



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

**Testimony Submitted for the Record
Senate Committee on the Judiciary
Hearing on “Supreme Court Ethics Reform”
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By Noah Bookbinder, President, Citizens for Responsibility and Ethics in
Washington**

Chair Durbin, Ranking Member Graham, and members of the Committee, thank you for the opportunity to submit testimony to address the ongoing ethical crisis engulfing the Supreme Court.

My name is Noah Bookbinder, and I am the President of Citizens for Responsibility and Ethics in Washington (“CREW”), a non-partisan non-profit committed to ensuring the integrity of our government institutions and promoting ethical governance. I submit this testimony on behalf of CREW to underscore the dire need for immediate action to ensure that our high court and the entire third branch are held to the highest standards of ethical conduct.

Over the past month, the public has learned of a previously unknown financial relationship between Justice Clarence Thomas and Harlan Crow, a reclusive billionaire and political activist who has donated “millions of dollars to groups dedicated to tort reform and conservative jurisprudence.”¹ These revelations come on the heels of a series of ethical scandals that have tarnished public faith in an institution whose entire existence depends on public support.

The details of Justice Thomas and Mr. Crow’s relationship are almost too sensational to believe. Over the course of more than 20 years, Justice Thomas accepted an unprecedented number of gifts from Mr. Crow—from opulent vacations to apparently beneficial real estate transactions. He disclosed almost none of them on his financial disclosure forms, despite his clear legal requirement to do so.

¹Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

For instance, Justice Thomas accepted, but did not disclose on his financial disclosure reports, a 2019 trip to Indonesia onboard Mr. Crow’s Bombardier Global 5000 jet so they could embark on a nine-day “island-hopping” cruise aboard Mr. Crow’s 162-foot “superyacht,” the *Michaela Rose*, which is “staffed by a coterie of attendants and a private chef.”² *ProPublica*, which broke the story, estimated that the trip could have cost more than \$500,000 had Justice Thomas chartered the plane and yacht himself.³ He previously accepted a cruise on the *Michaela Rose* in New Zealand and on a river around Savannah, Georgia.⁴ He and his wife Ginni accept almost yearly vacations at Mr. Crow’s 105-acre luxury resort in the Adirondacks called Topridge.⁵ Topridge features an artificial waterfall, more than 25 fireplaces, three boathouses, a clay tennis court, a batting cage, a hut that replicates the home of a Harry Potter character, a 1950s-style soda fountain where the staff fixes milkshakes, a great hall where guests are served meals prepared by private chefs, fishing guides, and private concerts.⁶ Rooms at one nearby resort that is less “exclusive” than Topridge start at \$2,250 a night.⁷

Notably, Justice Thomas and his wife are often joined on these vacations by people who have direct business before the Court, including corporate executives from Verizon and PricewaterhouseCoopers, which are major political donors, and by leaders of conservative think tanks like the American Enterprise Institute (“AEI”).⁸

But Mr. Crow didn’t just give Justice Thomas vacations. In 2014, Justice Thomas and his family members sold their interests in three Savannah, Georgia properties to a Texas company owned by Mr. Crow for the lump sum of \$133,363.⁹ The properties sold to Mr. Crow included Justice Thomas’ mother’s house, where Justice Thomas spent part of his childhood and where his mother continues to reside today without paying rent,¹⁰ and two vacant lots down the street.¹¹ After the purchase was finalized, Mr. Crow reportedly made “tens of thousands of dollars” of renovations to Justice

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Justin Elliott, Joshua Kaplan, and Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn’t Disclose the Deal*, *ProPublica* (Apr. 13, 2023), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

¹⁰ Ariane de Vogue, *Clarence Thomas to amend financial disclosure forms to reflect sale to GOP megadonor*, *CNN* (Apr. 17, 2023), <https://www.cnn.com/2023/04/17/politics/clarence-thomas-amend-disclosure-gop-megadonor/index.html>.

¹¹ Justin Elliot et al., *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn’t Disclose the Deal*, *ProPublica* (Apr. 13, 2023), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

Thomas's mother's house, including adding a carport, repairing the roof, and adding new gates and fencing.¹² When asked about the sale, Mr. Crow explained that he purchased the properties to “one day create a public museum at the Thomas home dedicated to telling the story of our nation's second black Supreme Court Justice”—a gift of potentially immeasurable value to Justice Thomas.¹³

Justice Thomas also may have violated 28 U.S.C. § 455, which requires justices to recuse themselves from cases in which his “impartiality might reasonably be questioned,” certainly a risk in any case in which his “close personal friend” and “generous benefactor” had a “direct financial interest.”¹⁴ In January 2005, the Court declined to hear an appeal from an architecture firm suing Trammell Crow Residential Co., in which Mr. Crow's firm, Crow Holdings, owned a non-controlling interest, for \$25 million.¹⁵ Justice Thomas did not recuse himself, though he may have been required to do so; the Court's denial of certiorari helped ensure that Trammell Crow Residential Co. would not be on the hook for the \$25 million.

That Justice Thomas felt comfortable accepting these lavish gifts is a stunning indictment of our judiciary's deeply broken ethics system. That he failed to disclose them, or these troubling real estate transactions, demonstrates systemic problems in the Ethics in Government Act's legal regime. And that he likely will not be held accountable for his repeated ethical violations is a disaster for the Court's institutional legitimacy.

Justice Thomas's actions however are more than unethical. They may also be illegal, as my colleagues Virginia Canter, Norman Eisen, Richard Painter, and I said in a complaint to the Department of Justice and Supreme Court.¹⁶ But they did not occur

¹² *Id.*

¹³ Ariane de Vogue, *Clarence Thomas to amend financial disclosure forms to reflect sale to GOP megadonor*, CNN (Apr. 17, 2023),

<https://www.cnn.com/2023/04/17/politics/clarence-thomas-amend-disclosure-gop-megadonor/index.html>.

¹⁴ Zoe Tillman, *Clarence Thomas's Billionaire Friend Did Have Business Before the Supreme Court*, Bloomberg News (Apr. 24, 2023),

<https://www.bloomberg.com/news/articles/2023-04-24/clarence-thomas-friend-harlan-crow-had-business-before-the-supreme-court>. See also Greg Stohr, *Supreme Court's Thomas Says He Heeded Gift Disclosure Rules*,

Bloomberg News (Apr. 7, 2023),

<https://www.bloomberg.com/news/articles/2023-04-07/justice-clarence-thomas-says-he-heeded-disclosure-rules-on-gifts>.

¹⁵ Zoe Tillman, *Clarence Thomas's Billionaire Friend Did Have Business Before the Supreme Court*, Bloomberg News (Apr. 24, 2023),

<https://www.bloomberg.com/news/articles/2023-04-24/clarence-thomas-friend-harlan-crow-had-business-before-the-supreme-court>.

¹⁶ CREW, Request for Investigation of Justice Clarence Thomas' failure to report gifts of private aircraft travel on his public financial disclosure report (Apr. 14, 2023),

<https://www.citizensforethics.org/wp-content/uploads/2023/04/Justice-Clarence-Thomas-DOI-Complaint-April-14-2023-5.pdf> (“CREW Complaint”).

in a vacuum. They are, rather, the latest manifestations of the ethical rot that is undermining the Supreme Court and the entire federal judiciary. For decades, conservative and liberal 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. As CREW has testified repeatedly at three Congressional hearings over the course of the last year and a half, the patchwork of rules and regulations that the federal judiciary developed to police itself has failed, and the Supreme Court's unspoken ethical honor system has become a public joke.¹⁷

Below I've detailed several actions that Congress can take under the Constitution to respond to this crisis. While many of these proposals have been included in CREW's prior congressional statements on this issue, today CREW is also endorsing a new policy: appointing an Inspector General tasked with overseeing the federal judiciary and rooting out corruption. It is time to rebuild public confidence in our judiciary. American democracy can no longer wait.

1. Creating and Establishing an Inspector General for the Judiciary

Offices of Inspectors General are charged with protecting the integrity of our government and are dedicated to preventing and detecting fraud, waste, and abuse in government agencies and programs. To do their jobs, IGs engage in serious investigative work and report their findings to the public, and, as appropriate, to law enforcement.¹⁸ The judiciary is the only branch of the federal government without an Inspector General. It is time for Congress to change that.

An Inspector General for the Judiciary situated within the Administrative Office of the U.S. Courts could investigate allegations of improper influence on judges and justices when they first occur, thereby preventing long-standing influence

¹⁷ 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>; Testimony of Donald Sherman, Hearing on Undue Influence: Operation Higher Court and Politicking at SCOTUS, Before the H. Comm. on the Judiciary (Dec. 8, 2022), https://www.citizensforethics.org/wp-content/uploads/2022/12/Donald-Written-HIC-Testimony-12_8.pdf; 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>

¹⁸ While various Inspectors General have some limited law enforcement authority, we do not believe that an Inspector General for the Judiciary need be given even limited law enforcement power.

campaigns like “Operation Higher Court” from remaining hidden in the shadows.¹⁹ An IG could also investigate an array of other behavior, including allegations of sexual harassment,²⁰ reports of federal judges owning or trading stock in parties to their cases,²¹ or violations of justices’ disclosure obligations, and would be tasked with identifying, auditing, and investigating fraud, abuse, and mismanagement in the implementation of the judiciary’s \$8.5 billion budget.²² An IG’s auditing and fraud prevention function would be particularly useful right now, as the judiciary’s request for a \$600 million budget increase, which includes plans to enter into opaque contracts with outside parties to fund capital improvements to numerous parts of judiciary’s infrastructure, is heightening the potential for waste, fraud, and abuse.²³ Particularly if Congress is considering giving the judiciary such a large budget increase, it will be important to also consider adding an Inspector General for the Judiciary so that we can be certain that these additional funds do not lead to additional fraud and abuse.

At the federal level, IGs have been used successfully in the executive and legislative branches for 45 years.²⁴ Just last year, an investigation by the Inspector General of the Architect for the Capitol uncovered “a significant amount of administrative, ethical and policy violations [and] ...evidence of criminal violations” by J. Brett Blanton, the then-Architect of the Capitol.²⁵ The investigation, and the bipartisan

¹⁹ “Operation Higher Court” was the name of conservative activists’ long-running strategy to purchase access to Supreme Court justices in order to, in essence, encourage conservative justices to issue rulings that matched their hard-right political ideologies. See 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>.

²⁰ See Abbey Meller and Joy Bagwell, *Sexual Harassment in the Judiciary*, Center for American Progress (Oct. 25, 2018), <https://www.americanprogress.org/article/sexual-harassment-judiciary/> (detailing numerous instances of judicial sexual misconduct).

²¹ Coulter Jones et. al, *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?st=83tufdpgmt8787u&reflink=desktopwebshare_permalink&mod=article_inline.

²² *The Judiciary Fiscal Year 2024 Congressional Budget Summary*, Administrative Office of the US Courts (Mar. 2023), <https://www.uscourts.gov/sites/default/files/FY%202024%20Congressional%20Budget%20Summary.pdf>.

²³ *Id.*

²⁴ See Inspector General Act of 1978, Pub. Law 95-452 (Oct. 12, 1978), <https://uscode.house.gov/statviewer.htm?volume=92&page=1101>. See also Ben Wilhelm, *Statutory Inspectors General in the Federal Government: A Primer*, Cong. Rsch. Service (Feb. 8, 2023), <https://crsreports.congress.gov/product/pdf/R/R45450>.

²⁵ 2021-0011-INVI-P- J. Brett Blanton, *Architect of the Capitol, Abused His Authority, Misused Government Property and Wasted Taxpayer Money, Among Other Substantiated Violations*, Inspector General of the Architect of the Capitol (Oct. 26, 2022), https://www.oversight.gov/sites/default/files/oig-reports/AOC/2021-0011-INVI-P-Oversight-Post-Final_0.pdf.

uproar that followed, caused President Biden to fire Mr. Blanton in February 2023.²⁶ Had the Inspector General's office not conducted its investigation, it is likely that Mr. Blanton's wrongdoing would not have come to light, and that he would have continued to waste taxpayer money and abuse his authority.

Admittedly, the IG system is not without its weaknesses, including the reality that presidents routinely fail to nominate, and the Senate routinely refuses to confirm, new Inspectors General. The Treasury Department, for instance, has been without a Senate-confirmed IG for almost four years.²⁷ Nonetheless, when fully staffed, they are effective independent investigators.

This sort of independent oversight is sorely needed in the judiciary because there are few, if any, real ways to bring about accountability for judicial misconduct. Under our current framework, the only real way to hold judges and justices accountable for judicial misconduct is impeachment. But in the almost 250-year history of the United States only a single justice has been impeached, Justice Samuel Chase, and even Justice Chase was spared removal from office by the Senate.²⁸ Impeachment and removal is also exceedingly rare at the circuit and district court level: only eight federal judges have ever been removed for malfeasance.²⁹ Investigations into judicial wrongdoing are also rare and, as the recent investigation into the *Dobbs* leak made clear, can be wholly insufficient even when they do occur. A fully funded and staffed IG for the judiciary would bring investigatory expertise to the third branch and ensure that corruption and malfeasance are brought to light before they rot the courts from within.

There is longstanding bipartisan support for establishing an Inspector General for the Judiciary. Sen. Chuck Grassley (R-IA) first introduced legislation to create a judiciary Inspector General with then-Rep. Jim Sensenbrenner (R-WI) in 2007;³⁰ and former Rep. Elijah Cummings (D-MD) and Rep. Gerry Connolly (D-VA) called for the

²⁶ See Dustin Jones, *Biden fires the architect of the Capitol after bipartisan criticism from lawmakers*, NPR (Feb. 13, 2023),

<https://www.npr.org/2023/02/13/1156610999/biden-fired-capitol-architect-ethical-violations-misusing-government-property>.

²⁷ *Inspector General Vacancies*, Oversight.Gov, <https://www.oversight.gov/ig-vacancies>.

²⁸ Samuel Chase, Oyez, https://www.oyez.org/justices/samuel_chase.

²⁹ *Judges and Judicial Administration – Journalist's Guide*, United States Courts, <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide>.

³⁰ *Judicial Transparency and Ethics Enhancement Act of 2007*, S. 461, 110th Cong. (2007). See also Press Release, Grassley, Sensenbrenner See Need For Inspector General For The Judiciary, Office of Chuck Grassley (Jan. 31, 2007), <https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary>.

establishment of a judiciary IG as recently as 2019.³¹ This bipartisan support should not be surprising. After all, while Justice Thomas' improprieties are the crisis du jour at the Supreme Court, judicial misconduct is not limited by political ideology and affects conservative and liberal justices and judges alike.

2. A Supreme Court Code of Conduct

The Supreme Court needs a binding, clear, and public Code of Conduct to prevent ethical misconduct in the first place. Under the current system, Supreme Court Justices are the arbiters of their own recusal decisions and their numerous other ethical obligations. This allows justices to routinely make inconsistent decisions regarding what type of financial or personal conflict requires recusal, or the propriety of accepting entreaties from advocates like Rev. Robert Schenck, the architect of "Operation Higher Court."³² In the case of Justice Thomas, the absence of a clear and comprehensive Code of Conduct has allowed him to accept, and then not disclose, vacations and real estate deals.³³ A binding Code of Conduct would have provided Justice Thomas, or any justice, a set of rules by which to measure their conduct.

Any Code of Conduct should include the following key elements:

a. Gifts

Wealthy and well-funded activists have been purchasing access to Supreme Court Justices for decades by pushing the boundaries of the definition of "gifts." This is not limited to Justice Thomas, though his conduct is the most egregious. For instance, the late Justice Scalia reportedly accepted 258 privately funded trips to places like Hawaii and Ireland from 2004 to 2014.³⁴ And the late Justice Ruth Bader Ginsburg

³¹ Letter from Rep. Elijah Cummings and Rep. Gerry Connolly to James C. Duff, Director of the Administrative office of the U.S. Courts (Sept. 5, 2019), <https://drive.google.com/file/d/1Eds44ftpVHsi5T2sSSCnm6tdEpTwB5dI/view>. See also Jacqueline Thomsen, *House Democrats Urge Federal Judiciary to Add Inspector General*, Law.com (Sept. 6, 2019), <https://www.law.com/nationallawjournal/2019/09/06/house-democrats-urge-federal-judiciary-to-add-inspector-general/>.

³² Peter S. Canellos and Josh Gerstein, *'Operation Higher Court': Inside the religious right's efforts to wine and dine Supreme Court justices*, Politico (July 8, 2022), <https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739>. See also Testimony of Donald Sherman, Dec. 8, 2022.

³³ Kaplan, Elliott, and Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

³⁴ 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>.

disclosed 14 trips in 2018, the most of any other justice that year, and accepted transportation, food, and lodging from Israeli billionaire businessman Morris Kahn.³⁵ Mr. Kahn had recently won a victory at the Supreme Court as the justices refused to take up a patent-related case against his company, Amdocs (Israel) Ltd.³⁶

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 from donors whose interests are publicly aligned with certain political or ideological causes. Under these circumstances, a reasonable person would question whether a justice who receives 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.³⁷ However, justices, unlike other federal judges, are not technically subject to the Judicial Conference Regulations on Gifts, which implement Section 7353.³⁸ Instead, members of the Court have agreed to follow the Judicial Conference gift regulations as a matter of internal practice,³⁹ with the Chief Justice being delegated administrative and enforcement authority under 5 U.S.C. § 7353 for officers and employees of the Supreme Court.⁴⁰ 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.⁴¹

³⁵ Karl Evers-Hillstrom, *Supreme Court Justices continue to rack up trips on private interest dime*, Open Secrets (June 13, 2019), <https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips/>.

³⁶ *Openet Telecom, Inc. v. Amdocs (Israel) Ltd.*, 841 F.3d 1288, (Nov. 1, 2016), *cert. denied*, *Openet Telecom, Inc. v. Amdocs (Israel) Ltd.*, 138 S. Ct. 469, 470 (2017).

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

³⁸ Judicial Conference, *Guide to Judiciary Policy Vol. 2* § 620.25, (Jan. 2020) <https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf>. See also Judicial Conference Regulations on Gifts, § 620.20.

³⁹ Joanna R. Lampe, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, Cong. Rsch. Serv. (2022), <https://sgp.fas.org/crs/misc/LSB10255.pdf>.

⁴⁰ Judicial Conference Regulations on Gifts, § 620.65.

⁴¹ In a "Statement of Principles" attached to Chief Justice Roberts's recent letter to Senator Durbin, the justices reiterated that they consult a wide range of authorities when making ethical decisions. See Letter to Sen. Richard Durbin, from Chief Justice John Roberts, (Apr. 25, 2023), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>. See also Chief Justice John G. Roberts, *2011 Year-End Report on the Federal Judiciary*, (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

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.⁴²

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 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.⁴³

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 in the first place.

Specifically, a Code of Conduct should contain a clear bar on accepting expensive gifts, with a cap on the value of any *de minimis* gifts that may be accepted in line with executive branch and legislative branch gift rules,⁴⁴ 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. Moreover, in the absence of evidence that a justice has a pre-existing personal friendship with a donor in which they exchange gifts of comparable value, a Supreme Court Code of Conduct should require the justice to decline expensive gifts. Relatedly, the Code of Conduct should also enhance and clarify the justices' public financial disclosure requirements, so that donations in support of a spouse's or dependent child's non-profit endeavors

⁴² *Id.*

⁴³ *Id.*

⁴⁴ In the executive branch, 5 C.F.R. § 2635.204(a) creates a \$20 threshold for the *de minimis* gift exception; the comparable *de minimis* exception for members of the House and their staff is \$50, see Gift Guidance, Committee On House Ethics, https://ethics.house.gov/house-ethics-manual/gifts#_Gifts_Worth_Less.

that give rise to similar potential conflicts of interest can be appropriately identified and addressed through recusal.⁴⁵

b. Personal and Financial Conflicts of Interest

The bombshell *Wall Street Journal* revelations of far-reaching financial conflicts of interest in the judiciary in the fall of 2021,⁴⁶ and the repeated scandals raising questions about Supreme Court justices' impartiality in the face of personal conflicts, have vividly demonstrated the need for a complete restructuring of the Court's conflict of interest regime.

The question of spousal conflicts is particularly relevant and remains unaddressed. In early 2022, news reports raised questions about Supreme Court justices' impartiality and recusal obligations with respect to cases that affect their spouse's political interests, business clients, and relate to their advocacy work.⁴⁷ For example, despite his spouse's active support of and communications with Trump administration officials about President Donald Trump's unprecedented efforts to overturn the 2020 election, Justice Thomas failed to recuse from Supreme Court cases relating to the 2020 election. That included *Trump v. Thompson*, where Justice Thomas was the lone dissent from the Court's decision to reject President Trump's attempt to block the release of documents requested by the House Select Committee to Investigate the January 6th Attack on the United States Capitol.⁴⁸ Justice Thomas' failure to recuse from this and various other cases not only undermines the Supreme Court's impartiality, it also potentially violates his ethical obligations under 28 U.S.C. § 455.

⁴⁵ 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>.

⁴⁶ 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 (Sept. 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-1634306192?st=83tufdpgmt8787u&reflink=desktopwebshare_permalink&mod=article_inline.

⁴⁷ Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, New Yorker (Jan. 21, 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. 28, 2022), <https://www.theguardian.com/law/2022/jan/28/clarence-thomas-supreme-court-affirmative-action-case-ginni-thomas>.

⁴⁸ 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/>.

The Supreme Court is also not immune from financial conflicts of interest. In fact, Justice Thomas is not the only justice to have engaged in a sale of real property to someone with business before the court. In April 2017, nine days after he was confirmed, a 40-acre tract of property on the Colorado River co-owned by Justice Gorsuch was sold to Brian Duffy, the CEO of Greenberg Traurig—a major American law firm.⁴⁹ While Justice Gorsuch disclosed the amount he made from the \$1.825 million sale (\$250,001-\$500,000), he did not disclose the name of the buyer.⁵⁰ In the years since the sale, Greenberg Traurig has been involved in some way in 22 cases before the Supreme Court, including representing parties and filing amicus briefs. In the cases in which his opinion was recorded, Gorsuch sided with Greenberg twice as many times as he did against it.⁵¹

Additionally, two currently-serving justices, Roberts and Alito, own individual stocks,⁵² and since 2015, each of them has participated in three cases in which they have a material financial interest.⁵³ And in 2015, 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.⁵⁴ His wife sold their \$33,000 stake in the company, Johnson Controls Inc, after a journalist inquired about the apparent conflict.⁵⁵

These conflicts, which occur across the ideological spectrum, harm the public's faith in the Court's impartiality and implicate the justices' recusal requirements under Section 455.

A. 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

⁴⁹ Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, Politico (Apr. 25, 2023), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>.

⁵⁰ *Id.* (While Justice Gorsuch did not have an obligation to disclose the parties to the real estate transaction under EIGA, the sale could still create a conflict of interest.)

⁵¹ *Id.*

⁵² Those Justices are Chief Justice Roberts, Justice Samuel Alito, and retired Justice Stephen Breyer. See Fix The Court, *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest*, (sic) (Mar. 7, 2023), <https://fixthecourt.com/2022/01/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁵³ *Id.*

⁵⁴ 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#xj4y7vzkg>.

⁵⁵ *Id.*

their impartiality might reasonably be questioned.⁵⁶ Congress added a series of examples to this general requirement, including that judges and justices must recuse from any matter in which they, their spouse, or minor child have a financial interest, or in which the judge knows that their spouse has “any . . . interest that could be substantially affected by the outcome of the proceeding.”⁵⁷ Under the Court's current ethical framework, justices decide for themselves whether recusal is warranted under section 455.⁵⁸ Since recusal determinations are not subject to review, this process leaves justices largely unaccountable if they fail to properly recuse themselves from cases in which their impartiality may reasonably be questioned.

For executive branch employees, who are subject to a similar recusal standard, the integrity of the agency's decision-making process is protected by the federal criminal conflict of interest statute, 18 U.S.C. §208, which governs financial conflicts of interest, and by requiring employees who are dealing with appearance issues to consult with an agency's ethics official.⁵⁹ 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.⁶⁰

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

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. 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.”⁶¹ In the absence of a similar process to help members of the Court address concerns

⁵⁶ 28 U.S.C. § 455(a).

⁵⁷ 28 U.S.C. § 455(b)(4).

⁵⁸ 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>.

⁵⁹ 5 C.F.R. § 2635.502.

⁶⁰ *Id.*

⁶¹ U.S. Supreme Court Resolution, Jan. 18, 1991, https://www.citizensforethics.org/wp-content/uploads/2022/03/1991_Resolution.pdf.

about impartiality, justices will continue to make these decisions for themselves on a seemingly ad hoc, opaque, and unregulated basis.

B. The Ethics in Government Act

Although the Ethics in Government Act (“EIGA”) establishes financial disclosure reporting requirements for justices and other judicial officers,⁶² spousal conflicts of interest based on their clients or outside positions are difficult to identify under EIGA’s current reporting regime because those relationships are not always required to be disclosed.⁶³ For example, when spousal compensation passes through a limited liability company (“LLC”) or similar legal entity, there is 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.⁶⁴ 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.⁶⁵ In the latter case, potential spousal conflicts of interest can be more easily identified.

C. Amicus Briefs

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. 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.

Similar conflicts occur when a justice accepts lavish gifts and other things of value from people who are affiliated with groups seeking to influence the court. For instance, Harlan Crow is on the board of AEI, which touted its impact on the court in its most recent Annual Report, saying that, “[t]hanks to a renewed emphasis on constitutional law and the Supreme Court, we have had our most direct impact on

⁶² 5 U.S.C. app. § 101(f)(11).

⁶³ 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).

⁶⁴ 5 U.S.C. app. § 102(e)(1)(A).

⁶⁵ *Id.*

the courts' evolving view of the administrative state. Specifically, an important AEI Press book on the topic helped shape a crucial Supreme Court decision."⁶⁶ During Mr. Crow's time on the board, and Justice Thomas' tenure on the bench, AEI has filed and publicized numerous amicus briefs supporting conservative causes at the Supreme Court.⁶⁷

In every circumstance, the justice must 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. When questions about the Court's impartiality are at issue, recusal needs to be the justices' default position rather than the exception.

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 or a wealthy benefactor's business interests and ideological pursuits. 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. Similar reporting requirements should also be put in place for other public disclosure filers, including elected officials and presidential appointees confirmed by the Senate.

CREW supports legislative efforts to ban Supreme Court Justices and all federal judges from owning or trading individual stocks, bonds, and other similar financial instruments, including requiring that such a ban be placed in a Supreme Court Code of Conduct. Such a ban is the best and only comprehensive way to ensure that

⁶⁶ AEI, *2022 Annual Report*,

<https://www.aei.org/wp-content/uploads/2023/03/2022-Annual-Report-FInal.pdf?x91208>.

⁶⁷ See, e.g., Peter J. Wallison, *Supreme Court Amicus Brief Seeking Certiorari in AT Corp. V. Lila T. Gavin*, AEI (Feb. 8, 2007),

<https://www.aei.org/research-products/speech/supreme-court-amicus-brief-seeking-certiorari-in-at-corp-v-lila-t-gavin/>; John E. Calfee et al., *Supreme Court Amicus Brief Regarding Wyeth V. Diana Levine*, AEI (June 3, 2008), <https://www.aei.org/research-products/testimony/supreme-court-amicus-brief-regarding-wyeth-v-diana-levine/>.

justices are not violating their duty to preside over cases as disinterested arbiters of law and fact. By imposing a ban, a Code of Conduct 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 too infrequently used to ever function as a true check on misconduct.

This requirement would not mean that justices 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.⁶⁸ Should justices and their close family members wish to continue to have investments in individual securities, they could place their assets in a qualified blind trust⁶⁹ and direct the trustee to divest from their current holdings and then reinvest the proceeds in individual stocks as the trustee sees fit. There is no question that this type of structure would effectively prevent financial conflicts of interest.

c. 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. Justices will often recuse from a case without any explanation—these nonpublic recusals reportedly occur in approximately 200 matters each year.⁷⁰ 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.

A Supreme 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

⁶⁸ 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/>.

⁶⁹ A "qualified blind trust" as generally defined in 5 C.F.R. § 2634.402(e).

⁷⁰ Gabe Roth, *Explaining the Unexplained Recusals at the Supreme Court*, Fix the Court (May 3, 2018), <https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf>.

served by recusal decisions that articulate why a justice has decided not to participate in a matter. That transparency would have ripple effects: it would help establish precedent for recusal, and it would allow the public—and litigants before the Court—to understand the scope of a justice’s conflicts.

d. *Outside Speaking Engagements*

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.⁷¹ For example, recent reports have been critical of justices who speak at conferences that bar news media from covering their speeches.⁷² 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,⁷³ 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.”⁷⁴

Based on rules set forth in the *Code of Conduct for United States Judges*, a lower court federal judge would need to consider whether speaking at these types of events, and accepting related travel costs to desirable locations to participate in them, raises questions about appearances of impropriety.⁷⁵ Relevant provisions of the Judicial Code of Conduct include:

⁷¹ 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 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 Judicial Conference, *Guide to Judiciary Policy* (Jan. 2020),

<https://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf>; see also, Debra Cassens Weiss, *US judiciary drops draft opinion telling judges they can’t be Federalist Society members*, ABA Journal (July 31, 2020), <https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members>.

⁷² 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/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Code of Conduct for United States Judges*, US Courts (Mar. 12, 2019), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b>.

- Canon 2 requires judges to refrain from lending the “prestige of the judicial office to advance the private interests of the judge or others” or to “convey or permit others to convey the impression that they are in a special position to influence the judge.”⁷⁶
- Canon 4 mandates that judges refrain from extrajudicial activities that interfere with the performance of the judge’s official duties or reflect adversely on the judge’s impartiality.⁷⁷
- Canon 5 mandates that judges refrain from political activity.⁷⁸

Executive branch employees are subject to similar standards of conduct that guard against preferential treatment.⁷⁹

Since justices are not subject to the *Code of Conduct for United States Judges*,⁸⁰ however, 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 appearance issues arising from outside speaking engagements. For example, justices 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, 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. Justices should also avoid perceptions of partisan political endorsements by eschewing participation in conferences or other public events that prominently feature politicians from a particular political party in favor of events that include persons who represent a variety of political views.

3. Apply the federal criminal conflict of interest statute, 18 U.S.C. § 208, to the Supreme Court and the federal judiciary.

The ethical crisis that has consumed the federal judiciary is not simply the result of the actions of individual justices. It is the result of decades of insufficient oversight

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 5 C.F.R. §§ 2635.101(b)(8), 2635.702.

⁸⁰ *Code of Conduct for United States Judges*, US Courts (Mar. 12, 2019), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b>.

and little to no discipline or accountability throughout the entire branch. There is no better example of this systemic ethical rot than the *Wall Street Journal's* revelations 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 that 61 judges or their families actively traded shares in a party to an ongoing case.⁸¹ These revelations have caused a wave of appeals, some of which threaten to overturn verdicts that could reach into the billions of dollars.⁸²

One clear way of providing some measure of accountability for this ethical crisis is by applying 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 and reassures the public that officials do not make decisions on the basis of their private interests. 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 they have a 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 egregious 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 then-Ranking Member of the House Judiciary Committee’s Subcommittee on the Courts Rep. Darrell Issa (R-CA) put it during a hearing in October 2021.⁸³

Justices are already required to recuse themselves from any cases in which they have a financial interest in a party to a proceeding.⁸⁴ Some federal judges however appear to treat conflict of interest law as simply a suggestion rather than a rule: applying Section 208 would add teeth to this now toothless legal regime.

⁸¹ James V. Grimaldi et al., *131 Judges Broke the Law by Hearing Cases Where They Had A Financial Interest*, *Wall St. Journal* (Sept. 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 et. al, *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?st=83tufdpgmt8787u&reflink=desktopwebshare_permalink&mod=article_inline.

⁸² 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>.

⁸³ 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).

⁸⁴ 28 U.S.C. § 455.

As the *Wall Street Journal's* reporting demonstrates, many judges feel empowered to brush off these violations, admitting to being “remiss” and promising to “stay on [their] toes” in the future. Chief Justice Roberts dismissed concerns about these conflicts, explaining that the problem boils down to “a small number,” of judges who “did not take sufficient note” of their ethics training. In general, he said, these were “isolated violations” that were the result of “unintentional oversights.”⁸⁵ This type of cavalier attitude does more harm than good and is precisely why fundamental, structural reforms such as those we have suggested are necessary to protect the integrity and impartiality of the entire institution.

4. Constitutional Concerns

Congress imposing recusal rules, or a Code of Conduct, on the Supreme Court does not raise serious separation of powers concerns.⁸⁶

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.⁸⁷ Congress has changed the size of the Supreme Court by statute on several occasions.⁸⁸ Congress also has the authority to raise justices' salaries, and, in extraordinary cases, remove justices via impeachment.⁸⁹

⁸⁵ Chief Justice John G. Roberts, *2021 Year-End Report on the Federal Judiciary*, Supreme Court (2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.

⁸⁶ Joanna R. Lampe, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, Cong. Rsch. Serv. (2022), <https://sgp.fas.org/crs/misc/LSB10255.pdf> (“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.”).

⁸⁷ 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.”).

⁸⁸ 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”, Cong. Rsch. Service (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10562>.

⁸⁹ 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.”).

Pertinent for today's conversation, Congress already has enacted legislation that imposes financial disclosure and recusal requirements and gift and outside earned income restrictions on Supreme Court justices.⁹⁰ 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."⁹¹ 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 laws. For instance, it is illegal for a Supreme Court justice to take a bribe.⁹² 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

CREW has been warning of the precipitous decline in public faith in the judiciary and the Supreme Court for years. In my statement to the House Judiciary Committee in October 2021, I called on Congress to pass structural and systemic judicial ethics reforms because "public confidence that the system of law is fair and just is critical to maintaining democratic governance," and a conflicted and unethical judiciary undermines that confidence.⁹³ A year and a half and three massive scandals later, it is time for Congress to finally act to pass serious judicial ethics reform.

Justice Thomas' financial relationship with Mr. Crow and his failure to report more than two decades of private luxury vacations and real estate transactions in possible violation of the Ethics in Government Act and the Judicial Conference Gift Regulations constitute egregious misconduct. But this scandal did not occur in isolation, and it must not be addressed as if it had. Justice Thomas is not the reason the highest court in the land has the lowest bar for ethical compliance and

⁹⁰ *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).

⁹¹ Chief Justice John G. Roberts, *2011 Year-End Report on the Federal Judiciary* (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

⁹² 18 U.S.C. § 201.

⁹³ Statement of Noah Bookbinder (Oct. 26, 2021), <https://www.citizensforethics.org/wp-content/uploads/2021/11/CREW-Statement-for-the-Record.pdf>.

accountability; Harlan Crow is not why 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, or to vote. This is rather the result of decades of benign neglect and absence of accountability.

That neglect must end now. It is time for Congress to step in and impose some measure of accountability on the Supreme Court and the federal judiciary beginning with the creation of an Inspector General for the federal judiciary. Moreover, as CREW has been advocating consistently for over the past several years, Congress should expand the criminal conflict of interest status to cover the judiciary, and, if the Court will not develop a Code of Conduct, as it is becoming clear it will not, then Congress must impose one on it. Democracy is a promise that our elected and appointed representatives will govern with the best interests of the people, and not their own individual pocketbooks, as their guiding light. When that promise is broken, so too is the foundation of our democracy.

CREW looks forward to working with your committee as you address this important issue.