

**TESTIMONY BEFORE
THE HOUSE COMMITTEE ON THE JUDICIARY
HEARING ON
“UNDUE INFLUENCE: OPERATION HIGHER COURT AND POLITICKING AT
SCOTUS”**

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Mr. Chairman, Mr. Ranking Member, and members of the Committee, thank you for the opportunity to appear before you today to address the ongoing ethical crisis at the Supreme Court and throughout the federal judiciary. I commend the Committee for holding this hearing, and the Subcommittee on the Courts for holding related hearings this past April,¹ and in October of 2021.² They are all long overdue, but like many Americans, I am appalled, but not shocked that they are needed.

My organization, Citizens for Responsibility and Ethics in Washington (or CREW), is a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I am here on behalf of CREW to encourage you to take action to fix the systemic problems that have given rise to the Supreme Court’s crisis of institutional legitimacy.

Before I begin, I would like to applaud members of the Committee and Congress for passing into law the Courthouse Ethics and Transparency Act, which will bring more transparency and accountability to the current judicial ethics regime. And I would also like to thank the Committee for passing the important Supreme Court Ethics, Recusal, and Transparency Act. The Act would require the Court to develop a truly binding code of conduct, bringing transparency to a branch of government that has long operated in shadow. It is precisely the type of bold action necessary to rebuild public confidence in the Supreme Court.

I also want to be entirely clear about the scope of my testimony today. I understand that some of this hearing will include a discussion of Mr. Schenck’s shocking allegations that Justice Alito leaked information about the Court’s decision in *Burwell v. Hobby Lobby* to wealthy benefactors to Schenck’s organization weeks before its public release, and his sadly familiar descriptions of

¹ Hearing on *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Apr. 27, 2022.

² Hearing on *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Oct. 26, 2021.

corruption, undue influence, and ethical malpractice at the Supreme Court.³ I applaud him for coming forward: blowing the whistle on corruption at the highest levels of our government is a courageous act. With that said, I am not here to testify to the veracity of Mr. Schenck's allegations or the content of his character. Activists like Mr. Schenck do not take an oath to uphold and defend the United States Constitution. Supreme Court Justices do. My purpose here is to help ensure that the Supreme Court Justices, and if necessary, the members of this body, address the ethical loopholes and failures that have led to the many scandals besmirching the federal judiciary in recent years, including this most recent one.

As a result of the Court's derelict ethics regime, Mr. Schenck and his numerous wealthy confidants and benefactors were able to buy unparalleled access to the Supreme Court. It is not in dispute that Mr. Schenck, like many before and many since, was consciously able to exploit the Court's unspoken, unenforced, and functionally nonexistent ethics code. And it is not in dispute that Justices of the Supreme Court have been more than happy to accept trips and gifts from these wealthy activists, like dinners and hunting trips, some requiring cross-country travel.

I cannot say that these actions actually have an impact on the Justices' decision making or that they lead to different outcomes in close cases. But I can say that when people buy this level of access, it creates among the American people the powerful impression that they are buying influence. And that, in turn, feeds into the crises of confidence and legitimacy that threaten the very foundations of the judiciary.

As has the Court's cavalier and dismissive attitude towards these numerous and compounding scandals.⁴ Last year, the *Wall Street Journal* revealed that the judiciary suffered from a systemic inability to track judges' financial conflicts of interest, a disastrous failure that had resulted in more than one hundred federal judges, and several Supreme Court Justices,⁵ presiding over cases in which they had a personal financial interest in one of the parties.⁶ Despite these explosive

³ Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022, <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>.

⁴ Senator Sheldon Whitehouse (D-RI) and Rep. Hank Johnson (D-GA) noted that the Supreme Court's dismissive response to their letter, "did not substantively answer any of our questions" and was "an embodiment of the problems at the court around ethics issues." Jodi Kantor and Jo Becker, "Supreme Court Defends Alito After Breach Allegation," *New York Times*, Nov. 28, 2022, <https://www.nytimes.com/2022/11/28/us/supreme-court-breach-alito.html>. See Letter from Sen. Whitehouse and Rep. Johnson to Chief Justice Roberts and Ethan V. Torrey, Nov. 20, 2022, <https://www.documentcloud.org/documents/23315037-2022-11-20-letter-to-scotus-operation-higher-court-follow-up>.

⁵ See "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," *Fix The Court*, Dec. 5, 2022, <https://fixthecourt.com/2022/12/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁶ See James V. Grimaldi, Coulter Jones and Joe Palazzolo, "131 Federal Judges Broke the Law by Hearing Cases Where They Had A Financial Interest," *Wall St. Journal*, Sep. 28, 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>; Coulter Jones, Joe Palazzolo and James V. Grimaldi, "Federal Judges or Their Brokers Traded

findings, Justice Roberts dismissed the scandal, blaming “[a] small number,” of judges for “unintentional” and “isolated violations” that, he implied, had never affected “the judge’s consideration of a case” or “actually financially benefited the judge.”⁷ Then, when Justice Clarence Thomas compromised the Court’s independence and impartiality by deciding to hear cases in which his wife’s conduct and communications were relevant to the dispute before the court, the Court was completely silent. And in response to Mr. Schenck’s stunning allegations, the Court issued a terse and indifferent letter, saying “[t]here is nothing to suggest that Justice Alito’s actions violated ethics standards.”⁸ The Court appears unwilling or unable to take the threat to its legitimacy seriously.

The willful blindness is disturbing. The judiciary is built on a foundation of public trust: it does not have the power of the purse or the authority to enforce the laws that it interprets. Credibility is its currency. If that falls away then the entire institution crumbles.

And that foundation of its credibility is eroding. Americans’ trust and confidence in the entire judicial branch is at the lowest level since *Gallup* began polling the question in 1972.⁹ That number has dropped twenty points in the last two years, just as these scandals exploded into public view. The same is true for Americans’ confidence in the Supreme Court, which is also at the lowest level since *Gallup* began polling the question nearly 50 years ago.¹⁰ And more Americans disapprove of the Supreme Court than at any time since polling began.¹¹

The Court’s recent ethical scandals are unforced errors that have helped decimate public confidence and trust in the federal judiciary. But these events and allegations were predictable, if not inevitable, given the Court’s broken and in some cases nonexistent ethics system. The judicial ethics regime, such as it is, is a mishmash of vague, inadequate rules and loose self-monitoring. Some might say that the system has failed, but the reality is even worse: it was not designed to succeed.

In particular, the Supreme Court’s unspoken ethical honor system would be untenable even if it wasn’t clearly broken. As we have seen, Supreme Court Justices have repeatedly engaged in

Stocks of Litigants During Cases,” *Wall St. Journal*, Oct. 15, 2021, <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192>.

⁷ Chief Justice John G. Roberts, Jr., “2021 Year-End Report on Federal the Judiciary,” Dec. 31, 2021, <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.

⁸ Ethan V. Torrey, Letter to Sen. Sheldon Whitehouse and Rep. Hank Johnson, Nov. 28, 2022, <https://int.nyt.com/data/documenttools/letter-from-scotus-counsel/e3dd2fbf4eda3dd0/full.pdf>.

⁹ Jeffrey M. Jones, “Supreme Court Trust, Job Approval at Historical Lows,” *Gallup*, Sep. 29, 2022, <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

¹⁰ Jeffrey M. Jones, “Confidence in U.S. Supreme Court Sinks to Historic Low,” *Gallup*, Jun. 23, 2022, <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx>.

¹¹ Jeffrey M. Jones, “Approval of U.S. Supreme Court Down to 40%, A New Low,” *Gallup*, Sep. 23, 2021, <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx>.

conduct that causes the public to question their impartiality--from flying around the country for hunting trips and having expensive dinners with wealthy benefactors, to ruling on cases that directly involve their spouses or their financial interests.¹² Now, there are allegations that one of the Justices leaked details about a pending decision to activists and benefactors of the Court.¹³

One reason for these repeated scandals is that Supreme Court Justices are the arbiters of their own recusal decisions and their numerous other ethical obligations. Under the current rules, Justices routinely make inconsistent decisions regarding what type of financial or personal conflict requires recusal, or the propriety of accepting overtures, meeting requests, and other entreaties from activists like Mr. Schenck. Given the lack of transparency regarding the Justices' decisions, we don't even know the full scope of the problem.

Federal judges have the power to make and unmake our laws, to uphold or overturn our civil rights. The nine Justices of the Supreme Court issue final judgment on matters of life and death, educational equity, voting access, reproductive health, separation of powers, the rule of law and countless other issues that have significant impact on individual litigants, millions of Americans and the institutions of our society. Not only do we repose in them this awesome power, we also give them the singular privilege of lifetime tenure. In return, we demand only that they conduct themselves according to the standards of ethical conduct that their position of immense trust demands.

We have now witnessed a series of separate but related ethical failures that vividly demonstrate that the federal judiciary has not lived up to its end of the bargain. And to be entirely clear: these scandals are only the latest manifestation of the judicial ethics regime's systemic failure. For decades, judges and Justices have routinely and publicly tested the limits of the system's absurdly weak rules, while activists and advocates, regardless of motivation or ideology, have found troubling ways to exploit every gap they can find. And although Mr. Schenck, the architect of Operation Higher Court, whose efforts to directly influence Supreme Court Justices have been publicly known for more than two decades, is in the proverbial hot seat today, the arrogance of the Supreme Court and the benign neglect of Congress are why the highest court in the land has the lowest bar for ethical compliance and accountability. The threat to the legitimacy of the judiciary stems from the Supreme Court's total failure to live up to even the most basic ethical requirements.

Since the Supreme Court and the federal judiciary cannot or will not effectively regulate itself, Congress must step in. There are a number of actions, some of which are included in CREW's

¹² See "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," *Fix The Court*, Dec. 5, 2022, <https://fixthecourt.com/2022/12/recent-times-Justice-failed-recuse-despite-clear-conflict-interest/>.

¹³ Jodi Kantor and Jo Becker, "Former Anti-Abortion Leader Alleges Another Supreme Court Breach," *New York Times*, Nov. 19, 2022, <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>.

statement for the record to Chairman Johnson’s subcommittee in October 2021,¹⁴ as well as my testimony to the Subcommittee in April,¹⁵ that Congress can take under the Constitution to respond to this crisis--each of which will help rebuild public confidence in the judiciary. And while Congress cannot solve this problem by itself, these necessary steps can help to ensure that the judicial branch is held to the high ethical standard their positions demand.

1. Gifts

The failure at the heart of the current scandal is the extent to which wealthy people or well-funded activists are able to purchase access to Supreme Court Justices. The most obvious manifestation of this failure is the Court’s attitude towards gifts, including, for example, the swanky meals and the stays at wealthy benefactors’ vacation houses that were part of Mr. Schenck’s lobbying campaigns.¹⁶ Activists and organizations have been pushing the boundaries of the definition of gift for decades, a practice that is particularly evident in the 258 privately funded trips to places like Hawaii and Ireland that the late Justice Antonin Scalia took from 2004 to 2014.¹⁷

Despite having life tenure, Justices appear to be less constrained by ethical considerations than other government officials.¹⁸ The absence of clear standards governing the solicitation or acceptance of gifts makes Justices particularly susceptible to conflicts of interest when they or their spouses accept expensive gifts. These concerns are pronounced when the gifts are coming

¹⁴ Statement of Noah Bookbinder, Hearing on *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Oct. 26, 2021, <https://www.citizensforethics.org/wp-content/uploads/2021/11/CREW-Statement-for-the-Record.pdf>.

¹⁵ Testimony of Donald Sherman, Hearing on *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms*, Before the Subcomm. On Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary, Apr. 27, 2022, <https://www.citizensforethics.org/wp-content/uploads/2022/04/Sherman-HJC-Oral-Testimony-Draft.pdf>.

¹⁶ Jodi Kantor and Jo Becker, “Former Anti-Abortion Leader Alleges Another Supreme Court Breach,” *New York Times*, Nov. 19, 2022, <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>. See also Peter S. Canellos and Josh Gerstein, “‘Operation Higher Court’: Inside the religious right’s efforts to wine and dine Supreme Court Justices,” *Politico*, Jul. 8, 2022,

<https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739>; and Kara Voght and Tim Dickinson, “SCOTUS Justices ‘Prayed With’ Her — Then Cited Her Bosses to End Roe,” *Rolling Stone*, Jul. 6, 2022, <https://www.rollingstone.com/politics/politics-features/roe-supreme-court-Justices-1378046/>.

¹⁷ Eric Lipton, “Scalia Took Dozens of Trips Funded by Private Sponsors,” *New York Times*, Feb. 26, 2016, <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html?partner=rss&emc=rss&r=0>.

¹⁸ Executive branch officials are cautioned by the *Standards for Ethical Conduct for Employees of the Executive Branch* to decline otherwise permissible gifts when a reasonable person would question their integrity or impartiality as a result of accepting the gift. 5 C.F.R. § 2635.201(b). For example, when considering whether to accept an otherwise permissible gift, executive branch officials are instructed to consider whether: the gift has a high market value; the timing of the gift creates the appearance that the donor is seeking to influence an official action; acceptance of the gift would provide the donor with significantly disproportionate access; and the gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. *Id.*

from donors whose interests are publicly aligned with certain political or ideological causes.¹⁹ Under these circumstances, a reasonable person would question whether a Justice who is the recipient of expensive gifts has the requisite impartiality to hear cases that would impact the political or ideological causes supported by the donor.

Like lower court judges, Justices are barred by 5 U.S.C. § 7353 from soliciting or accepting gifts from anyone who is seeking official action from, or doing business before, their court, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's official duties.²⁰ However, Justices, unlike other federal judges, are not technically subject to the *Judicial Conference Regulations on Gifts*, which implement Section 7535.²¹ Instead, members of the Court have agreed to follow the Judicial Conference gift regulations as a matter of internal practice,²² with the Chief Justice being delegated administrative and enforcement authority under 5 U.S.C. § 7353 for officers and employees of the Supreme Court.²³ The Justices, like other federal judges, also consult a wide variety of other authorities to help them resolve specific ethical issues, such as judicial opinions, treatises, scholarly articles, and disciplinary decisions, and seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues.²⁴

While most judges would be expected to recuse when an expensive gift would cause a reasonable person to question their impartiality in a case, Chief Justice John Roberts noted in his *2011 Annual Report on the Federal Judiciary* that some of the general principles for recusals that apply to lower court federal judges differ due to the unique circumstances of the Supreme Court.²⁵

Lower court judges can freely substitute for one another. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that

¹⁹ See Mike McIntire, "Friendship of Justice and Magnate Puts Focus on Ethics," *New York Times*, June 18, 2011, <https://www.nytimes.com/2011/06/19/us/politics/19thomas.html>. For example, one donor reportedly helped finance a library project dedicated to a Justice, presented him with a \$19,000 Bible that belonged to Frederick Douglass, gave him a \$6,484 bronze bust of Frederick Douglass, and reportedly provided \$500,000 for his spouse to start a Tea Party-related group and also spent time together at gatherings of prominent Republicans and businesspeople at the donor's Adirondacks estate and his camp in East Texas. *Id.*; Richard A. Serrano and David G. Savage, "Justice Thomas Reports Wealth of Gifts," *Los Angeles Times*, Dec. 31, 2004, <https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html>; Justice Clarence Thomas, Public Financial Disclosure Report, part V, item 1, May 15, 2016, <https://www.opensecrets.org/personal-finances/search?q=thomas&type=person>.

²⁰ 5 U.S.C. § 7353 similarly applies to executive branch officials and members of Congress.

²¹ Judicial Conference Regulations on Gifts, § 620.20.

²² Joanna R. Lampe, "A Code of Conduct for the Supreme Court? Legal Questions and Considerations," Congressional Research Service, Apr. 6, 2022, <https://sgp.fas.org/crs/misc/LSB10255.pdf>.

²³ *Id.* at § 620.65.

²⁴ Chief Justice John G. Roberts, "2011 Year-End Report on the Federal Judiciary," Dec. 31, 2011, <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

²⁵ 2011 Year-End Report on the Federal Judiciary.

recused judge's place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership. A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.²⁶

Because of these heightened recusal concerns, the Supreme Court's current ethical framework does not adequately address conflicts of interest that arise from expensive gifts and must be made more rigorous. If, as Chief Justice Roberts argues, recusals for ethics reasons are disfavored, the obvious response should be to increase the level of mandatory ethical guidelines that Justices must meet in order to avoid potential conflict or recusal concerns. Instead, Chief Justice Roberts has ignored calls for stronger ethical rules. A Supreme Court Code of Conduct is necessary to clarify and make publicly available the standards for soliciting and accepting gifts, including those based on *bona fide* personal friendships.

In the absence of evidence that a Justice has a pre-existing personal friendship with a donor where they would exchange gifts of comparable value, a Supreme Court Code of Conduct should require the Justice to decline expensive gifts.

Specifically, the Code of Conduct should contain a clear bar on accepting expensive gifts to avoid any impression that a member of the Court could be unduly influenced in their decision making by donors motivated by a particular political or ideological cause. In the absence of a clear prohibition, the Supreme Court must mandate a broad standard of recusal to avoid compromising public trust in the integrity of the Court's decision-making process. Relatedly, the Code of Conduct should also enhance the Justices' public financial disclosure requirements, so that donations in support of a spouse's or dependent child's non-profit endeavors that give rise to similar potential conflicts of interest can be appropriately identified and addressed through recusal.²⁷

2. Outside Speaking Engagements and Other Events

A Supreme Court Code of Conduct is also necessary to help address the potential ethical concerns that arise from Justices' participation in certain outside speaking engagements and other nonpublic events.²⁸ For example, recent reports have been critical of Justices who speak at

²⁶ *Id.*

²⁷ Danny Hakim and Jo Becker, "The Long Crusade of Clarence and Ginni Thomas," *New York Times*, Feb. 22, 2022, <https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html>.

²⁸ In 2020, the Judicial Conference proposed, and ultimately failed to adopt, an ethics opinion that would have told federal judges that they could not be members of the American Constitution Society, the Federalist Society, or the American Bar Association, because membership in those organizations would, for example, "frustrate the public's trust in the integrity and independence of the judiciary." See <https://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf>;

conferences that bar news media from covering their speeches, or who attend black-tie galas for partisan judicial activist organizations.²⁹ When these events are sponsored by organizations whose members are strongly associated with a particular ideology or prominently feature politicians of a particular political party rather than a spectrum of views,³⁰ they give rise to questions about preferential treatment, loss of impartiality, partisanship, and undue influence. Concerns about undue influence are further magnified when the organization is viewed as having close ties to and extraordinary influence over several members of the Supreme Court, including by getting them to “accept legal arguments that were previously outside the mainstream.”³¹

Unfortunately, as Mr. Schenck’s testimony helps demonstrate, questions of undue influence also occur when Justices attend high-dollar fundraising events for nonprofit institutions--and in particular the Supreme Court Historical Society. The Historical Society was a key element in Mr. Schenck’s strategy, and he counseled his ideological and financial benefactors to become patrons.³² In a 2008 briefing document he encouraged wealthy recruits attending the Historical Society’s annual gala to “boldly approach” Justices, who, he said, would likely have their guard down and be more willing to engage.³³ It has become clear that dedicated and well-funded activists will use any opportunity to buy access to Justices; and it is also increasingly clear that this type of access-purchasing is not limited to events sponsored by partisan institutions. When the wealthy, the well-connected, and the well-funded purchase unparalleled access to the people who have the power to shape our country’s laws, the public is left to wonder whether their ostensibly independent high court is truly operating independently. This is more evidence that a Supreme Court Code of Conduct is necessary to restore public confidence in the independence of the judiciary.

Since Justices are not subject to the *Code of Conduct for United States Judges*,³⁴ they are seemingly less constrained in terms of their outside speaking engagements and commitments. A Supreme Court Code of Conduct should establish common sense guidelines for minimizing conflict and appearance issues arising from outside speaking engagements. For example, Justices

see also,

<https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members>. Recently, Justices Alito, Barrett, Gorsuch, and Kavanaugh, attended a Federalist Society gala where Justice Alito at various points praised the influence the society has had on the legal landscape, finally saying, "And boy, is your work needed today." *See* <https://www.nbcnews.com/politics/supreme-court/abortion-ruling-author-alito-gets-standing-ovation-conservative-le-gal-rcna56696>.

²⁹ Nathan T. Carrington and Logan Strother, “Gorsuch is scheduled to speak to the right-wing Federalist Society. Americans find such speeches inappropriate,” *Washington Post*, Feb. 4, 2022, <https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-republicans/>.

³⁰ *Id.*

³¹ *Id.*

³² Jodi Kantor and Jo Becker, “Former Anti-Abortion Leader Alleges Another Supreme Court Breach,” *New York Times*, Nov. 19, 2022, <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>.

³³ *Id.*

³⁴ Code of Conduct.

should be prohibited from being members of organizations with clear partisan political or judicial biases, be advised to avoid allegations of preferential treatment by making their speeches publicly available in real time, speaking at widely-attended events only when they are open to the press, and accepting speaking invitations from a variety of similarly-situated organizations to ensure balanced exposure to different legal issues and judicial philosophies. But, under no circumstances should a Justice accept speaking invitations from current litigants or those with a history of practicing before the Court.

A Supreme Court Code of Conduct must also take steps to limit the potential for, and the appearance of, undue influence that arises when individuals are allowed to purchase access to Justices. In particular, a Code of Conduct should, with limited exceptions, prohibit participation in events that sell access to the Justices to raise money. It should also help ensure that Justices avoid perceptions of partisan political endorsements by creating guidelines that would substantially limit or even prohibit Justices from participating in conferences or other public events that prominently feature politicians from a particular political party.

3. Recusal Transparency

A Supreme Court Code of Conduct should address the public's right to know when and why a Justice chooses to recuse or not to recuse from a case. In particular, a Court Code of Conduct needs to ensure that recusal decisions are made in writing and on the record, even if a Justice considers recusal but ultimately participates in the matter. Public confidence in the integrity of the courts is best served by recusal decisions that articulate why a Justice has decided to participate or not to participate in a matter. That transparency would have ripple effects: it would help establish precedent and consistency for recusal, and it would allow the public--and litigants before the Court--to understand the scope of a Justice's conflicts.

Additionally, a Code of Conduct should create clear and public rules explaining and implementing the federal disqualification statute, 28 U.S.C. § 455.

The Disqualification Statute: 28 U.S.C. § 455

Congress passed the governing statute for disqualification of a Justice, judge, or magistrate judge, 28 U.S.C. § 455, to require all federal judges, including members of the Supreme Court, to recuse themselves from any judicial proceedings in which their impartiality might reasonably be questioned.³⁵ In addition, a judge must recuse when he knows that his spouse has "any . . . interest that could be substantially affected by the outcome of the proceeding."³⁶

³⁵ 28 U.S.C. § 455(a).

³⁶ 28 U.S.C. § 455(b)(4).

However, there is no way to enforce Section 455 at the Supreme Court: under the Court's current ethical framework, individual Justices decide for themselves whether recusal is warranted under Section 455.³⁷ Justices will often recuse from a case without any explanation--these nonpublic recusals reportedly occur in approximately 200 matters each year.³⁸ In fact, it is unclear if the other Justices are aware of the reasons for their colleagues' recusal deliberations or decisions. This lack of transparency harms individual litigants who expect their cases to have a fair hearing before the full court, and it harms the public's perception of the high court. Moreover, these nonpublic decisions don't just impact a single case: they leave the public to wonder whether there are other similar cases where the Justice should have recused--but chose not to.

For executive branch employees, who are subject to a similar recusal standard by virtue of the executive branch's standards of ethical conduct, the integrity of the agency's decision-making process is protected by requiring employees who are dealing with appearance issues to consult with an agency's ethics official.³⁹ In determining whether an employee should participate in a specific matter, the agency's ethics official weighs the appearance concerns against the interests of the Government in the employee's participation, while taking into account all relevant circumstances and a list of factors.⁴⁰

All of this underscores the need for the Supreme Court to adopt a Code of Conduct with formal and transparent recusal processes.

In this regard, there are existing models used by the Supreme Court that may be instructive when considering processes to include in a Supreme Court Code of Conduct to help the Court preserve its impartiality.⁴¹ In the absence of a similar process for members of the Court, Justices will continue to make these decisions for themselves on a seemingly ad hoc, opaque, and unregulated basis, and the Supreme Court will likely continue to be viewed by the public as largely unaccountable and increasingly "politicized."⁴²

4. Spousal Conflicts of Interest

³⁷ See Chief Justice John G. Roberts, "2011 Year-End Report on the Judiciary," Dec. 31, 2011, <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

³⁸ <https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf>

³⁹ 5 C.F.R. § 2635.502.

⁴⁰ *Id.*

⁴¹ For example, in 1991 the Court adopted a resolution that requires a Justice who "desires to receive compensation for teaching [to] obtain the prior approval of the Chief Justice. Should the Chief Justice deny approval, the request may be renewed to the Court and granted by it. If the Chief Justice desires to receive compensation for teaching, he must obtain the prior approval of the Court." U.S. Supreme Court Resolution, Jan. 18, 1991, https://www.citizensforethics.org/wp-content/uploads/2022/03/1991_Resolution.pdf.

⁴² Jane Mayer, "Is Ginni Thomas a Threat to the Supreme Court," *New Yorker*, Jan. 31, 2022, <https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court>.

Recent news reports raise questions about Supreme Court Justices' impartiality and recusal obligations with respect to cases that affect their spouse's political interests and business clients and relate to their advocacy work.⁴³ In particular, Justice Clarence Thomas has failed to recuse from Supreme Court cases relating to the 2020 election, despite his spouse's active support of then-President Donald J. Trump's unprecedented efforts to overturn the 2020 election and communications with Trump administration officials and state officials about those efforts.⁴⁴ Justice Thomas's failure to recuse from cases concerning the 2020 election, and particularly from a matter involving White House communications related to it, not only undermined faith in the Supreme Court's impartiality, it also potentially violated his ethical obligations under 28 U.S.C. § 455.

Spousal Conflicts Arising from Financial Interests

Spousal conflicts are particularly hard to track and enforce because of loopholes in the Ethics in Government Act ("EIGA"). In particular, there are specific circumstances identified in Section 455, such as when a spouse has a financial interest in a subject matter in controversy or in a party to the proceeding,⁴⁵ that may never come to light in individual cases. Although EIGA establishes financial disclosure reporting requirements for the Justices and other judicial officers,⁴⁶ spousal conflicts of interest based on their clients or outside positions are difficult to identify under EIGA's current reporting regime.⁴⁷ Spousal outside positions and clients are not always required to be disclosed. For example, when spousal compensation passes through a limited liability company ("LLC") or similar legal entity, there is currently no requirement to disclose the client who generated the spousal earned income. Only the spouse's LLC or other business entity would need to be reported as the source of spousal earned income.⁴⁸ In contrast, if compensation is sent directly to the spouse without passing through an LLC or similar business entity, the client is required to be reported as a source of spousal earned income assuming the \$1,000 reporting threshold is met.⁴⁹ In the latter case, potential spousal conflicts of interest can be more easily identified.

Spousal Conflicts Arising from Amicus Briefs

⁴³ Jane Mayer, "Is Ginni Thomas a Threat to the Supreme Court," *New Yorker*, Jan. 31, 2022, <https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court>; Ed Pilkington, "Who has more influence on supreme court: Clarence Thomas or his activist wife?," *Guardian*, Jan. 6, 2022, <https://www.theguardian.com/law/2022/jan/28/clarence-thomas-supreme-court-affirmative-action-case-ginni-thomas>
⁴⁴ See Letter to Chief Justice John G. Roberts, Jr. from Noah Bookbinder, Apr. 1, 2022, <https://www.citizensforethics.org/legal-action/legal-complaints/thomas-must-recuse-supreme-court-needs-code-of-conduct/>.

⁴⁵ 28 U.S.C. § 455 (b)(4).

⁴⁶ 5 U.S.C. app. § 101(f)(11).

⁴⁷ Spousal uncompensated outside positions are not required to be disclosed. Only spousal positions that result in earned income that exceeds the \$1,000 reporting threshold is required to be disclosed. See 5 U.S.C. app. §102(e)(1)(A).

⁴⁸ 5 U.S.C. app. §102(e)(1)(A).

⁴⁹ 5 U.S.C. app. §102(e)(1)(A).

In more and more cases before the Court, third parties submit and Justices refer to amicus briefs that weigh in on controversial issues under consideration.⁵⁰ When the views expressed in an amicus brief or by a party cite to public statements or advocacy positions by a Justice's spouse, or when a spouse has ties to an entity that files an amicus brief, obvious questions arise about whether a Justice has the requisite impartiality or appearance of impartiality to participate in that case. For this reason, some spouses have chosen to step back from pursuing legal or advocacy work on controversial issues that will likely end up being decided in cases brought before the Court.⁵¹ Jane Roberts, Chief Justice Roberts' wife, for example, left her lucrative career as a partner at an international law firm to join a legal recruiting business in order to avoid conflicts of interest when her husband was appointed to the Supreme Court.⁵² The decision by a spouse to step back may come at a personal cost, however, and for that reason may not be the right choice for every individual. In every circumstance, the Justice must nevertheless assume primary responsibility for protecting the Court's impartiality and take appropriate measures to recuse from cases in which their impartiality could reasonably be questioned due to their spouse's advocacy work and affiliations. When questions about the Court's impartiality are at issue, recusal needs to be the Justices' default position rather than the exception.

For this reason, CREW supports legislative efforts to facilitate the creation of a Supreme Court Code of Conduct that would more fully address recusal requirements that stem from spousal business activities and political advocacy work. The Supreme Court Code of Conduct should also address these issues in the context of the rising use of amicus briefs.

In addition, CREW supports legislative efforts to enhance disclosure requirements so that conflicts of interest stemming from spousal activities can be more readily discerned. For example, these measures should require Justices to annually disclose on their public financial disclosure report their spouse's board and consulting positions and identify any clients from whom their spouse received compensation that exceeded \$1,000. The reporting requirement should cover clients that make payments to the spouse's employer, LLC, or other business entity in return for personal services. To be fair, similar reporting requirements would need to be put in place for other public disclosure filers, including elected officials and presidential appointees confirmed by the Senate.

5. Financial Conflicts of Interest

⁵⁰ Mayer, *New Yorker*, Jan. 31, 2022.

⁵¹ *Id.*

⁵² https://www.abajournal.com/news/article/meet_jane_roberts_chief_Justices_spouse.

Last fall, the *Wall Street Journal* released the results of a sweeping investigation into financial conflicts of interest in the judiciary.⁵³ The results were stunning. The *Journal* found that at least 131 federal judges violated the law by hearing cases in which they had a financial interest in one of the parties. And 61 judges or their families actively traded shares in a party to an ongoing case. These revelations have caused a wave of appeals, some of which threaten to overturn decisions that could reach into the billions of dollars.⁵⁴ This is a practical disaster with individual and systemic implications, compounded by the apparent unwillingness of those at the top of the judicial branch to acknowledge it as such.⁵⁵

The Supreme Court itself is also not immune from financial conflicts of interest. Since 2015, three sitting Justices participated in at least one case in which they had a material financial interest.⁵⁶ For example, in 2015, the recently retired Justice Stephen Breyer failed to recuse from a case involving a Federal Energy Regulatory Commission rulemaking in which he had an interest in one of the companies challenging the Commission's final rule.⁵⁷ His wife sold their \$33,000 stake in the company, Johnson Controls Inc, the day after a journalist inquired about the apparent conflict. These types of conflicts, which occur across the ideological spectrum, unacceptably harm the public's faith in the Court's impartiality. And as long as Supreme Court Justices own individual securities, these conflicts will continue to occur.

With that in mind, there are two policies that can be adopted to stop financial conflicts of interest in the judiciary:

First, Congress should enact a blanket prohibition on all federal judges, their spouses, and their dependent children owning or trading any individual stocks or other financial instruments. This is the best and only comprehensive way that Congress can ensure that federal judges are not

⁵³ James V. Grimaldi, Coulter Jones and Joe Palazzolo, "131 Judges Broke the Law by Hearing Cases Where They Had A Financial Interest," *Wall St. Journal*, Sep. 28, 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>; Coulter Jones, Joe Palazzolo and James V. Grimaldi, "Federal Judges or Their Brokers Traded Stocks of Litigants During Cases," *Wall St. Journal*, Oct. 15, 2021, <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192>.

⁵⁴ James V. Grimaldi, Joe Palazzolo, and Coulter Jones, "Fallout From Judge's Financial Conflicts Spreads to Appeals Courts," *Wall St. Journal*, Mar. 1, 2022, <https://www.wsj.com/articles/fallout-from-judges-financial-conflicts-spreads-to-appeals-courts-11646155384>.

⁵⁵ Justice Roberts, for example, downplayed the *Journal's* reporting in his yearly report on the federal judiciary. See Gabe Lezra, "Justice Roberts gets it wrong: federal judges' conflicts of interest threaten the entire judiciary," *CREW*, Jan. 2022, <https://www.citizensforethics.org/news/analysis/Justice-roberts-gets-it-wrong-federal-judges-conflicts-of-interest-threaten-the-entire-judiciary/>.

⁵⁶ *Id.*

⁵⁷ *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. ____ (2016). See Greg Stohr, "Supreme Court Justice Hears Case Unaware of Stock Conflict," *Bloomberg*, Oct. 15, 2015, <https://www.bloomberg.com/news/articles/2015-10-16/u-s-supreme-court-justice-hears-case-unaware-of-stock-conflict?sref=PvPOJ8mX>.

violating their duty to preside over cases as disinterested arbiters of law and fact. By imposing such a ban, Congress would limit the possibility for these conflicts of interest before any violation occurs. A prospective ban on owning or trading individual securities is preferable to a disciplinary rule because members of the federal judiciary are appointed for life, and are removable only for grave constitutional offenses. Impeachment is far too arcane and weighty to ever function as a true check on anything but the most egregious ethical failings.

This requirement would not mean that federal judges would need to take a vow of poverty to serve. There are many ways to invest money that don't come with similar conflict of interest concerns. Diversified mutual or index funds, which do not create such a risk, are Americans' most common investment, whereas only 14% of Americans own individual stocks.⁵⁸ Should judges and their close family members wish to continue to have investments in individual securities, they could place their assets in a qualified blind trust⁵⁹ and direct the trustee to divest from their current holdings and then reinvest the proceeds in individual stocks as the trustee sees fit.

The Supreme Court is the ultimate guardian of the rule of law in our republic, and the very appearance of a conflict of interest can undermine its credibility. Public confidence that the legal system is fair and impartial is critical to maintaining democratic governance. The framers of our constitution were so acutely aware of the necessity of public trust in our judiciary that they granted Supreme Court Justices lifetime tenure--a privilege that the Constitution grants exclusively to the judiciary.⁶⁰ As a result, Justices of the Supreme Court must hold themselves to the highest of ethical standards.

To avoid even the appearance of financial conflicts that might undermine the impartiality of the court and the validity of its judgments, a Supreme Court Code of Conduct should include a comprehensive ban on owning any individual stock, bond, commodity, or other similar financial instruments.

Second, Congress should apply the federal criminal conflict of interest statute, 18 U.S.C. § 208, to the Supreme Court and the entire federal judiciary. The criminal conflict of interest statute protects the public from those who would seek to exploit their position of public trust for private gain. Specifically, it bars executive branch employees from participating in “particular matter[s]” focused on the interests of a discrete and identifiable class of persons or identified parties. In the case of judges and Justices, Section 208 would apply to cases in which a judge or Justice has a

⁵⁸ Kim Parker and Richard Fry, “More than half of U.S. households have some investment in the stock market,” *Pew Research*, Mar. 25, 2020, <https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/>.

⁵⁹ A “qualified blind trust” as generally defined in 5 C.F.R. § 2634.402(e).

⁶⁰ *See* Federalist 78 (Hamilton), “nothing will contribute so much as [lifetime tenure] to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”

financial interest in one of the parties based on their investment holdings. At present, there is no workable mechanism to hold judges and Justices accountable for violations of their ethical duties short of impeachment. Applying the criminal laws to police this type of conduct would serve as a powerful check on egregious ethical misconduct. The result of these changes would essentially be to “bind [federal judges] to substantially the same rules as the other two branches,” as Ranking Member Issa put it during this Subcommittee's hearing in October.⁶¹

Justices are already required to recuse themselves from any cases in which they have a financial interest in a party to a proceeding.⁶² And were an extension of Section 208 to the judiciary to be combined with a ban on ownership and trading of individual stocks and financial instruments, as we recommend, Justices would for only have to adhere to that simple, bright line rule to steer well clear of any trouble. That some federal judges have appeared to treat conflict of interest law as a suggestion rather than a rule is precisely the point: applying Section 208 would add teeth to this now toothless legal regime. The expansion would finally provide a procedural mechanism by which judges and Justices could be held accountable for egregious violations of their ethical duties. And it would also have the benefit of allowing judges and Justices who the public believes have violated their ethical duties to have their day in court.

6. Constitutional Concerns

Congress imposing recusal rules, or a Code of Conduct, on the Supreme Court does not raise serious separation of powers concerns.⁶³

Based on its Article III powers, Congress has considerable control over the Supreme Court's structure and its jurisdiction. For example, under the Exceptions Clause of Article III, Congress is specifically empowered to alter the Supreme Court's appellate jurisdiction and even determine what types of cases the Court can and cannot hear.⁶⁴ Congress has changed the size of the

⁶¹ October Hearing.

⁶² 28 U.S.C. § 455.

⁶³ Joanna R. Lampe, “A Code of Conduct for the Supreme Court? Legal Questions and Considerations,” Congressional Research Service, Apr. 6, 2022 (“Some observers have argued that imposing a code of conduct upon the Supreme Court would amount to an unconstitutional legislative usurpation of judicial authority. . . . On the other hand, some commentators emphasize the ways that Congress may validly act with respect to the Supreme Court, for example through its authority to impeach Justices and decide whether Justices are entitled to salary increases. By extension, according to this argument, requiring the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress's authority.”)

⁶⁴ U.S. Const. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”)

Supreme Court by statute on several occasions.⁶⁵ Congress also has the authority to raise Justices' salaries, and, in extraordinary cases, remove Justices via impeachment.⁶⁶

Congress has already enacted legislation that imposes financial disclosure and recusal requirements and gift and outside earned income restrictions on Supreme Court Justices.⁶⁷ As Chief Justice Roberts noted, "the Court has never addressed whether Congress may impose those requirements on the Supreme Court," and the Justices "comply with those provisions."⁶⁸ CREW believes that imposing these and other ethical requirements on Supreme Court Justices is constitutional, appropriate, and necessary.

Finally, Congress has exercised its Constitutional authority to subject members of the Supreme Court to the nation's criminal laws. Though they interpret and sometimes strike down the law, Supreme Court Justices are not above it. Not only may Congress subject the Supreme Court to criminal laws writ large, Congress can and has subjected the Supreme Court to anti-corruption law: it is illegal for a Supreme Court Justice to take a bribe, for example.⁶⁹ In fact, bribery is a similar crime to conflicts of interest under Section 208: in both cases a public official is betraying the public trust in service of their own personal gain.

Conclusion

We are here today because of another serious scandal that has caused the public to once again question the Supreme Court's impartiality--and has consequently deepened the Court's catastrophic crisis of institutional legitimacy. This crisis is not the result of this scandal, or the many that came before it. It is the result of a broken and ineffective judicial ethics regime, a system that has been abused for decades by bad actors, the wealthy and well-connected. It is the result of the Supreme Court's failure, whether willful or not, to stop the abuse and ensure that the public would never question its status as a neutral arbiter of law and fact. This crisis is the foreseeable consequence of the Supreme Court's failure to develop even the most basic code of conduct for its Justices. When the powerful are not held to the highest ethical standards their positions demand, and consequently do not behave ethically, the public will eventually and inevitably question the legitimacy of their power.

⁶⁵ U.S. Const. art. III; Caprice Roberts, "The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Law Resort," 57 Rutgers L. Rev. 107, 166 (June 4, 2005); Joanna R. Lampe, "Court Packing;; Legislative Control over the Size of the Supreme Court," Congressional Research Service, Dec. 14, 2020.

⁶⁶ 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.") See Lampe.

⁶⁷ Ethics in Government Act of 1978, 5 U.S.C. app. § 101(f)(10); § 109(10); 28 U.S.C. § 455. See also *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979) (rejecting a claim by a class of federal judges that the Ethics in Government Act's financial disclosure requirements were unconstitutional as applied to the federal judiciary).

⁶⁸ 2011 Year-End Report on the Judiciary.

⁶⁹ 18 U.S.C. § 201.

When I testified to the Subcommittee in April, I stressed the importance of Congressional action. Since then, new polling has shown that the crisis of public confidence has only deepened. So I wish to once again stress something that we at CREW have said many times: the Supreme Court has neither the power of the purse nor the authority to enforce the laws that it interprets. Credibility is its currency. And now, the Court's failure to ensure that Justices live up to their most basic ethical requirements is threatening the legitimacy of the entire judiciary.

Public service is a public trust. It is the standard to which we hold all our public servants, from the thousands of dedicated career employees of our federal bureaucracy to the Supreme Court Justices who protect, and sometimes take away, our most fundamental rights. And it is the basis of the bargain that we make with those in whom we repose power: we demand only that they conduct themselves according to the standards of ethical conduct that their position of trust demands. That is a bargain that the Supreme Court has been unwilling to uphold for a long time: we currently subject a low-level career civil servant to a higher standard of ethical conduct than we do the people who tell us whether or not we have the right to privacy, to bodily autonomy, and to vote. Service as a Justice on the United States Supreme Court is also a choice and a privilege. Meeting strict but common sense ethical standards is hardly an undue burden for the select few provided this privilege.

Since the Supreme Court will not hold itself to the highest ethical standards, Congress must step in. We have proposed various actions that you can take under the Constitution to respond to this crisis. Each of them will help address the central problem that you are tasked with solving: that public faith in the integrity of the Supreme Court--and the entire federal judiciary--is plummeting. And without your intervention, that downward spiral will result in a catastrophic loss of institutional legitimacy that has the potential to undermine the rule of law in the United States.

I look forward to answering your questions and working with the Committee moving forward.