

# Reforming Judicial Ethics

**The federal judiciary lacks a comprehensive and robust ethics regime.**

Although judges are supposed to avoid even the appearance of impropriety and litigants may seek judicial recusals in cases with potential conflicts of interest, these obligations are difficult to enforce. Litigants are reluctant to seek recusals for fear that if their judge declines, the motion may influence the final decision. For district and circuit judges, ethics and misconduct issues are handled within the circuit, which means that judicial ethics and misconduct complaints are adjudicated by a judge's peers. Meanwhile, justices on the Supreme Court are not subject to any binding ethics requirements, nor are they under any obligation to explain recusal decisions.

It is time for the federal judiciary to take ethics seriously. We call on the judiciary to establish an independent ethics body that is empowered to promulgate ethics rules for federal judges, establish enforceable recusal standards, and hold judges accountable. To the extent that sufficient reforms are not pursued by the courts, Congress should step in and enact them.

In addition, the judiciary should adopt transparency measures to increase public confidence in the courts—including providing free access to court records as well as audio and video access to court proceedings. Again, to the extent courts do not increase transparency on their own, Congress should be ready to act in their stead.

## Issue 1: Unaccountable judges

The single greatest impediment to improving judicial ethics is the absence of a single, independent body charged with providing judicial ethics regimes and policing misconduct violations. Currently, the [Judicial Conduct and Disability Act of 1980](#) allows ethics and misconduct complaints to be filed with the chief judge of any district or circuit court. The chief judge may then [appoint](#) a special committee of judges within the circuit to investigate and report on the alleged misconduct. This current precedent raises multiple concerns: first, those responsible for handling a complaint have a professional and possibly personal relationship with the judge facing misconduct allegations. Second, the use of special committees to handle complaints—rather than a permanent body—means that those responsible for investigating and adjudicating complaints are unlikely to have the experience or expertise for handling them. Third, the Supreme Court has not bound itself to these regulations, which apply to all lower courts.

In addition to the flaws illustrated above, there is also no independent body charged with identifying and disclosing potential judicial conflicts of interest or with resolving recusal motions by litigants. Judicial officers are required to make regular [financial disclosures](#) under the Ethics in Government Act of 1978. Those forms may be [requested](#) from the Administrative Office of the Courts, but they are not disclosed affirmatively. Although disclosure reports are potentially subject to public scrutiny and have been [corrected](#) in the past, there is no judicial entity proactively policing compliance.

The federal judiciary has taken [strides](#) towards addressing sexual harassment and discrimination in the workforce; however, judges who flout these rules can still avoid accountability. Investigations of judicial misconduct currently end if a judge quits or—in some cases—is promoted. Panels of judges convened to consider a colleague’s misconduct have [concluded](#) that they have no authority to investigate a judge who retires or is appointed to a different court. Investigations into the misconduct of retired Court of Appeals Judges [Alex Kozinski](#) and [Maryanne Trump Barry](#), retired District Judges [Walter Smith](#) and [Carlos Murguia](#), and now-Supreme Court Justice [Brett Kavanaugh](#), among others, have been dropped for this reason. Moreover, under [28 U.S.C. § 371](#), judges who resign amidst misconduct investigations still collect tax-payer funded pensions [for life](#). Judges Kozinski and Barry each continue to collect annual pensions of nearly \$220,000 despite unresolved allegations of [sexual misconduct](#) in the case of Judge Kozinski and [tax fraud](#) in the case of Judge Barry.

### Solutions

- **Establish a consolidated, independent ethics office within the Judicial Conference of the United States Courts.** A single, independent organization within the Judicial Conference should have consolidated power to shape and enforce the ethics standards of the federal judiciary. This entity can be led by judges appointed by the Chief Justice of the United States for a fixed number of years—the mechanism by which judges are appointed to the Foreign Intelligence Surveillance Court.
- **Establish a process for handling judicial ethics and misconduct complaints that applies to all judges and justices and that retains jurisdiction even if a judge**

**resigns, retires, or is removed from office.** The independent ethics office established within the Judicial Conference should be given jurisdiction over judicial ethics and misconduct complaints by any judicial officer—including Supreme Court justices. This entity should have a complaint process that protects the privacy interests of whistleblowers or accusers. It should also have the authority to launch investigations based on public reports of misconduct as well as specific complaints that it has received.

- **Empower the independent ethics office to impose stronger sanctions on judges.** While ethical violations of the code can lead to investigation or sanction under the [Judicial Conduct and Disability Act of 1980](#), penalties are rarely [administered](#). Indeed, despite [high profile](#) allegations of ethics violations and misconduct, no federal judge has been sanctioned [in years](#). Stronger disciplinary authority is needed, including the ability to strip judges or justices of their non-vested [taxpayer-funded pension benefits](#). While [Article III](#) of the Constitution prohibits compensation from being reduced after a judge is in office, retirement pay for new judges could be made contingent on their refraining from serious misconduct. The independent ethics office should also have the authority to refer cases to Congress for impeachment or the United States Attorney for prosecution.
- **Empower the independent ethics office to aggregate and disseminate information about potential judicial conflicts, and issue recusal opinions (as discussed in issue 3 of this section).** The independent ethics office should help ensure that recusal motions are well founded by arming litigants with accurate information about potential conflicts of interest, including judges’ financial disclosures and the disclosures of personal contacts proposed in issue 2 of this section. As discussed in issue 3 of this section, the independent ethics office should also decide or weigh in on recusal motions.

## Resources

Sen. Warren and Rep. Jayapal’s [Anti-Corruption and Public Integrity Act](#), S. 3357, § 403 (115th Congress, 2018).

Rep. Sarbanes’ [For the People Act of 2019](#), H.R. 1, § 7001 (116th Congress, 2019).

Rep. Johnson’s [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

Stephen Breyer, et al., [Implementation of the Judicial Conduct and Disability Act of 1980: A report to the Chief Justice](#), *The Judicial Conduct and Disability Act Study Committee*, September, 2006.

Danielle Root and Sam Berger, [Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts](#), *Center for American Progress*, May 8, 2019.

Arthur D. Hellman, [An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings](#), *32 The Georgetown Journal of Legal Ethics* 341, 2019.

[Restoring Trust in an Impartial and Ethical Judiciary](#), *Warren Democrats*.

## Issue 2: Weak ethics standards

The independence and integrity of the judiciary are paramount to public trust in the courts' ability to deliver impartial justice. The rule of law depends more than anything on the expectation that neutral principles and application of the law will drive outcomes—not the ability of individuals to curry favor with jurists. For this reason, the [Federal Disqualification Statute](#) and the [Judicial Code of Conduct](#) have encouraged judges to avoid even the appearance of impropriety that could undermine the courts' legitimacy. Under the [Judicial Code of Conduct](#), “[e]very judge is required to develop a list of personal and financial interests that would require recusal, which courts use with automated conflict-checking software to identify court cases in which a judge may have a disqualifying conflict of interest under 28 U.S.C. § 455 or the Code of Conduct.”

Current ethics requirements for federal jurists fall short of this aspiration. Existing rules permit judges and justices to trade individual stocks, which creates a considerable risk that their participation in a dispute could impact an investment. This risk is not theoretical. In 2012, the [Center for Public Integrity](#) examined the financial disclosures of appellate circuit judges and found 24 cases where judges owned stock in a company with a case before them. In 20 other cases, the judge's investment(s) raised questions even if they did not present a clear conflict of interest.

Additionally, while there are existing [Judicial Conference ethics rules](#) preventing judges from accepting gifts that create the appearance of conflicts, judges are still permitted to accept certain all-expenses-paid trips to appear in certain contexts. On occasion, those trips have involved [appearances](#) that have a fundraising component. Judges are only required to disclose these types of gifts once a year on their annual financial disclosures.

Jurists do not have a good record of following the existing disclosure requirements. For instance, in 2011, [Supreme Court Justice Clarence Thomas](#) failed to disclose his wife's employment with the Heritage Foundation. In 2016, [Supreme Court Justice Sonia Sotomayor](#) left expensive gifts off her financial disclosure report. Neither justice faced discipline for these oversights.

Overall, the disclosure regime for jurists focuses on financial conflicts of interest without shining a light on the potential for other forms of influence that are damaging to the courts' independence and impartiality. Both the public and private litigants have a right to know if judges have had contacts or meetings with executive branch officials, litigants, or attorneys with interests before the court.

### Solutions

- **Require federal judges to divest assets that are likely to create conflicts of interest or the appearance of a conflict of interest.** Recusal is in many cases an undesirable outcome: federal judges should be able to participate in matters to which they are assigned. That's why judges should be required to take prophylactic steps to prevent conflicts of interest by divesting stocks, non-diversified mutual funds, and other ownership interests in private entities.

- **Establish new affirmative disclosure requirements for the personal and professional contacts of jurists and make them available in a searchable database.** Members of the public and litigants before the courts need accurate, timely information about potential conflicts of interest including relevant extrajudicial conduct and activities of federal judges and justices. In addition to making financial disclosures, federal jurists should be required to disclose on a regular basis, a list of meetings, communications, or other contacts they have had with any executive, legislative, or corporate officers. There should be exceptions for widely attended gatherings or open-press events.
- **Provide judges with a budget for travel to make public appearances or appearances at educational institutions and ban them from accepting reimbursement for travel.** Federal judges should be encouraged to participate in extrajudicial activities, including appearances at educational institutions and public events; however, their travel should not be reimbursed by any private individual or entity. Accordingly, the judiciary should budget for and Congress should appropriate funds for federal judges to travel to avoid any appearance of impropriety.

## Resources

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 401 et seq. (115th Congress, 2018).

Sen. Whitehouse and Rep. Cicilline's [Judicial Travel Accountability Act](#), S. 2632 (116th Congress, 2019).

Rep. Johnson's [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

Johanna Kalb and Alicia Bannon, [Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency](#), *Brennan Center for Justice at New York University School of Law*, September 24, 2019.

## Issue 3: Unclear and unenforceable recusal requirements

Judicial recusal and disqualification are crucial mechanisms for safeguarding both the reality and the perception of judicial integrity. Federal law requires judges to recuse in certain cases; however, it is not always clear when recusal is required and litigants may be reluctant to seek recusal for fear of adversely impacting the judge's assessment of the merits of a case.

Three statutes establish federal judicial recusal rules: [28 U.S.C. § 47](#) prohibits a trial judge from participating in an appeal of the same case; [28 U.S.C. § 144](#) permits a party to file an affidavit stating that a district court judge is biased or prejudiced; [28 U.S.C. § 455](#) establishes a general disqualification standard for all federal judges—“any proceeding in which his impartiality might reasonably be questioned” and identifies specific circumstances that require recusal.

Seeking a judge's recusal from a matter is not an ordinary motion, for it has the potential to end a judge's participation in a case and is resolved by the judge whose recusal is sought. There are good [reasons](#) to think that judges should not rule on their own recusal or disqualification motions, including the potential for unconscious bias or blind spots in their self perception. Moreover, litigants might hesitate to file a recusal motion for fear of it [negatively affecting](#) the judge's assessment of the merits of a case in the event he or she decides not to recuse. A mechanism for independent, swift adjudication of recusal motions could eliminate that disincentive without opening the door to disingenuous recusal efforts.

There have also been notable cases in which Supreme Court justices have failed to recuse in circumstances that suggested that there was the appearance of bias. In 2004, it was [widely reported](#) that the late Supreme Court Justice Antonin Scalia had traveled with then-Vice President Richard Cheney for a duck-hunting trip while a case involving Cheney was pending before the Supreme Court. Despite the [appearance](#) of favoritism that the trip presented, Justice Scalia wrote a [21-page memo](#) rejecting the argument that the hunting trip was reasonable cause to question his impartiality. Scalia later cast a vote for the majority in a [7-2 decision](#) in Cheney's favor. There is, of course, a particularly strong motive for a judge or justice not to recuse in cases that are perceived to be important or controversial and where the stakes of stepping aside could be particularly high.

A separate, disturbing trend is the recusal of judges and justices without explanation. A recent [report](#) by Fix the Court noted that Supreme Court justices recused from approximately 200 matters each year without explaining why. That lack of transparency is bad for the public and bad for litigants. If there are reasons why a justice cannot participate in one case, it is plausible that they might need to recuse from similar cases.

### Solutions

- **An independent authority (such as the ethics office proposed in issue 1 of this section) should be empowered to decide (or at least offer its opinion on) recusal or disqualification motions.** Recusal motions should be referred to an independent body for swift adjudication so that judges themselves are not involved in deciding whether they should continue participating in a matter. To prevent such motions from being used by parties as a dilatory tactic, the ethics office should be required to rule

expeditiously on recusal motions and empowered to deny facially insufficient motions and to require a response from the opposing party or the judge whose recusal is sought. Alternatively, the ethics office could be charged with issuing an advisory opinion in circumstances where recusal is warranted. In either case, the procedure should apply to all federal jurists—including Supreme Court justices.

- **Recusal decisions should be made in writing and on the record.** Public confidence in the integrity of the courts is best served by recusal decisions that articulate why a judge has decided not to participate in a matter. That transparency could help establish precedent for recusal and help inform the public and litigants about the existing conflicts of sitting judges.
- **Strengthen existing recusal requirements and make them binding on the Supreme Court.** A judge who was employed by a corporation, law firm, agency, or office should recuse from all cases involving that entity for at least one year from their last day of employment. Recusal obligations should be binding on the Supreme Court, and not subject merely to the compliance of individual justices.

## Resources

Rep. Murphy’s [Supreme Court Transparency and Disclosure Act of 2011](#), H.R. 862 (112th Congress, 2011).

Sen. Warren and Rep. Jayapal’s [Anti-Corruption and Public Integrity Act](#), S. 3357, § 403 et seq. (115th Congress, 2018).

Rep. Johnson’s [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

James Sample, et al., [Fair Courts: Setting Recusal Standards](#), *Brennan Center for Justice at New York University School of Law*, 2008.

Matthew Menendez and Dorothy Samuels, [Judicial Recusal Reform: Toward Independent Consideration of Disqualification](#), *Brennan Center for Justice at New York University School of Law*, November 30, 2016.

Danielle Root and Sam Berger, [Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts](#), *Center for American Progress*, May 8, 2019.

## Issue 4: Poor public access to court proceedings and records

Courts lack transparency and accessibility to the general public. This issue extends across all levels of the judicial system, including the Supreme Court. Access to court proceedings is often limited to those who have time to attend in person; and in high-profile cases, only a limited number of people can fit in the courtroom where the proceedings are occurring. Additionally, it is particularly difficult to gain access to the Supreme Court, where a limited number of seats are made available to the public and one must wait in line for hours to attend especially controversial or important arguments. Most federal courts provide no alternative to attending in person: live-access to court proceedings is for the most part limited, and transcripts or recordings of proceedings are not routinely released to the public.

[The Public Access to Court Electronic Records \(PACER\) system](#), which is designed to provide access to federal court documents for the public, presents another significant barrier to transparency in the judicial system. While the PACER system is supposed to ease access to court documents, it is [complicated, expensive, and there are limited search options](#). Specifically, the system charges users to access most documents (10 cents per page), and it is difficult for laypeople to find the information they need.

Better access to court proceedings is possible. In May 2020, as a result of the coronavirus, the [U.S. Bankruptcy Court](#) of the Southern District of New York issued a temporary waiver of PACER fees for specific parties if the fees would cause an unreasonable burden. This waiver should be more widely and permanently applied. In August 2020, the [U.S. Court of Appeals](#) for the Federal Circuit ruled that the public is being overcharged to access court records and the unreasonable fees for operating the PACER system violates federal law. Unfortunately, this did not result in free access to the PACER system, as fees could continue to be charged due to the 2002 E-Government Act.

The barriers that the public must overcome in order to obtain information about court proceedings and access court records are unjustifiable. By livestreaming court proceedings and making the PACER system free and easier to use, the public will be able to learn about decisions that are impacting their lives as they are issued.

### Solutions

- **Provide audio livestream of circuit court and Supreme Court proceedings.** The limited in-person seating, lack of audio arguments, and delayed transcripts create a barrier to the public. Making available audio livestream of circuit court and Supreme Court hearings will increase accessibility to rulings that potentially affect the public at large.
- **Eliminate Public Access to Court Electronic Records system fees.** The PACER system, which is used by federal trial and appellate courts, is not easily searchable and charges 10 cents per page. Removing the PACER system fees would encourage public-facing third party websites to help members of the public access court filings.



## Resources

Sen. Portman and Rep. Collins' [Electronic Court Records Reform Act of 2019](#), S. 2064 (116th Congress, 2019).

Rep. Quigley's [Transparency in Government Act of 2019](#), H.R. 5150, § 801 et seq. (116th Congress, 2019)

Sen. Durbin's [Cameras in the Courtroom Act](#), S. 822 (116th Congress, 2019).

Rep. Johnson's [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

Danielle Root and Sam Berger, [Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts](#), *Center for American Progress*, May 8, 2019.

Dylan Hedtler-Gaudette and Anthony Marcum, [Simple Reforms to Improve Transparency and Public Trust in the Federal Judiciary](#), *Project on Government Oversight*, March 2, 2020.