"Building Confidence in the Supreme Court Through Ethics and Recusal Reforms"

Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary

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Oral Testimony of Gabe Roth, Executive Director of Fix the Court

Chairman Johnson, Ranking Member Issa and Members of the Subcommittee:

Back in 2016, a Supreme Court justice failed to recuse in a major patent case despite owning up to $250,000's worth of shares in one party's parent company. That same year, a different justice attended a $500-per-plate dinner in Texas with finance, legal and oil executives. Another justice that year omitted from her financial disclosure the fact that a public university paid for as many as 11 rooms for her in one of the state's fanciest hotels.

In 2019, in the Supreme Court building, two justices met with the head of an organization that had submitted amicus briefs in three then-unresolved cases. Later that year, two justices failed to recuse in a case involving their book publisher, though the two had earned $3.5 million combined from that company.

In 2020 a justice failed to recuse in a case concerning the constitutionality of a federal law that she likely worked on a legal strategy to defend in her previous job. And last year, a justice had dinner with a prominent politician and a dozen of his friends and then gave a speech — with that politician at her side — in which she said the Supreme Court, quote, "is not comprised of a bunch of partisan hacks."

These are just a handful of examples of Supreme Court justices flouting basic ethics rules in the handful of years that my organization, Fix the Court, has existed. I have dozens more in my written statement.

And none of the justices just referenced was Clarence Thomas.

When asked over the years about how they confront questions of ethics, the justices say they look to precedent or scholarly articles or seek advice from their colleagues. But which precedents, which articles and which colleagues? That there is not a single, definitive source the justices use for guidance means they'll be more likely come to different conclusions about their ethical obligations.

This era of the nine justices operating, as has been said, like nine independent law firms must end.

It shouldn't be the case that about half the justices accept flights on private planes paid for by big-time political benefactors, while the rest stick with business or coach, or that two justices leave free trips off their annual financial disclosure reports, while the rest are filing accurately, or that three justices trade individual stocks — and are unable to participate in some cases because of it — when the rest do not, or that two justices recuse in cases involving the work of a family member, but two justices do not recuse when faced with similar circumstances.

For these reasons and more, we need a formal, written Code of Conduct for the Supreme Court of the United States.

But a Code is not a panacea. The rules governing recusal must also be expanded to reflect modern times.

If a justice's spouse was paid a quarter million dollars at the time her employer filed an amicus brief on a major case, that justice shouldn't hear the case. If a justice received lavish gifts and was flown around the country by individuals and organizations funding merits and amicus briefs, there should be recusals in those cases. If a justice's wife's communications with a third party are subject of a congressional investigation, and the Supreme Court is asked to rule on the validity of that investigation, the justice should recuse.

The current recusal law says, among other things, that a judge or justice must recuse when, quote, "his impartiality might reasonably be questioned." I am a reasonable person. And I question Justice Thomas' impartiality in each of the examples I just mentioned and, sadly, in many more.

But I'll grant that the "reasonable person" standard might be a little vague. Congress can do better. We need a law to ensure judges and justices take the proactive step of informing themselves of every personal interest and every financial interest of theirs and of their spouse's that could be impacted by the outcome of a proceeding. They should recuse when those who financially backed their confirmation appear as litigants. And when they're given a free trip, there should be a "cooling off" period afterwards — take that trip, but then wait a few years before you participate in a case involving the sponsor.

All the reforms I've discussed — a formal ethics code, a more exacting branchwide recusal standard and a "cooling off" period — are in the 21st Century Courts Act of 2022 that was introduced earlier this month.

Why do we need this bill? Because time and again we see that, left to their own devices, the justices will do nothing to improve their policies and build a more modern, trustworthy institution. Despite all the ethical lapses I've mentioned, the justices have not lobbied for any new laws, nor have they put any new accountability measures in place.

Finally, this hearing is not the first attempt at fixing the judiciary's ethical lapses. The campaign to improve the recusal law and impose an ethics code goes back decades. More recently, in 2018, the full Judiciary Committee unanimously passed a reform bill called the Judiciary ROOM Act. Led by Courts Subcommittee Ranking Member Issa, the bill included a SCOTUS Code of Conduct, a requirement that the justices explain their recusal decisions and a livestreaming requirement.

These elements were carried forward into the 21st Century Courts Act of 2020, and they are included once more in the 21st Century Courts Act of 2022.

It's this spirit of bipartisanship that I pray carries the day — and that I hope we can talk more about in our ensuing discussion.

Thank you again for the opportunity to testify.