

SUPREME COURT, INFERIOR OVERSIGHT

The high court's ethics and disclosure rules are weaker than those of the other two branches. That should change.

A REPORT BY FIX THE COURT



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EXECUTIVE SUMMARY

A new analysis by Fix the Court reveals the extent to which Supreme Court justices follow different ethics, disclosure, personal finance and travel rules from those of top officials in the other two branches.

This lack of oversight leaves both the press and public wondering about the jurists' potential conflicts of interest, financial investments and privately-funded travel.

Unfortunately, there is little, if anything, the average citizen can do to find this information.

Without these basic transparency measures, Americans are simply forced to trust the integrity of the institution and of the individuals appointed to serve.

This report lays out the most important functional differences across an array of ethics-related categories among the Supreme Court justices, other federal judges, members of Congress and executive branch officials (cabinet-level heads) for the purposes of highlighting the transparency and accountability discrepancies at the Supreme Court – **while also suggesting ways to bring greater oversight to the institution.**



Why don't Supreme Court Justices follow the same ethics and disclosure rules as officials in the other branches?



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WHAT LIMITS DO WE PLACE ON OUR GOVERNMENT OFFICIALS?

	Supreme Court justices	Other federal judges	Members of Congress and senior staff	Executive branch officials*
 Required to file financial disclosure reports online?	NO	NO	YES ¹	YES ¹
 Required to disclose privately-funded travel?	NO	SOME-TIMES	YES ²	YES
 Subject to oversight by internal body?	NO	YES	YES ³	YES ³
 Subject to oversight by external body?	NO	NO	YES ⁴	YES ⁴
 Required to follow branch-specific code of conduct?	NO	YES ⁵	YES ⁶	YES ⁶
 May earn outside income	YES, and most do	YES, and some do	YES, and few do	YES, and almost none do
 Place stocks in blind trust during time in office	NONE DO	NONE DO	SOME DO	Most presidents and some cabinet secretaries do
 Must report stock transactions within 45 days	NO	NO	YES ¹	YES ¹

*President, VP, heads of agencies

1. This is due to the 2012 STOCK Act, which includes legislative and executive branch officials but not federal judges
2. Both before and after a trip, the sponsor and member of Congress or staff must fill out forms describing the trip
3. The House and Senate Ethics Committees, the Office of Government Ethics and designated agency ethics officers fill these roles
4. The House has its own inspector general, as do cabinet-level agencies, though there is no Senate inspector general
5. It's called the Code of Conduct for United States Judges, though Supreme Court exempts itself from adhering to the code
6. Each Congress establishes its own rules on conduct that are in addition to the relevant statutes. Since 1989 each President has issued his own executive order governing conduct



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FINANCES

Supreme Court justices may earn up to an additional 15 percent of their income per year, or \$36,600, via teaching. Many take advantage of that policy by lecturing at law school seminars during the court's three-month summer break or during other breaks between monthly sittings.

Though outside income earned by members of Congress, heads of cabinet agencies and top aides in either branch is not forbidden by statute, it is nearly unheard of today. A series of executive orders beginning in the G.H.W. Bush administration prohibit highest-level executive branch officials from any outside work.

In many cases, of course, the justices are earning far less than each would be making on the open market, which is in part why Chief Justice Roberts has been a strong advocate for judicial pay increases.

Fix the Court believes if the justices want to look to Congress to increase third branch salaries, Congress is well within its authority to tie pay raises to an increase in judicial oversight.

The justices have more leeway on outside income than their first and second branch counterparts. But should they?



Justice Elena Kagan reported in her most recent financial disclosure that she earned \$15,000 in 2015 for teaching at Harvard Law School, where she was once dean.



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STOCK OWNERSHIP

Officials in all three branches who own securities are subject to the Ethics in Government Act of 1978 and Ethics Reform Act of 1989, which forbid them from having official dealings with companies in which they own securities. Congressional and executive branch officials must also abide by the Stop Trading on Congressional Knowledge, or STOCK, Act of 2012. Supreme Court justices, on the other hand, are not subject to this legislation.

The STOCK Act requires members of Congress and top executive branch officials to publically report securities transactions no later than 45 days after the transaction. Conversely, when a justice buys or sells a security, it may be up to a year and a half before the sale is made public.

This January, for example, the Supreme Court added to its fall 2016 docket a case in which Microsoft is a litigant. For years Chief Justice Roberts owned up to \$500,000 in shares of the tech giant, yet Roberts did not indicate that he was recusing himself from the case, meaning either there was an oversight or, more likely, that he sold his shares sometime between Jan. 1 and Jan. 15 of this year.

The public won't know until Roberts' 2016 financial disclosure report comes out in the summer of 2017. That is roughly 16 months after a similar notice would become public if Roberts were a member of a branch covered by the STOCK Act. Plus, it is likely that Roberts took advantage of a little-known law whereby a justice may defer capitals gains taxes in order to sell a security to avoid a conflict.

This episode underscores another discrepancy among the branches in terms of stock ownership: while nearly every president and presidential candidate post-Watergate has either relinquished ownership of individual stocks or placed their securities into blind trusts, Supreme Court justices have refused to do so. Three of the current eight (Roberts, Breyer and Alito) justices own shares in individual companies – large, litigious companies that often stand before the court – and each year there are a half dozen unnecessary recusals for cases that reach the court and another 180 at the petition stage, meaning lots of potential for ties.

While the House and Senate Ethics Committees have comprehensive guides on the steps members can take to create a trust, no such guidance exists for Supreme Court justices, though it should.



Chief Justice Roberts likely sold his Microsoft shares in January 2016, but the public may not find out until the summer of 2017.



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DISCLOSURES

Striking an appropriate balance between public disclosure and privacy has long been a difficult line for public officials to walk. While the press and public have come to expect transparency and access to various streams of information about the character of their elected and appointed officials, under current law only the executive and legislative branches are following best practices regarding disclosure standards.

It is important to note that nearly every state and lower federal court case on the constitutionality of disclosure laws has resulted in those laws being upheld. And although the Supreme Court has not definitively ruled on the public's right to know about public officials' finances, the high court's refusal in 1979 to review a challenge to the disclosure requirements of the Ethics in Government Act effectively sustained those very requirements.

Here is how someone may obtain the annual financial disclosures of Supreme Court justices and other federal judges:

One must print out a form called "AO10a"; write in the names of the justices or judges whose reports are being requested; fax or mail the form to the Administrative Office of U.S. Courts; wait to receive confirmation of receipt of the request and of the cost to obtain the reports, at \$0.20 per page; wait to hear when the reports are ready for pickup; and then go to the AO building in D.C., check in hand, to pick them up or wait to receive them by mail.

Here's how the financial disclosure process works in the other branches:

- **Legislative.** The annual reports of members of Congress are scanned and uploaded to the House Clerk's website and to the Senate's own disclosures website about a month after they are due to their respective ethics offices.
- **Executive.** By mid-June, reports from 67 top executive branch officials are uploaded to the Office of Government Ethics website. By mid-June, if an individual requests a report from one of the 1,200 other executive branch officials required to fill one out, he or she may make that request via an online form, and OGE will e-mail the requestor a PDF of the report within 24-48 hours.

Another aspect of the disclosure process that separates the political branches from the Supreme Court is that the ethics bodies in the House, Senate and executive branch offer trainings on how to fill out financial disclosure forms.

Fix the Court asked judiciary officials (both at the Supreme Court and at the Administrative Office) about this, and we learned that while district and circuit court judges have disclosure training as part of their judicial orientations, it seems as if Supreme Court justices do not – though they should, just as they should be required to post their disclosures online like members of Congress and top executive branch officials.





OVERSIGHT

The role of a peer organization to review, monitor and supervise the work of federal agencies and employees has long been regarded as a hallmark of sound governance. Oversight, both within the legislative and executive branch, follows a strict regimen of practices and protocols to ensure compliance with federal law, stewardship of taxpayer dollars and accountability among federal employees.

When a member of Congress is accused of breaking those protocols, he or she may be brought before the House or Senate Ethics Committee for discipline. Members may be reprimanded, censured or even expelled for their actions. Additionally, unscrupulous members of Congress have the ultimate level of accountability through a vote of confidence by their constituents in the form of an election.

Like members of Congress, cabinet secretaries and top executive officials are subject to internal protocols and ethics offices and officers that could push for removal, and they may also be tried in the court of public opinion should they act in an unprincipled way.

Additionally, the House and Senate and executive agencies have inspectors general who act as independent watchdogs to reduce waste, fraud and abuse. No such office exists within the federal judiciary, though there have been a number of proposals over the years to create such an office for the third branch.

Federal district and circuit court judges accused of wrongdoing may be brought before a circuit's Judicial Council, which comprises some of the jurisdiction's most respected judges, and such a case may be referred to the Judicial Conference's Committee on Judicial Conduct and Disability for further disciplinary action.

The justices of the Supreme Court, on the other hand, have long been overlooked in judicial oversight proceedings. Should one be accused of wrongdoing – maybe a justice heard a case despite a financial interest or made injudicious public comments – there are no protocols through which a justice may be removed from a case or otherwise censured. If, for example, a litigant brings a motion for a justice to recuse, it's the justice himself or herself who decides if that motion is reasonable.

Impeachment is essentially the only disciplinary tool. That such a high and solitary bar exists renders it ineffective as a deterrent.

Fix the Court believes our nation's highest court is missing a critical component of our nation's checks and balances and supports congressional efforts to implement oversight protocols within the Supreme Court.



Should members of Congress make an ethics-related mistakes, there is someone in place to catch them. That's not the case for Supreme Court justices like Thomas and Breyer (pictured above).



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TRAVEL¹

All top federal officials must make public every trip they take for which they were reimbursed more than \$350 for food, lodging, travel expenses. Yet while that is essentially all the Supreme Court justices must report, officials in the other branches have many additional reporting requirements regarding their travel, as well as restrictions on whom they may accept travel from.

Both before and after they take privately-funded trips, members of Congress and their staffs are required to fill out a series of forms, which include the name of the sponsors, other attendees, other invitees and a full agenda of the trip, among other details, nearly all of which may be made public.

Legislative branch officials are also subject to a series of restrictions regarding who may sponsor a trip and how long a member may stay. If a trip sponsor is a private entity that retains lobbyists, a trip may only last one day and night; if the sponsor does not retain lobbyists, the trip may last a week. For domestic travel, a trip may only last three days in the Senate and four days for the House.

Similarly, top executive branch officials are only allowed to be reimbursed for travel once their agency is satisfied that such travel is in service of their official duties. Officials are required to fill out semiannual reports of reimbursements from non-federal sources that describe the nature of the trips they have taken during the previous six months and who paid for them.

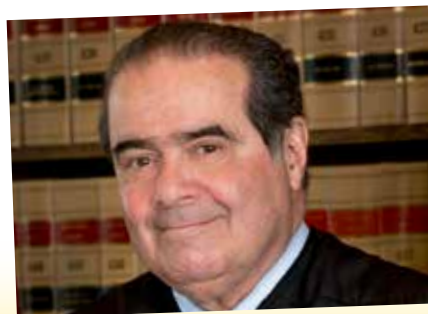
Federal judges – but not Supreme Court justices – must get pre-approval from the Administrative Office of U.S. Courts should private entities wish to pay a judge's expenses in connection with certain types of seminars. The AO publishes a periodic list of these seminars and a list of the sponsors online.

A justice could take a trip in, say, February 2016 – without having to obtain any internal approval – and the public would not know about it until his 2016 financial disclosure report is released to the public in summer 2017 – nearly a year and a half later. (Or, if you're Justice Scalia, you would never have to report it, since custom is that the estates of deceased filers do not submit disclosure reports posthumously.)

In fact, the public would likely not have known about that very trip had Scalia not passed away during it. If a justice leaves D.C. on privately-funded travel, there's no backstop through which the public can be confident the trip would be reported.

Fix the Court would like to see that changed, so we submitted a FOIA request to the U.S. Marshals Service in May 2016 asking for details about the trips on which marshals accompanied justices in the past year. We were initially quoted an exorbitant fee to gain access to this information so went back to USMS to narrow our request, sent in a check and, as of this writing, are still awaiting a response.

Had Justice Scalia not passed away on his privately-funded February trip, it's possible the public would never had known about it.



1. If you work in the legislative or executive branch and are reading this report, this will likely be the most frustrating section.





CODE OF CONDUCT

While there are a number of statutes that generally guide conduct across the federal government, each branch supplements these laws with a code of conduct. In the federal judiciary, it's called the Code of Conduct for U.S. Judges, and while it does not technically have the force of law, it is something that all non-Supreme Court federal judges aspire to follow.

Legislation that would require the justices to follow this code or to create their own, as has been introduced in each of the three previous sessions of Congress, highlights the role Congress can play to ensure the court adheres to the same type of ethics policies that nearly all other top government officials follow.

The Supreme Court has chosen to remove itself from the type of oversight, ethics and disclosure policies that nearly all other top government officials are required to follow. Whatever reasoning the justices may have had for such exemptions no longer passes muster.

Efforts to create a code of conduct, to more closely monitor the justices' potential conflicts of interest and to ensure greater oversight are worthy causes at a time when the high court – more than the other branches – is deciding the most controversial issues in our public discourse.

CONCLUSION

Finally, it is important to point out that Fix the Court believes that efforts to correct some of the above disparities on ethics, disclosures, travel and finances should be apolitical.

Removing the unnecessary disparity between the rules adhered to by the justices and those followed by officials in the other branches has no inherent partisan bent, and no one party would benefit from enacting these improvements.

Of course, Chief Justice Roberts tomorrow could implement all of the reforms mentioned in this report, but we are fairly confident he won't. So the ball rests in Congress's court.

2. Though Fix the Court has often stated that federal judges are "bound" to follow the code, it's more akin to how doctors are "bound" to follow the Hippocratic Oath than, say, how judges are, in fact, bound to follow the recusal statute, 28 U.S.C. §455.



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