuters.com/legal/legalindustry/column-us-supreme-courts-duty-sit-new-ethics-code-could-strengthen-shield-2023-11-16 [https://web.archive.org/web/20231123135443/https://www.reuters.com/legal/legalindustry/column-us-supreme-courts-duty-sit-new-ethics-code-could-strengthen-shield-2023-11-16].

151 *See id.*

152 *See* Sample, *supra* note 112.

153 541 U.S. 913, 914 (2004) (Scalia, J.) (mem.).

details regarding a duck-hunting trip were released to the public.[154] The Sierra Club, an opposing party, argued that Justice Scalia's impartiality "might reasonably be questioned," thereby meeting the standard for recusal.[155]

The hunting trip's timing, just three weeks after the Supreme Court agreed to take up the former Vice President's appeal, raised concerns as to the appearance of partiality.[156] Justice Scalia dismissed ethical violation allegations, claiming that any alone time he could have spent with Cheney was so short as to be rendered insignificant, and that, while he did fly on Air Force Two, he had purchased round-trip tickets beforehand and had accepted the flight strictly out of convenience.[157]

Justice Scalia addressed concerns of potential favoritism by distinguishing between lawsuits involving private parties and those concerning official actions.[158] Friendship may warrant recusal in the former, but not in the latter.[159] According to Justice Scalia, requiring a Supreme Court Justice to step aside in official action cases involving friends would significantly impair the Court, given that its Justices often share social circles with government officials.[160] Furthermore, even though Cheney's decisions may have been at issue in the official action suit, the outcome would not have impacted his "reputation and integrity."[161] Thus, Justice Scalia argued, there was no incentive to exhibit partiality for his friend.[162]

---

154 *See id.* at 923; *see also* Steve Twomey, *Scalia Angrily Defends His Duck Hunt with Cheney*, N.Y. TIMES (Mar. 18, 2004), https://www.nytimes.com/2004/03/18/politics/scalia-angrily-defends-his-duck-hunt-with-cheney.html [https://web.archive.org/web/20241120125613/https://www.nytimes.com/2004/03/18/politics/scalia-angrily-defends-his-duck-hunt-with-cheney.html].

155 *Cheney*, 541 U.S. at 923 (quoting 28 U.S.C. § 455(a) (2004)). "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

156 *See* David G. Savage, *Cheney and Scalia Went Hunting Together*, WASH. POST (Jan. 16, 2004), https://www.washingtonpost.com/archive/politics/2004/01/17/cheney-and-scalia-went-hunting-together/0b0c1991-d7be-46e4-b84a-a7761e00f572 [https://web.archive.org/web/20240715203250/https://www.washingtonpost.com/archive/politics/2004/01/17/cheney-and-scalia-went-hunting-together/0b0c1991-d7be-46e4-b84a-a7761e00f572].

157 *Id.*; *Cheney*, 541 U.S. at 915, 920.

158 *Cheney*, 541 U.S. at 916.

159 *See id.* Of course, merely that a case involves personal friends of a Justice is not a justification for recusal, but when a personal friend appears before the Court in their governmental capacity, rather than personal, that raises questions.

160 *See id.*; Savage, *supra* note 156.

161 *Cheney*, 541 U.S. at 919.

162 *See id.* at 920.

Monroe Freedman, however, contended that the case before the Court was "not a routine administrative matter."[163] Rather, it involved determining whether Vice President Cheney, as Chair of the National Energy Policy Development Group, had misrepresented the makeup of the advisory panel.[164] Thus, Cheney's "reputation and integrity," contrary to Justice Scalia's claim,[165] was indeed on the line, particularly in an election year.[166] As Vice President, Cheney had a far greater stake in the outcome than an ordinary government official named pro forma in a standard administrative law case..[167] Justice Scalia also emphasized that the determination of whether a Justice's impartiality "might reasonably be questioned" is to be appraised "from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."[168]

Justice Scalia asserted that the sentiment of the national media, serving as a stand-in for the American public, should not be the determining factor in whether a Supreme Court Justice should recuse themselves.[169] However, the Justice's inaccuracies and mischaracterizations vis-à-vis friendship as grounds for recusal are irrelevant to the analysis. Justice Scalia redirected the focus of the inquiry onto the media and its shortcomings, asking the American public to accept that editorialists from eight out of ten of the newspapers with the largest circulation in the United States were simply being unreasonable.[170]

Justice Scalia ended his forceful memorandum with the remark: "If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."[171] Unfortunately, this rhetoric diverts attention from the central question of whether the public might reasonably doubt his impartiality, instead reframing the issue as a reflection of what he sees as the public's unreasonableness. This "trust us" because "Washington officials know the rules" rationale fails to confront or dispel the deeper concern of concentrated, unchecked power in the hands of a few. Rather than restoring confidence, it exacerbates the public's distrust in the Court. The

---

163 Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 232 (2004).

164 *See id.* at 232–33; Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 609–10 (2006).

165 *Cheney*, 541 U.S. at 919.

166 Freedman, *supra* note 163, at 233.

167 *See id.*; *Cheney*, 541 U.S. at 920.

168 *Cheney*, 541 U.S. at 923–24.

169 *Id.*

170 *Id.*

171 *Id.* at 929.

very purpose of the appearance of impropriety standard was to address precisely this fear.[172] The appearance of impropriety standard was created in response to this very fear.[173]

The acceptance of the aforementioned fishing vacation, among other subsidized trips, appeared to violate Canons Two and Four of the newly imposed Code of Conduct: "A Justice Should Avoid Impropriety and the Appearance of Impropriety in all Activities" and "A Justice May Engage in Extrajudicial Activities that Are Consistent with the Obligations of the Judicial Office."[174] However, without the necessary enforcement mechanisms to alleviate tensions from the lack of transparency and perceived partiality, the new Code of Conduct would have likely led to the same results.[175]

2. Justice Ruth Bader Ginsburg

Justice Ruth Bader Ginsburg faced calls by Republican members of Congress to preemptively recuse herself from all future litigation before the Court involving abortion because of her work with the National Organization for Women Legal Defense Fund ("NOW").[176] Just fifteen days after agreeing with an amicus brief filed by NOW,[177] Justice Ginsburg introduced a lecture series in partnership with the fund titled "Fourth Annual RBG Distinguished Lecture Series on Women and the Law"[178] and donated signed copies of her most historic decisions to

---

172 *Cheney*, 541 U.S. at 923; *see* Lawrence v. Texas, 539 U.S. 558, 602–04 (2003) (Scalia, J., dissenting).

173 Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 134 (2004).

174 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canons 2, 4 (U.S. 2023); *see also* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11078, THE SUPREME COURT ADOPTS A CODE OF CONDUCT 2 (2023).

175 *See* LAMPE, *supra* note 174, at 1.

176 Jimmy Moore, *Supreme Court Justice Ginsburg Under Fire for Close Ties to Women's Advocacy Group*, TALON NEWS (Mar. 12, 2004, 12:53 PM), http://www.freerepublic.com/focus/f-news/1096378/posts [https://perma.cc/E4QN-426X].

177 *Ruth Bader Ginsburg: On the Death Penalty*, ABA (Oct. 30, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/ruth-bader-ginsburg-on-the-death-penalty.

178 Ginsburg explained her refusal to recuse herself on issues of importance to the NOW Legal Defense Fund while commenting on the lecture series over which the NOW Legal Defense Fund took an interest: "I think and thought and still think it's a lovely thing. Let the lecture speak for itself." Peter S. Canellos, *Outspoken Justices Cloud High Court's Appearance*, BOS. GLOBE, June 15, 2004, at A3. As one of the nation's leading supporters of abortion rights, it is no mystery that the message would be to "[p]rotect and preserve a constitutional right to abortion." *Id.*

charity events for the fund.[179] Justice Ginsburg was also quoted saying that certain potential appointments to the Court would not "advance" human or women's rights.[180] Affiliations with cause-oriented or partisan legal groups can, in some circumstances, create a loss of public faith in the rule of law.[181] While not necessarily an easy call as far as ethical violations go, Justice Ginsburg's failure to recuse in cases related to the NOW Fund arguably crossed the line of whether her "impartiality might reasonably be questioned."[182]

While it is highly unusual for a Justice to make politically charged remarks, the late Justice Ginsburg did not shy away from expressing her criticism of Donald Trump.[183] As discussed above, Justice Ginsburg faced disapproval for ignoring ethical constraints and venturing into partisan politics by issuing critical statements about then-presidential candidate Donald Trump.[184] However, another ethical issue arose when Justice

179 Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff [https://perma.cc/HJ7F-LDFL]; Letter from David B. Rivkin, Partner, Baker & Hostetler LLP, to Sen. Richard Durbin, Chairman, Sen. Judiciary Comm. & Sen. Sheldon Whitehouse, Chairman, Subcomm. on Fed. Cts., Oversight, Agency, & Fed. Rts. (July 25, 2023), https://levin-center.org/wp-content/uploads/2023/10/2023-7-25-Leo-counsels-ltr-to-Senate-Judiciary-declining-to-produce-requested-information.pdf [https://perma.cc/D3PW-YNEM].

180 Jed Babbin, *J'Recuse*, AM. SPECTATOR (Sept. 26, 2005, 4:08 AM), https://spectator.org/47996_jrecuse [https://perma.cc/W5CE-T74A]; *see also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. (2005) (statements of Joseph R. Biden, Senator, and John G. Roberts, Chief Justice Nominee).

181 *See* 2 GUIDE TO JUDICIARY POL'Y, pt. B, ch. 2, § 220, no. 46 (2022), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf [https://web.archive.org/web/20230923020637/https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf] (advising against accepting awards from organizations that take positions in contested policy debates); *id.* § 220, no 85 (concluding that judges can be members of organizations that take positions on policy debates as long as the judge is not involved in that work).

182 28 U.S.C. § 455(a).

183 Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html ("He is a faker, "He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. . . . How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that."); Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. 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 ("I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president . . . .").

184 *See supra* Part II; Mike Rappaport, *A Problematic Decision: Ruth Bader Ginsburg's Failure to Recuse Herself in the Travel Ban Case*, LAW & LIBERTY (July 3, 2018), https://lawliberty.org/a-problematic-decision-ruth-bader-ginsburg-failure-to-recuse-trump-hawaii [https://perma.cc/7GY9-LFNP].

Ginsburg refused to recuse herself or explain why she was not doing so in integral cases involving Trump, specifically, the travel ban case.[185]

Even if one thinks extrajudicial statements about the President should ordinarily not lead to a recusal, the travel ban case was different.[186] Not only was this "a lawsuit against the President in his own name, it also center[ed] more on the President's personal behavior and character than other lawsuits against the executive branch."[187] With Justice Ginsburg's past anti-Trump statements, no rational person would have any confidence that she would be an impartial judge of whether President Trump acted in good or bad faith in stating his reason for the ban.[188] Yet, even after issuing a public statement saying her comments about Trump were "ill-advised," she refused to step aside from the case, giving no reasoning for her failure to recuse.[189] Rather, Justice Ginsburg joined the dissenting opinion, finding the travel ban was unconstitutional because President Trump acted in bad faith by expressing his anti-Muslim animus during his campaign and during his presidency.[190]

Justice Ginsburg's failure to recuse after expressing blatant support for NOW and making several extremely critical statements about then-presidential candidate Trump clearly violated 28 U.S.C. § 455(a), which provides that any justice or judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[191] A Justice shall also disqualify himself "[w]here he has a personal bias or prejudice concerning a party."[192] Additionally, the newly imposed Code of Conduct, though it did not exist during Justice Ginsburg's tenure, purports to "largely represent[] a codification of principles that [the Justices] have long regarded as governing [their] conduct."[193] Justice Ginsburg's failure to recuse seems to violate Canons Two, Three, and Five: "A Justice Should Avoid Impropriety and the Appearance of

185 *See* Rappaport, *supra* note 184.

186 *See id.*

187 *Id.*

188 *See* David E. Weisberg, *Ginsburg Should Recuse Herself from Trump Travel Ban Case*, HILL (June 5, 2017, 12:20 PM), https://thehill.com/blogs/pundits-blog/the-judiciary/336364-more-opinions-more-problems-why-the-notorious-rbg-must [https://web.archive.org/web/20220811004251/https://thehill.com/blogs/pundits-blog/the-judiciary/336364-more-opinions-more-problems-why-the-notorious-rbg-must].

189 Rappaport, *supra* note 184. Ginsburg publicly stated, "On reflection, my recent remarks in response to press inquiries were ill-advised and I regret making them. Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect." Barnes, *supra* note 47.

190 Trump v. Hawaii, 585 U.S. 667 (2018); *see* Rappaport, *supra* note 184.

191 28 U.S.C. § 455(a).

192 *Id.* § 455(b)(1).

193 *Statement of the Court* of CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

Impropriety in All Activities," "A Justice Should Perform the Duties of Office Fairly, Impartially, and Diligently," and "A Justice Should Refrain from Political Activity."[194] However, even if the new Code of Conduct had existed, since there is no enforcement mechanism implemented, the result would likely be no different, with no avenue to hold a Justice accountable.[195]

3. Justice Elena Kagan

Justice Elena Kagan faced several conflicts between her work prior to appointment, as Solicitor General and her work on the Court, perhaps most notably her work and the subsequent suit involving President Obama's Affordable Care Act.[196] During her confirmation hearing, Kagan stated that as a general policy, if she had "played any kind of a substantial role in the process," she would recuse, even if she had not been the formal decision-maker.[197] Justice Kagan faced multiple direct inquiries about the Affordable Care Act, to which she responded with assurance that she had not expressed an opinion on the bill's merits while she served as Solicitor General—though there was an overlap in her tenure as Solicitor General and the time during which the bill had circulated in Congress, which ordinarily would have warranted recusal.[198] Justice Kagan's answers implicate the provision of § 455 that require disqualification "[w]here [the Justice] has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[199]

Perhaps most illustrative are a series of emails between Justice Kagan and her former colleagues in the Solicitor General's Office and Laurence

---

194 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canons 2–3, 5 (U.S. 2023).

195 *See id.*; Debra Cassens Weiss, *One Justice Was 'Especially Vocal' in Opposition to Enforcement Mechanism for SCOTUS Ethics Code, Report Says*, ABA J. (Dec. 4, 2024, 11:44 AM), https://www.abajournal.com/news/article/one-justice-was-especially-vocal-in-opposition-to-enforcement-mechanism-for-supreme-court-ethics-code-report-says [https://perma.cc/A6BD-MAMW].

196 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

197 *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 111th Cong. 64 (2010) (statement of Solic. Gen. Elena Kagan) [hereinafter *Kagan Hearing*]; *see also* Wash. Post, *Elena Kagan's Old Job as Solicitor General Is Having an Effect on Her New One*, CLEVELAND.COM (Oct. 3, 2010, 10:38 PM), https://www.cleveland.com/nation/2010/10/elena_kagans_old_job_as_solici.html [https://perma.cc/JKW5-BBNZ] (citing Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases*, WASH. POST, Oct. 4, 2010, at Al5).

198 *Kagan Hearing*, *supra* note 197.

199 28 U.S.C. § 455 (b)(3).

Tribe, her former colleague from Harvard Law School that highlight the jarring nature of her failure to recuse in the Affordable Care Act case.[200] These emails indicate a nuanced reality, even though the White House's official position and Justice Kagan's unequivocal responses during her Senate confirmation hearing reflect a solicitor general entirely blocked off from contributing to the litigation strategy defending the Affordable Care Act.[201]

Justice Kagan's email sequence—much like the other questionable recusal decisions discussed in this Article—demonstrates yet another example where, if the individual was not a member of the Supreme Court, and instead was associated with a lower court, the outcome of the recusal may have been different. Even if the ultimate result had been the same, the process offered by lower federal courts, with effective enforcement mechanisms, would have provided a source of legitimacy.[202]

Justice Kagan also encountered calls to recuse herself from the recent affirmative action case, *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, [203] due to her previous role as dean of Harvard Law School thirteen years earlier.[204] While Kagan offered no public explanation or public comment regarding her choice to remain on the case, her colleague, Justice Ketanji Brown Jackson, who was serving as a member of Harvard University's board of overseers throughout the litigation, did choose to recuse herself.[205]

Justice Kagan's lack of recusal underscores the new Code of Conduct's primary issue. Although Justice Kagan's involvement, especially in the Affordable Care Act case, appears to violate Canon Three, she would still have discretion to recuse with absolutely no external review process.[206] The new Code of Conduct still does not

---

200 For a more thorough breakdown of Justice Kagan's email sequence, see generally Sample, *supra* note 112, at 145–50.

201 *Id.*

202 Jonathan H. Adler, *Mukasey on the ObamaCare "Recusal Nonsense,"* VOLOKH CONSPIRACY (Dec. 5, 2011, 8:51 AM), https://volokh.com/2011/12/05/mukasey-on-the-obamacare-recusal-nonsense [https://perma.cc/EC52-S6SS].

203 600 U.S. 181 (2023).

204 Lawrence Hurley, *Justice Thomas Defenders Make the Case for Supreme Court Ethics Reform*, NBC (May 5, 2023, 7:08 AM), https://www.nbcnews.com/politics/supreme-court/justice-thomas-defenders-make-case-supreme-court-ethics-reform-rcna82846 [https://perma.cc/SPW5-CKRQ].

205 *Id.*; *see also* Nate Raymond, *U.S Supreme Court Pick Jackson to Recuse from Harvard Race Case*, REUTERS (Mar. 23, 2022, 4:21 PM), https://www.reuters.com/legal/government/us-supreme-court-pick-jackson-recuse-harvard-race-case-2022-03-23 [https://web.archive.org/web/20230630024916/https://www.reuters.com/legal/government/us-supreme-court-pick-jackson-recuse-harvard-race-case-2022-03-23].

206 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 3B(2)(a) (U.S. 2023).

guarantee a different result—no matter how clear the violation—because there are no consequences when the Justices violate the Code.

4. Justice Samuel Alito

During the Supreme Court's October Term 2023, Justice Alito participated in a case concerning the constitutionality of a repatriation tax despite concerns raised by a congressional leader over his connection with one of the lawyers in the case.[207] Nearly all of the Democratic Senators on the Judiciary Committee had urged Chief Justice Roberts "to ensure" that Justice Alito recuse from the major tax case, *Moore v. United States*, over his apparent relationship with David Rivkin, a conservative lawyer representing the petitioner.[208] The issues stemmed from Rivkin's interviews with Justice Alito for the *Wall Street Journal*.[209] During the interviews, Justice Alito aired his personal grievances with Congress attempting to regulate the Supreme Court, saying "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."[210] Rivkin then called Alito an "important voice on the court with a distinctive interpretative method that is rooted in originalism and textualism."[211]

Alito rejected the request to recuse from the tax case, stating Rivkin acted as a journalist, not an advocate and his involvement in the tax case was never discussed.[212] The Justice went on to cite other instances in which his colleagues were interviewed by media outlets or other attorneys but did not later recuse from cases in which those same media outlets or attorneys were involved.[213] However, Alito's arguments against recusal inspired further criticism. Senator Durbin pushed back saying that Justice

---

207 Moore v. United States, 144 S. Ct. 2 (2023) (mem.) (statement of Alito, J.).

208 Letter from Richard J. Durbin, Chair, S. Comm. on the Judiciary, et al. to John G. Roberts, C.J., Sup. Ct. of the U.S. (Aug. 3, 2023), https://www.judiciary.senate.gov/imo/media/doc/durbin_judiciary_committee_dems_urge_chief_justice_to_address_justice_alitos_wall_street_journal_interview_that_violates_the_courts_statement_on_ethics.pdf [https://perma.cc/ZB4E-ZZCR].

209 David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7 [https://web.archive.org/web/20250317043412/https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7]

210 *Id.*

211 Amy Howe, *Alito Rebuffs Calls for Recusal in Upcoming Tax Dispute*, SCOTUSBLOG (Sept. 8, 2023, 1:20 PM), https://www.scotusblog.com/2023/09/alito-rebuffs-calls-for-recusal-in-upcoming-tax-dispute [https://perma.cc/CZW4-CFFL].

212 *Id.*

213 *Id.*

Alito "surprises no one by sitting on a case involving a lawyer who honored him with a puff piece in the *Wall Street Journal*."[214] Notably, Gabe Roth of Fix the Court criticized Alito's examples of other media interviews with Justices as "inapt."[215] Roth bluntly stated "[i]t's not like Nina Totenberg's name was on the cover of a Supreme Court brief at the time she interviewed some Justices. What an embarrassment."[216] Roth concluded that Rivkin's appearance "as a co-byline in both the first interview, when his petition was pending, and in the second interview, given just after the petition was granted, raises ethical questions that seem obvious to everyone but Alito and require disqualification."[217]

Additionally, Justice Alito faced widespread calls for his recusal from two cases involving the January 6 insurrection.[218] Many Democratic members of Congress sought disqualification after the *New York Times* reported that flags associated with the movement to overturn President Biden's 2020 electoral victory flew outside his Virginia home and his New Jersey vacation home.[219] Justice Alito, one of the Supreme Court's most notorious conservative Justices, refused to recuse, claiming the flags were flown by his wife "in response to a neighbor's use of objectionable and personally insulting language on yard signs."[220] Alito then cited portions of the Code of Conduct for the Supreme Court, which states that Justices should disqualify or recuse themselves if their "impartiality might reasonably be questioned."[221] Justice Alito claimed that "an unbiased and reasonable person" would come to the same conclusion he did, and attribute the flags and their political connections only to his wife.[222]

---

214 Nina Totenberg, *Justice Alito Rejects Recusal in Major Tax Case*, NPR (Sept. 8, 2023, 5:08 PM), https://www.npr.org/2023/09/08/1198531562/justice-alito-tax-case [https://perma.cc/T6TC-MUWD].

215 *Responding to Alito's Non-Recusal Notice*, FIX CT. (Sept. 8, 2023), https://fixthecourt.com/2023/09/responding-to-alitos-non-recusal-notice [https://perma.cc/BFX9-CKHL].

216 *Id.*

217 Howe, *supra* note 211.

218 Jodi Kantor, *The Alitos, the Neighborhood Clash and the Upside-Down Flag*, N.Y. TIMES (May 28, 2024), https://www.nytimes.com/2024/05/28/us/justice-alito-neighbors-stop-steal-flag.html [https://web.archive.org/web/20250312025623/https://www.nytimes.com/2024/05/28/us/justice-alito-neighbors-stop-steal-flag.html].

219 *Id.*; *see supra* Part II.

220 Ian Millhiser, *The Republican Party's Man Inside the Supreme Court*, VOX (May 21, 2024, 10:00 AM), https://www.vox.com/scotus/350339/samuel-alito-republican-party-scotus [https://perma.cc/4YZR-V5U4].

221 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canon 3B(2) (U.S. 2023); *see* Chris Walker, *Critics Decry Justice Alito's Refusal to Recuse on Key Court Cases*, TRUTHOUT (May 30, 2024), https://truthout.org/articles/critics-decry-justice-alitos-refusal-to-recuse-on-key-court-cases [https://perma.cc/47BT-QHJJ].

222 Walker, *supra* note 221.

However, reasonable people like Senator Durbin questioned Alito's impartiality and, as discussed above, not for the first time. Chairman Durbin along with U.S. Senator Sheldon Whitehouse (D-RI), Chair of the Judiciary Subcommittee on Federal Courts, implored the Chief Justice to take appropriate steps to ensure Justice Alito recused himself from these insurrection cases.[223] Senator Durbin stated that "[f]lying the American flag upside down at his home is a signal of defiance, which raises reasonable questions about bias and fairness in cases pending before the Court," and added that Chief Justice John Roberts could "end this spiraling decline in America's confidence in our highest Court by taking decisive action to establish a credible code of conduct."[224] Alito's clear refusal to address doubts of his impartiality by offering nothing more than his own word to substantiate his claims as an explanation for the flag scandal underlines the weaknesses of the Supreme Court's ethical guidelines.[225]

Justice Alito's actions flag the fatal flaw of the newly imposed Supreme Court Ethics Code. The Justice's actions seem to violate Canons Two and Three of the newly imposed Code of Conduct.[226] But "Justice Alito's excuse for the partisan activity demonstrates that the Court's begrudgingly adopted code of conduct will never alone build public trust in the institution because there is no enforcement mechanism."[227]

5. Justice Clarence Thomas

Amid calls for Justice Clarence Thomas to recuse himself from January 6-related matters, Justice Thomas refused to step aside or even explain his reasoning for remaining on the cases.[228] Critics cited the fact that his wife, Ginni Thomas, both publicly empathized with the January 6 rioters and insurrectionists and encouraged Arizona legislators and the White House Chief of Staff over text to assist in overturning the 2020

---

223 *Id.*

224 *Id.*

225 *See* Ed Pilkington, *Alito Refuses to Step Aside from Trump Supreme Court Cases amid Flag Scandal*, GUARDIAN (May 29, 2024, 3:09 PM), https://www.theguardian.com/law/article/2024/may/29/samuel-alito-flag-jan-6-recusal [https://perma.cc/ZK9G-YVJ3].

226 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canons 2–3 (U.S. 2023).

227 Kedric Payne, *Alito Flags the Fatal Flaw of the Supreme Court Ethics Code*, CAMPAIGN L. CTR. (May 20, 2024), https://campaignlegal.org/update/alito-flags-fatal-flaw-supreme-court-ethics-code [https://perma.cc/4K3L-BVS4].

228 Devan Cole, *Justice Clarence Thomas Chooses Not to Recuse Himself from Another January 6-Related Case*, CNN (Apr. 25, 2024, 5:00 AM), https://www.cnn.com/2024/04/25/politics/clarence-thomas-january-6-case/index.html [https://perma.cc/6S3V-RVYV].

election results.[229] Justice Thomas then repeatedly participated in cases that came to the Court directly or indirectly involving those election results.[230] During this time, a subpoena was issued against the Arizona Republican Party chair, and the phone records sought would have implicated Mrs. Thomas, so Justice Thomas voted to block the subpoena.[231] He also was the lone dissenter in the Court's decision requiring that Trump's White House records be turned over to the House committee investigating the January 6 riot at the U.S. Capitol.[232] Justice Thomas claims he was unaware of his wife's involvement in the events surrounding the January 6 attacks, however, in asserting his unawareness, Thomas ignores an essential element of the new Code.[233] The question is not his own awareness, but instead whether non-recusal in the case creates the "appearance of impropriety."[234]

As detailed in further depth in the above Section of this Article, over the past two decades Justice Thomas has received excessive and lavish gifts from billionaire Harlan Crow.[235] Crow is no stranger to the Court, having long supported efforts to move the judiciary to the right.[236] He is a major donor to the Federalist Society and has given millions of dollars to groups dedicated to tort reform and conservative jurisprudence.[237] The various organizations and think tanks Crow supports frequently submit

---

229 Ryan Nobles, Annie Grayer, Zachary Cohen & Jamie Gangel, *First on CNN: January 6 Committee Has Text Messages Between Ginni Thomas and Mark Meadows*, CNN (Mar. 25, 2022, 7:53 PM), https://www.cnn.com/2022/03/24/politics/ginni-thomas-mark-meadows-text-messages/index.html [https://perma.cc/G6G6-F28L]; Nina Totenberg & Jess Zalph, *Supreme Court Allows Jan. 6 Committee to Subpoena Arizona GOP Chair's Phone Records*, NPR (Nov. 14, 2022, 12:09 PM), https://www.npr.org/2022/11/14/1132507724/supreme-court-allows-jan-6-committee-to-subpoena-arizona-gop-chairs-phone-record [https://perma.cc/N6PA-CSTD].

230 Payne, *supra* note 227.

231 Totenberg & Zalph, *supra* note 229.

232 Robert Barnes, *Supreme Court Rejects Trump's Request to Withhold Jan. 6 from House Committee Investing Capitol Riot*, WASH. POST (Jan. 19, 2022, 9:57 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-trump-january-6/2022/01/19/a432dab4-797d-11ec-83e1-eaef0fe4b8c9_story.html [https://web.archive.org/web/20230331050457/https://www.washingtonpost.com/politics/courts_law/supreme-court-trump-january-6/2022/01/19/a432dab4-797d-11ec-83e1-eaef0fe4b8c9_story.html].

233 Sarakshi Rai, *Ginni Thomas Says 'Ironclad' Rule Is Not to Talk About Pending Cases at Home*, HILL (Dec. 30, 2022, 12:33 PM), https://thehill.com/homenews/3793226-ginni-thomas-says-ironclad-rule-is-not-to-talk-about-pending-cases-at-home [https://web.archive.org/web/20221230181332/https://thehill.com/homenews/3793226-ginni-thomas-says-ironclad-rule-is-not-to-talk-about-pending-cases-at-home/].

234 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canons 2, 4A(1)(e) (U.S. 2023).

235 *See* Kaplan et al., *supra* note 1; Section V.A.

236 *See supra* note 235.

237 *Id.*

amicus briefs in the very cases in front of Crow's close personal friend, Justice Thomas.[238]

Further, Justice Thomas refused recusal from a 2004 appeals case where Harlan Crow's own family company had a twenty-five-million-dollar copyright claim brought against them.[239] At that time, Harlan Crow had already begun giving Justice Thomas luxury gifts and trips.[240] Perhaps unsurprisingly, the Supreme Court decided to deny the appeal, ultimately benefitting the Crow family business.[241]

Broadly speaking, Thomas seems to identify conflicts less often than any of the other Justices. In total, "the Justices recused themselves in roughly 750 or about three percent of appeals between 2018 and 2023—virtually all of which were unexplained," according to an analysis by *Bloomberg Law*.[242] Thomas recused himself in 0% of cases between 2018 and 2021, and 3% of cases in 2022.[243] On the other hand, Justices Elena Kagan and Neil Gorsuch recused themselves from 16% to 11% of cases in 2022, respectively.[244]

"The Clarence Thomas recusal conundrum is the most vivid example of a court that has neither a system of accountability nor a system of transparency when it comes to recusal."[245] His failure to explain any reasoning for his recusal decisions after facing multiple calls from members of a co-equal branch demonstrates just how little the new code actually requires of the Justices.[246] Justice Thomas's actions seem to violate Canons Two and Three, yet when these ethical guidelines are put

---

238 *Id.*

239 Lauren Steussy, *Clarence Thomas Didn't Recuse Himself from a 2004 Appeal Tied to Harlan Crow's Family Business, per Bloomberg*, BUS. INSIDER (Apr. 24, 2023, 7:24 PM), https://www.businessinsider.com/clarence-thomas-didnt-recuse-case-involving-harlan-crow-bloomberg-2023-4 [https://perma.cc/8HZE-2CVK].

240 *Id.*

241 *Id.*

242 Hassan Kanu, *Justice Thomas' Rare Recusal Was an Attempt at Damage Control and Little Else*, REUTERS (Oct. 24, 2023, 11:59 AM), https://www.reuters.com/legal/government/column-justice-thomas-rare-recusal-was-an-attempt-damage-control-little-else-2023-10-24 [https://web.archive.org/web/20231102084129/https://www.reuters.com/legal/government/column-justice-thomas-rare-recusal-was-an-attempt-damage-control-little-else-2023-10-24].

243 *Id.*

244 *Id.*

245 Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022, 5:00 AM), https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases [https://perma.cc/AV72-RQVH].

246 *Id.*

into place with no enforcement mechanisms, Justice Thomas and others face no repercussions for failure to properly abide by the Code.[247]

VI. LEONARD LEO AND THE FEDERALIST SOCIETY

In 2016, then-presidential candidate and Republican frontrunner Donald Trump released a list of potential court appointments, which included current Supreme Court Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.[248] The list was drawn up in part by conservative activist and billionaire Leonard Leo, longtime Vice President and current co-chairman of the Federalist Society, who has since become arguably the most influential activist in American jurisprudence today, often credited with developing the conservative supermajority that currently sits on the bench.[249]

Leo has used his extensive network of nonprofit organizations to funnel millions of dollars in conservative political efforts, resulting in close personal relationships with the conservative Justices on the Court.[250] He also arranged lavish gifts and trips for the Justices.[251]

In 2008, Leo played a hand in organizing the infamous salmon fishing trip with Justice Alito and billionaire Paul Singer.[252] According to *ProPublica*, it was Leo who arranged for Alito to fly on Singer's plane, and the owner of the aforementioned lodge the trio stayed at was a Leo

---

247 CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. canons 2B, 3B(2)(a) (U.S. 2023) ("A Justice should neither knowingly lend the prestige of the judicial office to advance the private interests of the Justice or others nor knowingly convey or permit others to convey the impression that they are in a special position to influence the Justice . . . . A Justice should disqualify himself or herself in a proceeding in which . . . [t]he Justice has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .").

248 Alan Rappaport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html [https://web.archive.org/web/20250308172028/https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html]; *Complete List of Donald Trump's Potential Nominees to the U.S. Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Complete_list_of_Donald_Trump%27s_potential_nominees_to_the_U.S._Supreme_Court [https://perma.cc/LCP8-BB48].

249 *See* Rappaport & Savage, *supra* note 248; Andy Kroll, Andrea Bernstein & Ilya Marritz, *We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority*, PROPUBLICA (Oct. 11, 2023, 5:00 AM), https://www.propublica.org/article/we-dont-talk-about-leonard-leo-supreme-court-supermajority [https://perma.cc/9BLQ-M9AV]; *Leonard A. Leo*, FED. SOC'Y, https://fedsoc.org/contributors/leonard-leo [https://web.archive.org/web/20250314190510/https://fedsoc.org/contributors/leonard-leo].

250 *See generally* Kroll et al., *supra* note 249.

251 Elliott et al., *supra* note 131.

252 Kroll et al., *supra* note 249.

donor.[253] Leo has arranged multiple meetings for both Scalia and Thomas to attend events hosted by the Koch brothers, arranging for the Justices to attend private donor retreats and summits where the Justices spoke to members and donors.[254] Leo also played a hand in assisting Justice Thomas's wife, Ginni, in launching her own consulting firm, directing at least $25,000 be paid to her as a subcontractor, with "no mention of Ginni, of course."[255]

Without question, Leo is entitled to his own political efforts, and his campaigning efforts to stock the judiciary with conservative members, as well as his role in arranging lavish gifts for the Justices, do not, in and of themselves, violate any laws or ethics code, no matter how enraging they may be.[256] However, issues arise when those same billionaires who the Justices have shared private jets and luxury fishing lodges with, who have paid private school tuition and house renovation costs for Justices' family members, then appear with matters before the Court. That is where Code violations come into play. When the very same Justices Leo has wined and dined to extremes are then deciding cases in which Leo has, by way of his expansive nonprofit network, funneled millions of dollars into amicus briefs,[257] impartiality is most certainly called into question. And as it stands today, that is entirely on the Justices to self-police.

Leo's efforts are not limited to the Supreme Court. With Leo as a key advisor, President Trump appointed 231 judges to the federal court system over his four-year tenure.[258] Eighty-six percent of those individuals were former or current members of the Federalist Society.[259]

Leo's efforts have largely been a massive success. By way of example, Justice Thomas joined the majority opinion and wrote his own concurrence in the landmark case *Loper Bright Enterprises v.*

---

253 Elliott et al., *supra* note 131.

254 Kroll et al., *supra* note 249.

255 Emma Brown, Shawn Boburg & Jonathan O'Connell, *Judicial Activist Directed Fees to Clarence Thomas's Wife, Urged 'No Mention of Ginni,'* WASH. POST (May 4, 2023), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway [https://web.archive.org/web/20240916062638/https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway] (noting that Leo denied any connection to the Supreme Court's work, and claimed he obscured Ginni's role simply to protect her and Justice Thomas's privacy).

256 *See* discussion *supra* Section V.A. Notwithstanding issues of Justices' improper lack of financial disclosures.

257 Kroll et al., *supra* note 249; Andy Kroll, Andrew Perez & Aditi Ramaswami, *Conservative Activist Poured Millions Into Groups Seeking to Influence Supreme Court on Elections and Discrimination*, PROPUBLICA (Dec. 14, 2022, 12:30 PM), https://www.propublica.org/article/leonard-leo-scotus-elections-nonprofits-discrimination [https://perma.cc/JA99-3Q63].

258 Kroll et al., *supra* note 249.

259 *Id.*

Raimondo,[260] decided in 2024, which overturned *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[261] Contrast Thomas's staunch belief that *Chevron* deference "does not comport with the Administrative Procedures Act," and "violates our Constitution's separation of powers,"[262] in his concurrence in *Loper* with his *defense* of the *Chevron* doctrine in the 2005 case *National Cable & Telecommunications Association v. Brand X Internet Services*.[263] Thomas's majority opinion in *National Cable & Telecommunications* argues that the lower court should have applied the *Chevron* doctrine.[264]

It is of course possible that Thomas simply changed his viewpoint on the issue. However, it is also a reasonable inference that various gifts and luxury trips organized and funded by Leo, within the same timeframe that Leo's organizations gave over one million dollars to the New Civil Liberties Group, a conservative organization working to bring administrative law cases before the Court,[265] had some sway over the Justice.[266] Might it be reasonable to conclude that in donating over $1 million between 2020 and 2021 to former Vice President Mike Pence's nonprofit, Advancing American Freedom, which submitted amicus briefs in *Loper*, Leo's personal relationship with Thomas created a conflict?[267] Two of the three appointees from Leo's shortlist, Justices

---

260 Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) (Thomas, J., concurring).

261 *Id.*

262 *Id.* Thomas cites to himself numerous times in his concurrence, likely as an attempt to underscore that this is a longstanding belief he has held, however, it is worth pointing out that the earliest of his own work that Thomas cites is from 2015. *Id.*

263 545 U.S. 967 (2005).

264 *Id.* at 980.

265 Heidi Przybyla, *Leonard Leo Used Federalist Society Contact to Obtain $1.6B Donation*, POLITICO (May 2, 2023, 4:30 AM), https://www.politico.com/news/2023/05/02/leonard-leo-federalist-society-00094761 [https://web.archive.org/web/20250214172226/https://www.politico.com/news/2023/05/02/leonard-leo-federalist-society-00094761]; *Leonard Leo*, SUP. TRANSPARENCY, https://supremetransparency.org/powerbrokers/leonard-leo [https://perma.cc/W5Q6-DP5H]. In 2020, Thomas went so far as to even renounce his own opinion in *National Cable & Telecommunications*, 545 U.S. 967 (2005). Thomas was the sole dissent in a vote not granting certiorari for the case *Baldwin v. United States* where the focus of the New Civil Liberties Group's efforts remained. 140 S. Ct. 690 (2020) (mem.) (Thomas, J., dissenting); *see* Aysha Bagchi, *Thomas Dissent Latest Sign in Battle over Chevron Deference*, BLOOMBERG TAX (Feb. 25, 2020, 3:32 PM), https://news.bloombergtax.com/daily-tax-report/thomas-dissent-latest-sign-in-battle-over-agency-rulemaking-power [https://perma.cc/KP7N-6N3D].

266 The New Civil Liberties group also filed amicus briefs in *Loper*, supporting the overturning of *Chevron*, along with the Manhattan Institute, where Harlan Crow's wife serves on the board. Julia Rock & Andrew Perez, *Influenced by Dark Money, Clarence Thomas Has Reversed His Position on a Landmark Legal Doctrine*, JACOBIN (May 10, 2023), https://jacobin.com/2023/05/clarence-thomas-chevron-regulatory-doctrine-conservatives-dark-money [https://perma.cc/Y8C5-GMK2].

267 *See id.*

Gorsuch and Kavanaugh, publicly opposed the *Chevron* doctrine before and during their appointment hearings.[268]

VII. CONGRESSIONAL RESPONSE

Following the Court implementing its first ever Code of Conduct, members of Congress have pushed for stronger legislation and enforcement mechanisms to further hold members of the bench accountable.[269] Recently, Congressman Dan Goldman introduced the "Supreme Court Ethics and Investigations Act" with the hopes of restoring accountability and transparency to the Supreme Court.[270] This bill would establish an investigative body in the Supreme Court that would conduct investigations into alleged ethical improprieties and report to Congress on its findings.[271] Additionally, Representatives Jamie Raskin and Alexandria Ocasio-Cortez recently introduced the High Court Gift Ban Act to prohibit federal judges, including Supreme Court Justices, from receiving gifts valued over fifty dollars, hoping to restore faith and integrity in the Roberts Court.[272]

In July of 2024, Senator Whitehouse sent a letter to Attorney General Merrick Garland,[273] requesting a Special Counsel be appointed to

---

268 *See* Allan Smith, *Trump's Supreme Court Nominee Just Had His First Real Day of Grilling—And There's More to Come*, BUS. INSIDER (Mar. 22, 2017, 9:01 AM), https://www.businessinsider.com/neil-gorsuch-senate-confirmation-hearing-2017-3 [https://perma.cc/Z6LF-RK4Q]; Jonathan Wood, *Undue Deference*, NAT'L REV. (July 29, 2018, 5:30 AM), https://www.nationalreview.com/2018/07/brett-kavanaugh-opposition-to-chevron-deference-may-reverse-it [https://perma.cc/8L9A-LWA6].

269 Press Release, Rep. Jamie Raskin, Ocasio-Cortez Introduce Legislation Imposing Gift Ban on Supreme Court Justices (June 25, 2024), https://raskin.house.gov/2024/6/raskin-ocasio-cortez-introduce-legislation-imposing-gift-ban-on-supreme-court-justices [https://perma.cc/JNC5-JMDK]; Press Release, Rep. Dan Goldman, Congressman Dan Goldman Introduces 'Supreme Court Ethics and Investigations Act' to Restore Accountability and Transparency to the Supreme Court (June 4, 2024), https://goldman.house.gov/media/press-releases/congressman-dan-goldman-introduces-supreme-court-ethics-and-investigations-act [https://perma.cc/45DS-WTAZ].

270 Press Release, Rep. Dan Goldman, *supra* note 269 ("'Our nation's highest court is facing an unprecedented crisis of legitimacy because there is no enforceable code of ethics and no accountability to the fundamental norms required of all other judges,' Congressman Dan Goldman said. 'It is imperative—for the health of our democracy—that we restore faith in the Supreme Court immediately. The "Supreme Court Ethics and Investigations Act" is a sorely needed first step to hold Supreme Court Justices accountable and ensure the highest court does not have the lowest ethical standards.'").

271 *See id.*

272 H.R. 8830, 118th Cong. (2024); Press Release, Raskin, *supra* note 269.

273 Letter from Sheldon Whitehouse, U.S. Sen., & Ron Wyden, U.S. Sen., to Merrick Garland, Att'y Gen. of U.S. (July 3, 2024), https://www.whitehouse.senate.gov/wp-content/uploads/2024/07/

investigate Justice Thomas, after Senate investigations and public reporting found evidence of potential violations of ethics, false statement, and tax laws, rising to levels warranting criminal investigation.[274] The lawmakers noted that the Senate cannot prosecute and the Court "has no fact-finding function of its own," alluding to the lack of enforcement mechanism in the Supreme Court Code of Conduct.[275]

The following day, Representative Ocasio-Cortez introduced Articles of Impeachment against Justices Thomas and Alito given their "pattern of refusal to recuse from consequential matters before the court in which they hold widely documented financial and personal entanglements."[276] Given the lack of enforcement mechanisms for the

---

2024-07-03-Letter-to-AG-Garland-re-Special-Counsel-FINAL.pdf [https://perma.cc/6RVL-LPD9]. It remains unclear if the Department of Justice will respond or launch an investigation, but regardless of DOJ action, this will only further erode public trust in the Court. *See* Press Release, Raskin, *supra* note 269.

274 *See* Press Release, Sen. Sheldon Whitehouse, Whitehouse and Wyden Ask Attorney General to Appoint Special Counsel to Investigate Potential Ethics and Tax Law Violations by Justice Clarence Thomas and His Benefactors (July 9, 2024), https://www.whitehouse.senate.gov/news/release/whitehouse-and-wyden-ask-attorney-general-to-appoint-special-counsel-to-investigate-potential-ethics-and-tax-law-violations-by-justice-clarence-thomas-and-his-benefactors [https://perma.cc/83UB-6AAN].

> The senators' letter requests that a Special Counsel be appointed to determine whether Justice Thomas violated federal ethics and tax laws by failing to disclose as income more than $267,000 in forgiven debt. An investigation by Chairman Wyden's Senate Finance Committee uncovered that Justice Thomas failed to repay the principal of a $267,230.00 loan he used to purchase a luxury motorcoach.

Id. The investigation suggested the loan was forgiven; however, Thomas' attorney previously stated the Justice had satisfied the terms of the agreement. Letter from Elliot S. Berke, Att'y, to Ron Wyden, U.S. Sen., & Sheldon Whitehouse, U.S. Sen. (Jan. 19, 2024), https://www.finance.senate.gov/imo/media/doc/berke_farah_response_letter_to_senators_wyden_and_whitehouse_on_justice_thomaspdf.pdf [https://perma.cc/6RVL-LPD9].

> Justice Thomas did not disclose this forgiven debt on his ethics filings, as required by federal law . . . . The letter also asks for a Special Counsel to review the many instances of undisclosed gifts given to Justice Thomas by billionaire benefactors. These gifts include multiple instances of free private jet travel; yacht travel; country club membership; luxury sports tickets; lodging; tuition for Justice Thomas's grandnephew; and real estate transactions, home renovations, and free rent for Justice Thomas's mother. The Ethics in Government Act required Justice Thomas to disclose all these gifts, but Justice Thomas failed to properly disclose them.

Press Release, Whitehouse, *supra*.

275 Press Release, Whitehouse, *supra* note 274.

276 Press Release, Cong. Alexandria Ocasio-Cortez, Ocasio-Cortez Introduces Articles of Impeachment Against Justice Thomas and Justice Alito (July 10, 2024), https://ocasio-cortez.house.gov/media/press-releases/ocasio-cortez-introduces-articles-impeachment-against-justice-thomas-and [https://perma.cc/D562-6ZF4].

new code, impeachment still serves as the only process to hold a Justice accountable for code violations. But while this is the most aggressive proposal by Democrats to crack down on the Supreme Court,[277] impeachment serves as a near impossible and impractical solution. Fifteen federal judges have been impeached, though no Supreme Court Justice has ever been removed this way.[278] Only one Justice has ever been impeached—Associate Justice Samuel Chase, who was impeached by the House in 1805, but acquitted by the Senate.[279]

VIII. EXECUTIVE RESPONSE

In late July of 2024, after dropping out of the presidential race, former President Biden issued a plan for Supreme Court reform in an attempt to "restore trust and accountability" to the Court.[280] The plan includes three key reforms: (1) a constitutional amendment that explicitly states no individual is immune from federal indictment, trial, conviction, or sentencing due solely to holding presidential office, (2) term limits for the Justices, and (3) a binding code of conduct for members of the Court.[281]

> The first impeachment resolution includes the following impeachment articles against Justice Thomas: (1) Failure to disclose financial income, gifts and reimbursements, property interests, liabilities, and transactions, among other information[;] (2) Refusal to recuse from matters concerning his spouse's legal interest in cases before the court[; and] (3) Refusal to recuse from matters involving his spouse's financial interest in cases before the court.

Id. "The second impeachment resolution includes the following impeachment articles against Justice Alito: (1) Refusal to recuse from cases in which he had a personal bias or prejudice concerning a party in cases before the court," and "(2) Failure to disclose financial income, gifts and reimbursements, property interests, liabilities, and transactions, among other information." *Id.*

277 *See* Owen Dahlkamp, *Ocasio-Cortez Introduces Articles of Impeachment Against Supreme Court Justices Thomas and Alito*, CNN (July 10, 2024, 3:31 PM), https://www.cnn.com/2024/07/10/politics/alexandria-ocasio-cortez-impeachment-supreme-court/index.html [https://perma.cc/BM75-BVXP].

278 Kimberly Wehle, *How to Impeach a Supreme Court Justice*, POLITICO (Mar. 30, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/03/30/impeach-supreme-court-justice-clarence-thomas-00021480 [https://perma.cc/ZEW3-6CPV].

279 *Impeachment Trial of Justice Samuel Chase, 1804–05*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm [https://perma.cc/A6QP-X2E9].

280 Press Release, White House, Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law [https://perma.cc/5SM9-HZNP].

281 *Id.*

The first step of Biden's tripartite plan—the constitutional amendment—was a direct response to the Court's decision in *Trump v. United States*, which held President Trump has "absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority," and "is entitled to at least presumptive immunity from prosecution for all his official acts."[282] Under Article V of the Constitution, there are two ways to propose and ratify the Constitution.[283] Either a two-thirds vote from both houses of Congress must vote to propose the amendment, or two-thirds of the states must request a convention called specifically for that purpose.[284] The amendment must then be ratified by either three-fourths of the state legislatures, or three-fourths of conventions called in each state for ratification.[285] This process is intentionally *extremely* onerous. Since the Constitution's inception, only thirty-three amendments have been proposed and passed to states for ratification, and of those, twenty-seven have been passed.[286] The process is only made even more difficult given the starkly divided, partisan current political atmosphere. While an amendment declaring that a former or current President has no broad federal immunity from criminal prosecution for official acts is a good idea in theory, practically speaking, it is near impossible. Especially when a Democratic President's calls for an amendment are prompted by the Court's decision regarding the former and current Republican President, the bipartisan support necessary for a constitutional amendment is simply unrealistic.

The second part of President Biden's plan called for term limits for the Justices, in which the President nominates a Justice every two years, and the Justices serve for eighteen years on the bench.[287] The Biden administration asserted that "[t]erm limits would help ensure that the Court's membership changes with some regularity; make timing for Court nominations more predictable and less arbitrary; and reduce the

---

282 Trump v. United States, 603 U.S. 593, 593 (2024).

283 U.S. CONST. art. V.

284 *Id.*

285 *Id.*

286 Scott Bomboy, *Newly Proposed Constitutional Amendments Face Steep Challenges*, NAT'L CONST. CTR. (Jan. 30, 2025), https://constitutioncenter.org/blog/newly-proposed-constitutional-amendments-face-steep-challenges [https://perma.cc/JZN8-EPRF]. Of those twenty-seven, only twelve have been passed since the Reconstruction Era. Additionally, it is worth noting that the two Prohibition amendments technically cancel each other out. *Compare* U.S. CONST. amend. XVIII, *with id.* amend. XXI.

287 Press Release, Am. Presidency Project, Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law (July 19, 2024), https://www.presidency.ucsb.edu/documents/fact-sheet-president-biden-announces-bold-plan-reform-the-supreme-court-and-ensure-no [https://perma.cc/X9LD-J5JZ].

chance that any single Presidency imposes undue influence for generations to come."[288] The United States is the only major constitutional democracy where members of the highest court in the nation are afforded life tenure.[289] Term limits for the Justices are by no means a new proposal and, in fact, have long garnered bipartisan support.[290] The Court's growing list of ethical scandals, unaccountability for members of the bench, and unusually long terms have reinvigorated calls for term limits.[291]

The third and final proposal in President Biden's plan was a *binding* code of conduct and ethics for the Court, passed and enforced by Congress, which would require Justices to "disclose gifts, refrain from public political activity, and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest."[292] This author has advocated for enforcement by Congress, a co-equal branch, since the release of the Supreme Court Code of Conduct was released.[293]

President Biden's audacious plan faced almost immediate criticism from the right, with Speaker of the House Mike Johnson deeming the proposals "dead on arrival."[294] None of these proposals were implemented. Following a presidential election in which President Biden stepped down and Vice President Kamala Harris lost to President Donald Trump—a fierce ally of the conservatives on the Court who has faced countless ethical scandals himself[295]—it is incredibly unlikely we will see any ethical reform, let alone the drastic (yet incredibly necessary) measures proposed by President Biden.

---

288 *Id.*

289 *Id.*

290 Several polls since 2014 demonstrate term limits for the Court have constantly garnered bipartisan support, and in 2022, over two-thirds of Americans supported term limits. Alicia Bannon & Michael Milov-Cordoba, *Supreme Court Term Limits,* BRENNAN CTR. FOR JUST. (June 20, 2023), https://www.brennancenter.org/our-work/policy-solutions/supreme-court-term-limits [https://perma.cc/6UJZ-W3ZW].

291 Justices are serving nearly twice as long as they served just two generations prior. Tyler Cooper, Amanda Dworkin, Dylan Hosmer-Quint & Amanda Pescovitz, *Retiring Life Tenure: On Term Limits and Regular Appointments at the Supreme Court*, 42 CARDOZO L. REV. 2763, 2766–70 (2022).

292 Press Release, White House, *supra* note 280.

293 *See* Sample, *supra* note 84, at 610–15; *see also infra* Part IX.

294 Rachel Reed, *Too Little and Too Late*, HARV. L. TODAY (Aug. 1, 2024), https://hls.harvard.edu/today/bidens-proposed-court-reforms-may-be-too-little-and-too-late-says-doerfler [https://perma.cc/9NN7-SK7T].

295 Meghan Faulkner, Esther von Allmen & Sacha Heymann, *Trump 2.0: Bracing for Criminals, Corruption and Constitutional Crises*, CITIZENS FOR RESP. & ETHICS (Feb. 5, 2025), https://www.citizensforethics.org/reports-investigations/crew-reports/trump-2-0-bracing-for-criminals-corruption-and-constitutional-crises.

IX. CONGRESSIONAL ENFORCEMENT

Contrary to Justice Alito's improper and incorrect assertion that Congress has "no authority" to regulate the conduct of Supreme Court Justices,[296] congressional oversight fits squarely within the kinds of "checks and balances that flow from the scheme of a tripartite government."[297] Constitutional text, history, case law, and purpose support the authority of Congress to impose a Supreme Court ethics code with an enforcement mechanism.[298]

The text of the Necessary and Proper Clause establishes Congress's authority to "carry[] into Execution" all the powers of any Department of the United States;[299] this includes the "judicial Power"[300] vested in the judicial department.[301] As Chief Justice Marshall emphasized, "That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by [the Necessary and Proper] clause, seems to be *one of those plain propositions which reasoning cannot render plainer*."[302] In more general terms, "Congress's necessary and proper power is precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively."[303]

From the beginning of our nation's history, the First Congress exercised this very authority. With the Judiciary and Compensation Acts

---

296 Rivkin & Taranto, *supra* note 209.

297 United States v. Nixon, 418 U.S. 683, 704 (1974) (citing THE FEDERALIST NO. 47 (James Madison)).

298 *See generally* Ahearn & Milov-Cordoba, *supra* note 84, at 564–72 (discussing Congress's constitutional authority to regulate Supreme Court ethics and its limitations, including a more detailed analysis of *Wayman*, *Caperton*, *Sibbach*, and *Mistretta*); Sample, *supra* note 84, at 610–14 (discussing constitutional text, history, case law, and purpose concerning Congress's constitutional authority to enact some form of enforcement mechanism, including a more detailed analysis of statutory precedent).

299 U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o 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 *in any Department* or Officer thereof." (emphasis added)).

300 U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added)).

301 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825).

302 *Id.* (emphasis added); *see also* Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts . . . .").

303 John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 532 (2000).

of 1789, Congress stipulated the size, location, quorum, salary, staff, term, jurisdiction, and ethics (such as by mandating an oath of office for the Supreme Court).[304] The history of congressional ethics regulation continued through the Judiciary and Judicial Procedure Acts of 1948 and the Ethics Acts of 1978 and 1989.[305] In light of this historical precedent, Congress possesses the constitutional authority to enact further Supreme Court ethics legislation.

Case law also supports the constitutionality of the kind of ethics reform under current consideration. In the touchstone civil procedure case *Sibbach v. Wilson & Co.*, the Court proclaimed that "Congress has undoubted power to regulate the practice and procedure of federal courts."[306] More particularly, in *Caperton v. A.T. Massey Coal Co.*, which centered on the nonrecusal of a state supreme court justice, the Court held that the Due Process Clause imposes a constitutional requirement of judicial recusal under some circumstances.[307] But most importantly for present purposes, the *Caperton* Court specified: "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress . . . of course, remain[s] *free to impose more rigorous standards for judicial disqualification.*"[308] And in *Davis v. Passman*, an employment discrimination case against a U.S. Congressman, the Court declared, "It

---

304 The First Congress set the Court's size, quorum, location, and term in the Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73. It authorized the Court to hire staff, § 7, 1 Stat. at 76, defined its jurisdiction, § 13, 1 Stat. at 80–81, and required the Justices to take an oath of office, § 8, 1 Stat. at 76. It set the Justices' salary in Compensation Act of 1789, ch. 18, § 1, 1 Stat. 72, 72.

305 Judiciary and Judicial Procedure Act of 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455) ("Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."); Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (requiring various government officers, including the Chief Justice and Associate Justices, § 308(9), to file an annual report, § 301(c), disclosing, inter alia, their nongovernmental income, gifts, and reimbursements, § 302(a)) (codified as amended at 5 U.S.C. §§ 13101–13104); Ethics Reform Act of 1989, Pub. L. No. 101-194, sec. 303, § 7353(a)(2), 103 Stat. 1716, 1746–47 ("Except as permitted by subsection (b), no Member of Congress or officer or employee of the executive, legislative, *or judicial* branches shall solicit or accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties." (emphasis added)) (codified as amended at 5 U.S.C. § 7353(a)).

306 312 U.S. 1, 9 (1941) (establishing the rule for diversity jurisdiction cases that federal procedural rules govern only the manner and means by which rights are enforced and not the rules of decision by which the court will adjudicate rights).

307 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (alteration in original) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))).

308 *Id.* at 889–90 (emphasis added) (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986)); *cf. Caperton*, 556 U.S. at 893 (Roberts, C.J., dissenting) ("States are, of course, free to adopt broader recusal rules than the Constitution requires . . . .").

is entirely appropriate for Congress, in creating [statutory] rights and obligations, *to determine* in addition, *who may enforce them and in what manner*."[309] In sum, Congress may establish judicial recusal and other ethics standards and determine its own enforcement mechanisms.

Regarding separation of powers doctrine, the Court observed in *Mistretta v. United States* that "the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."[310] The necessity of Supreme Court ethics regulation, as discussed above, is a good case in point.

On the other hand, the Court has strictly enforced divisions among the Branches when one interferes with the core powers of another. This aspect of the doctrine is exemplified by the recent decision in *Trump v. United States*: "[W]hen the President acts pursuant to his *exclusive constitutional powers*, Congress cannot—as a structural matter—regulate such actions . . . ."[311] By analogy, Congress cannot—as a structural matter—regulate the Justices' actions under the exclusive constitutional power of the judiciary.[312] That power is, as *Marbury v. Madison* established, the power "to say what the law is."[313] To elaborate, it is "the authority to determine the facts and the law in an individual case, and to render a final, binding judgment based on those determinations."[314]

Ethics enforcement involves factual and legal determinations that are distinct from those involved in an individual case, and so long as any new enforcement mechanism applies proactively—that is, prior to the decision of a case—then there is no interference with the judiciary's ability to render final, binding judgments. Thus, congressional efforts to enforce Supreme Court ethics are unlikely to interfere with this authority. On the contrary, ethics enforcement would enhance the Court's exercise

---

309 442 U.S. 228, 241 (1979) (emphasis added).

310 488 U.S. 361, 381 (1989) (upholding the constitutionality of the federal sentencing guidelines).

311 603 U.S. 593, 636 (2024) (emphasis added) (finding presidential immunity for acts within the president's core constitutional powers, at least presumptive immunity for official acts, and no immunity for unofficial acts).

312 *E.g.*, Bank Markazi v. Peterson, 578 U.S. 212, 225–26 (2016) (holding that Congress may not usurp the judiciary's power to interpret and apply the law by vesting review of its decisions in the Executive, commanding it to reopen final judgments, or limiting its jurisdiction in a way that requires a court to act unconstitutionally).

313 5 U.S. (1 Cranch) 137, 177 (1803).

314 Jones v. Hendrix, 599 U.S. 465, 487 (2023) (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217–19 (1995); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202–03 (1830)) (prohibiting a federal prisoner from bringing a successive motion to vacate sentence).

of its constitutional powers by reducing the interference of improper personal motives during its factual and legal determinations, and it would support the Court's final judgments by reducing the appearance of impropriety.

Finally, the Court has long recognized the self-evident truth that "no man can be a judge in his own case."[315] The Framers recognized that same limitation inherent in human nature: Humans are not angels.[316] Separation of powers does "not mean that these departments ought to have no partial agency in, or no control over, the acts of each other," James Madison wrote.[317] Instead, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[318] "True justice arises only when the men and women of the government operate within a system, greater than any one individual, that checks their self-interested biases."[319] That is what congressionally imposed ethics enforcement is about.

An unaccountable Supreme Court has resulted in a concentration of power which has encroached on fundamental liberties and the powers of other Branches.[320] Congress rightly has the constitutional means and personal motives to resist this encroachment. It can do so while also strengthening the Court's proper constitutional role. Congress can and should enact an ethics enforcement mechanism that brings the Justices within a system that checks their individual interests. Only within an ethics enforcement system can the Supreme Court truly do "equal justice under law."[321]

---

315 *In re* Murchison, 349 U.S. 133, 136 (1955); *see, e.g.*, Chrysafis v. Marks, 141 S. Ct. 2482 (2021) (per curiam) (granting an emergency injunction against a state law that precluded landlords from contesting a tenant's self-certification of financial hardship).

316 THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) ("If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

317 THE FEDERALIST NO. 47 (James Madison).

318 THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison); *see* U.S. CONST. art. I, § 8, cl. 18.

319 Sample, *supra* note 84, at 614.

320 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 222 (2022) (erasing the constitutional right to abortion); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 410–13 (2024) (limiting the power of Congress to delegate authority to the agencies it creates); *see supra* Part VI (discussing Justice Thomas's changed position on the subject and how the lack of ethics enforcement allowed Leonard Leo to influence such change).

321 *About the Court*, SUP. CT. U.S., https://www.supremecourt.gov/about/about.aspx [https://perma.cc/JP6C-MKP9].

CONCLUSION

The fact that there is more substance and actual legal analysis in *ProPublica*'s reporting than in Justice Alito's self-serving op-ed and various public statements highlights the fundamental flaw of Justices deciding their own cases.[322] It is telling as to the Court's degraded norms that Abe Fortas was at least capable of the shame that resulted in his resignation—during the very presidency which appointed him—when confronted with his ethical lapse. Justice Thomas and Justice Alito, on the other hand, keep doubling and tripling down with farcical defenses.

The newly adopted Code is not a product of some sudden change of heart on behalf of the members of our Supreme Court. Instead, it reflects the significant work done by organizations like *ProPublica*, uncovering these scandals, bringing them to the public's attention, and putting pressure on the Justices. The Code, in its present form, is manifestly insufficient. With permissive language and no meaningful enforcement mechanism, the Code serves only as a clever loophole, designed to suppress public scrutiny of the Court, without enacting real change.

322 Rivkin & Taranto, *supra* note 209.