

October 7, 2024

The Honorable John G. Roberts, Jr.  
Chief Justice of the United States  
1 First Street, NE  
Washington, DC 20543

Re: Recommendation for Creation of a Judicial Reference Panel with Respect to the Court's Code of Conduct

Dear Mr. Chief Justice:

The Court's decision last fall to adopt a formal Code of Conduct was welcome and commendable.<sup>1</sup> It was a pivotal first step toward strengthening public confidence in the Court. At the same time, while we recognize the significance of the Court's action, we are concerned that inherent limitations within the Code, including its lack of an oversight mechanism, may hinder both its efficacy and its impact on the public's view of the Court. As individuals with diverse backgrounds—one, a former federal judge and former Director of the Federal Judicial Center, and the other, the leader of Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit organization dedicated to ethical government—we approach you with a shared commitment to supporting the Court in upholding its core ethical values.

We were particularly heartened by the commentary that accompanied the Code, in which you and your fellow justices noted that “the Court will assess whether it needs additional resources in its Clerk's Office or Office of Legal Counsel to perform initial and ongoing review of recusal and other ethics issues.”<sup>2</sup> We write to you today to share our recommendation as to how these critical functions might be strengthened, specifically by establishing a panel of retired federal judges qualified by their extensive experience and unquestioned integrity to provide the justices with confidential advice as to recusals and other significant ethical questions.<sup>3</sup>

This ethics reference panel, the members of which would be appointed by you, would provide confidential advice concerning motions for disqualification and compliance with relevant laws, rules, and ethical standards, including the Court's recently adopted Code of

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<sup>1</sup> [Code of Conduct for Justices of The Supreme Court of the United States](#) [hereinafter Code of Conduct] (Nov. 13, 2023).

<sup>2</sup> *Id.* at 14.

<sup>3</sup> Judge Jeremy Fogel & Noah Bookbinder, *Building public confidence: how the Supreme Court can demonstrate its commitment to the highest ethical standards* (Aug. 9, 2023), <https://www.citizensforethics.org/reports-investigations/crew-reports/building-public-confidence-how-the-supreme-court-can-demonstrate-its-commitment-to-the-highest-ethical-standards/>.

Conduct. Under our proposal, included here as an attachment, litigants could file a certified motion to disqualify a justice when they believe that a “Justice’s impartiality might reasonably be questioned” because of alleged personal bias, prior involvement as legal counsel or financial conflict of interest.<sup>4</sup> That motion would be referred to the Office of Legal Counsel for initial review to ensure that it alleges facts sufficient to establish a prima facie case for disqualification. If it does, the Office of Legal Counsel would refer the motion to the panel, which would review the matter and offer an advisory confidential opinion to the justice in question. At the end of each year, the panel would submit an annual report indicating the number of motions referred and of advisory opinions provided. Although many of the Court’s critics have called for an outside oversight mechanism, we are especially mindful of the Court’s concerns about the separation of powers and judicial independence. We believe that our proposal represents a meaningful form of impartial review that also is respectful of the Court’s unique role in our constitutional structure.

Our proposal has important similarities to the structure outlined in the Judicial Conduct and Disability Act of 1980.<sup>5</sup> That legislation provides a pathway for individuals to seek review of ethical concerns regarding judges of the lower federal courts by tasking chief circuit judges with conducting an initial review of complaints and referring them, if appropriate, to a select committee of judges for further investigation and recommendations.<sup>6</sup> Our proposal for the Supreme Court sets forth a similar process and is offered in the same spirit as Justice Kagan’s recent suggestion to appoint lower court judges to assist the Court in complying with its Code of Conduct.<sup>7</sup> As detailed in our proposal, the initial review would be conducted by the Court’s Office of Legal Counsel, with the responsibility for further consideration of matters raising substantial questions to a panel whose members have intimate familiarity with the judiciary, in this case deeply experienced and widely respected retired federal judges. The panel also would be available to the justices on an informal basis as a source of impartial advice, much as the Committee on Codes of Conduct of the Judicial Conference serves the lower federal courts.

The commentary that accompanies the Court’s new Code also contains a lengthy discussion of the unique challenges the Court faces with respect to recusals.<sup>8</sup> We are fully respectful of those challenges. At the same time, the extraordinary impact of many of the cases the Court hears makes impartiality and the appearance of impartiality on the part of the justices uniquely important. The current absence of any type of reference mechanism for recusals is problematic as a matter of both substance and appearance. Drawing upon the experience, expertise and reputation of respected retired judges is a realistic, practical and palatable

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<sup>4</sup> [Code of Conduct](#) at 2.

<sup>5</sup> [Judicial Conduct and Disability Act of 1980](#), 28 U.S.C. §§ 351–364 (1980).

<sup>6</sup> *Id.*

<sup>7</sup> Ann E. Marimow, *Justice Kagan: Lower court judges could enforce Supreme Court ethics code* (Sept. 9, 2024), <https://www.washingtonpost.com/politics/2024/09/09/supreme-court-kagan-melissa-murray/>.

<sup>8</sup> [Code of Conduct](#) at 10; *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004).

solution to this problem, and we believe that it would contribute significantly to rebuilding public trust and confidence in the Court.

Again, we commend you and your colleagues for taking the important first step of adopting a formal Code of Conduct. We hope that it is just that: a first step. With deep appreciation for the difficulty of this work, we encourage you to consider implementing the next step described here. We stand ready to be helpful in that effort.

Very truly yours,

Judge Jeremy Fogel



Noah Bookbinder



Cc: Clarence Thomas, Associate Justice  
Samuel A. Alito, Jr., Associate Justice  
Sonia Sotomayor, Associate Justice  
Elena Kagan, Associate Justice  
Neil M. Gorsuch, Associate Justice  
Brett M. Kavanaugh, Associate Justice  
Amy Coney Barrett, Associate Justice  
Ketanji Brown Jackson, Associate Justice  
The Honorable Robert M. Dow, Jr., Counselor to Chief Justice of the United States

Enclosure: Proposed language to be incorporated into the Code of Conduct establishing an ethics reference panel

## Enclosure

Proposed language to be incorporated into the Code of Conduct for Justices of the Supreme Court of the United States

### 1. REVIEW OF CERTIFIED MOTIONS TO DISQUALIFY

a. Motion for Disqualification. If a party to a proceeding or the Solicitor General of the United States in a case in which the government is participating believes that a Justice should be disqualified from a proceeding under the above provisions or under any provision of law, the party or the Solicitor General may file a timely motion for disqualification. The motion shall be forwarded to the Court's Office of Legal Counsel for review and processing.

i. In General. The motion shall be filed in writing and under oath and shall consist of an affidavit or declaration under penalty of perjury accompanied by a certificate of good faith alleging facts sufficient to show a prima facie case that disqualification of the Justice is so required.

1. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the Justice, including:

a. A short statement of the issue(s) presented for review;

b. A statement of the facts, setting forth the facts relevant to the issue(s) presented for review;

c. A brief argument, setting forth the contentions of the party with respect to the issue(s) presented, and the reasons therefore, including the reasons why the contentions require disqualification, with citations to the authorities, as appropriate;

d. A short conclusion, stating the precise relief sought;

e. An affirmative statement that the motion is not being presented for any improper purpose, such as to harass or to cause unnecessary delay; and

f. A certification of the date the party first became aware of the facts set forth in the motion.

ii. Timing. The motion shall be made promptly after a party learns or reasonably should have learned of the facts establishing the asserted basis for disqualification. The motion shall be filed not later than 10

days after a petition for a writ of certiorari has been granted, absent a showing of good cause which must also be supported by an affidavit.

- b. Consideration of Motion by Office of Legal Counsel. The Court's Office of Legal Counsel shall promptly review the affidavit and certificate of good faith to determine whether a prima facie case for disqualification has been made.
  - i. Referral to Ethics Reference Panel. If the Office of Legal Counsel determines that a prima facie showing has been made, it shall certify the motion in writing to the ethics reference panel within 30 days of receipt so that timely and prompt advice by the reference panel can be given with respect to the motion.
  - ii. No Undue Delay. The filing of a motion for disqualification and the consideration of that motion shall not unduly delay the proceedings.
- c. Ethics Reference Panel. An ethics reference panel consisting of three members shall be appointed by the Chief Justice of the United States.
  - i. Initial Appointment. Within 60 days of the adoption of this addendum to the Code of Conduct, the Chief Justice shall appoint qualified judges to serve as reference panel members.
    1. The Chief Justice shall designate one panel member to serve an initial one-year term. This panel member shall be eligible to serve one additional three-year term.
    2. The Chief Justice shall designate one panel member to serve an initial two-year term. This panel member shall be eligible to serve one additional three-year term.
    3. The Chief Justice shall designate one panel member to serve an initial three-year term. This panel member shall not be eligible to serve an additional three-year term.
  - ii. Subsequent Appointments. Except as provided in clause 1(c)(i):
    1. The Chief Justice shall appoint each panel member for a term of three years.
    2. A panel member shall not serve more than one three-year term.
  - iii. Qualifications. Each member of the reference panel shall be a circuit court judge under 28 U.S.C. § 44 who is retired under 28 U.S.C. § 371(b)

or § 372(a) (applicable to all Article III judges), or a retired Article III judge who is also a former member of the Judicial Conduct and Disability Committee of the Judicial Conference of the United States.

- iv. Disqualification of Panel Member. A panel member may not consider a disqualification motion if the panel member, the Chief Justice, or, for a motion concerning the Chief Justice, the most senior Associate Justice not subject to the motion, concludes that the circumstances warrant disqualification of the panel member. If a panel member is disqualified, the Chief Justice shall appoint another judge qualified under clause 1(c)(iii) to serve as a temporary panel member for consideration of the motion.
  - v. Vacancy. If a member of the reference panel dies, steps down, or is unable to serve the remainder of the member's term, within 60 days of the occurrence of the vacancy the Chief Justice shall appoint to the reference panel another judge qualified under clause 1(c)(iii) to serve the remainder of the former member's term.
- d. Consideration of Disqualification Motions by Reference Panel. Upon referral by the Court's Office of Legal Counsel of a motion to disqualify a Justice, or at the request of any Justice with respect to such a motion, the reference panel shall convene (virtually or in person) to consider the motion within thirty days. The reference panel shall immediately provide written notice of the referral to the complainant and to the Justice who is the subject of the motion.
- i. The reference panel shall consider the facts and allegations contained in the motion. The reference panel shall provide the subject Justice a reasonable opportunity to present the Justice's views on and any materials related to the motion.
  - ii. The reference panel shall evaluate the merits of the motion and provide a confidential advisory opinion to the Justice as to whether or not the Justice should disqualify himself or herself.
- e. In addition to the procedure set forth in the preceding section, any Justice or, after consultation with a Justice, the Court's Clerk, Counselor or Legal Counsel, may request a confidential, informal opinion from the reference panel with respect to the application of any laws, rules and ethical standards that apply to the Justice's official conduct. Such opinion may be provided either orally or in writing and is not binding on the Justice or the reference panel.
- f. At the end of each calendar year, the reference panel shall submit to the Clerk's Office a report indicating the number of motions referred to and of

advisory opinions provided by the panel during that year. This report shall be published on the Court's official website concurrently with the Chief Justice's annual report.