

“Undue Influence: Operation Higher Court and Politicking at SCOTUS”

Hearing Before the House Committee on the Judiciary

December 8, 2022

Statement of Gabe Roth, Executive Director of Fix the Court

Chairman Nadler, Ranking Member Jordan and Members of the Committee: thank you for the opportunity to submit a statement for this hearing.

As you know from my testimony earlier this year at a Subcommittee hearing on a similar topic, I am the executive director of Fix the Court, a nonprofit that since 2014 has been advocating for apolitical improvements to judicial transparency and accountability. Though major steps toward reform have been achieved of late — livestreaming at the Supreme Court, online financial disclosures and bills to make PACER free — more needs to be done to build a modern, ethical and exemplary federal judiciary.

The revelation¹ that Justice Alito in 2014 allegedly tipped the result of open case during a social outing highlights deficiencies in SCOTUS’s gift and personal hospitality guidelines and underscores the need for immediate action to strengthen the rules governing the justices’ ethics and extracurricular activities. The leak of the *Dobbs* opinion earlier this year only accentuates the point. Given SCOTUS’s decades-long reluctance to act in this realm, Congress must step in, both on the legislative and investigative fronts.

Ethics Rules Must Be Strengthened

On SCOTUS ethics, though it’s been said time and again, I will repeat here the preposterous fact that lawmakers, business leaders, medical providers and lower federal court judges, to name a few, all must follow an articulated code of ethics, for which there are consequences for noncompliance, yet at the Supreme Court no such code exists.

A formal, written statement of principles that sets behavioral expectations for the justices, and against which the public can measure the justices’ moral aptitude, would give Americans confidence that the nine are discharging their duties, both on and off the Court, with the highest moral character. That the justices now play such a central role in our public and political discourse today only amplifies this need. So does the frequent embarrassment judges elsewhere in the country feel when they see their peers on the high court behaving injudiciously.²

¹ See Jodi Kantor and Jo Becker, “Former Anti-Abortion Leader Alleges Another Supreme Court Breach,” *New York Times*, Nov. 19, 2022 ([link](#)).

² When I speak to current and former lower court judges about ethics (almost always off the record or on background), I hear their frustration that the Supreme Court is neglecting its responsibilities. Relatedly, earlier this year D.D.C. Senior Judge Reggie Walton said it’s “unimaginable that we have a segment of our federal judiciary that’s not subject to an ethics code; see Nate Raymond, “Federal judge takes rare step of backing U.S. Supreme Court ethics code,” Reuters, May 26, 2022 ([link](#)). See also, Ed Cohen, “Almost all judges believe Supreme Court justices should be subject to an ethics code,” National Judicial College, June 21, 2022 ([link](#)), reporting the results of NJC’s “Question of the Month,” e-mailed to 12,000 alumni (both federal and non-federal judges),

Even with recent attention focused on Justice Alito and earlier this year on Justice Thomas, it is important to note that every justice has committed ethical errors in the past few years.³ In fact, public discussion about the justices' ethical blind spots has been a part of every era of American history (e.g., Chief Justice John Marshall should have recused in *Marbury v. Madison* since he was involved in not delivering Marbury's commission).

In the modern era, an ethics scandal over the acceptance of outside income led to the 1969 resignation of Justice Abe Fortas, and a similar ethics issue nearly forced Justice William Douglas off the bench.⁴ Congress responded with all sorts of proposals to improve judicial integrity in the years that followed: some that became law, like the 1978 Ethics in Government Act, which requires justices and lower court judges to file annual financial disclosure reports; and others that did not, like a 1977 proposal⁵ that would have created a Commission on Judicial Disabilities and Tenure to determine upon request whether a justice or judge has failed to serve with good behavior. In other words, inaction today would be ahistorical.

In the aftermath of Justice Ginsburg's injudicious comments about then-candidate Donald Trump, and Justice Scalia's death in an \$700-per-night room that he did not pay for, which was furnished by a recent SCOTUS litigant, the House Judiciary Committee Chairman Bob Goodlatte, along with former Committee Chairman Lamar Smith and then-Courts Subcommittee Chairman Darrell Issa, all Republicans, drafted a bill in consultation with their Democratic colleagues called the Judiciary ROOM Act⁶ that would have had the Judicial Conference of the U.S. write an ethics code for all levels of Article III, including the Supreme Court. The bill passed out of Committee on Sept. 13, 2018, without a single "no" vote, though it expired before floor action could commence.

Sadly, that experience did not compel the Court of its own volition to write an ethics code. Luckily, this Congress the Supreme Court Ethics, Recusal and Transparency Act⁷ was introduced, and it includes a similar ethics provision (though much to my chagrin it's a Democrats-only bill⁸). Its Section 2 states, "Not later than 180 days after the date of enactment of this section, the Supreme Court of the United States shall, after appropriate public notice and opportunity for comment [...] issue a code of conduct for the justices of the Supreme Court." Here, the justices, not the Judicial Conference, would be the ones

which asked, "Should U.S. Supreme Court justices be bound by a code of ethics?" More than 97 percent of the 859 judges who responded answered "yes."

³ This even includes the newest justice. This fall Justice Jackson failed to recuse from a petition despite a financial interest in a party. She remains a registered voter with a political party. And she noted in her nomination documents earlier this year that from time to time she's failed to list some of her husband's outside income in her disclosure reports. A full accounting by Fix the Court of the justices' recent ethical lapses — more than six dozen over the past decade — is available [here](#).

⁴ See Andrew Glass, "Abe Fortas resigns from Supreme Court, May 15, 1969," *Politico*, May 14, 2017 ([link](#)).

⁵ The Judicial Reform Act of 1977 (H.R. 9042; 95th Congress) ([link](#)).

⁶ The Judiciary ROOM of 2018 (H.R. 6755; 115th Congress) ([link](#)).

⁷ The Supreme Court Ethics, Recusal, and Transparency Act of 2022 (H.R. 7647; 117th Congress) ([link](#)).

⁸ It's worth noting that the Courthouse Ethics and Transparency Act (Public Law 117-125) — a bill President Biden signed two days after H.R. 7647 passed through the Committee, which requires the judiciary to post federal judges' and justices' annual disclosures and periodic stock transaction reports online — was a 100 percent bipartisan effort in both the House and Senate, led by Reps. Deborah Ross (D-N.C.) and Darrell Issa (R-Calif.) and Sens. Chris Coons (D-Del.) and John Cornyn (R-Tex.).

to write their own code, albeit with some prodding from Congress to get the ball rolling. As you know, the bill passed out of Committee in May and awaits floor action.

Taking a step back, I would argue that Congress imposing a requirement that the justices write an ethics code is less burdensome than the justices filling out a financial disclosure report each year, which lists all their reimbursed travel, outside income, financial investments, major debts and more. (They do that each year without issue.) A code already exists for the lower courts that SCOTUS could use as a starting point; they say they “consult” it after all.⁹ The justices in their code would likely remove some sentences to reflect their nonfungibility and add a section that more clearly lays out how they would handle recusals, gifts, travel and personal hospitality, but overall, this is not only a much needed project but also a very doable one.

What’s more, the Court would have the public behind this effort, as a May 2022 *Politico*/Morning Consult poll¹⁰ found 67 percent of Republicans and 81 percent of Democrats support the justices having a “binding [...] code of ethics.”

Frankly, if the justices can’t be bothered to write an ethics code, maybe Congress shouldn’t bother giving the nine \$122 million in discretionary spending for the coming fiscal year.¹¹ That might sound like a drastic step, but Congress attaching strings to a nine-figure appropriation is not uncommon, and in the realm of strings, an ethics code is more twine than suspension bridge cable. In fact, one leading Senate Appropriations Committee member is already considering this option.¹²

Regulations on Extracurricular Activities Must Be Strengthened

It’s not just the lack of an ethics code that recent events have brought into stark relief, though. The *Times*’ Nov. 19 report indicates that not only did Justice Alito allegedly share the results of *Hobby Lobby* with a wealthy couple he and his wife had befriended but that the same couple took the Alitos to their vacation home near Jackson Hole, Wyo. — a trip that never appeared on an Alito disclosure report. If, per a Nov. 28 letter¹³ from Supreme Court Legal Counsel Ethan Torrey, Alito’s acceptance of this trip from people clearly seeking to impact the outcome of a SCOTUS case “[didn’t] violate ethical standards,” then those standards need to change.

Luckily, more exacting standards already exist — in the halls of Congress. According to Rule XXV, clause 5, of the Rules of the House of Representatives (117th Congress), “a Member [...] may not accept a gift the value of which exceeds \$250 on the basis of the personal friendship exception [...] unless the Committee on Ethics issues a written determination that such exception applies.” Here, the definition of

⁹ See generally Chief Justice Roberts’ 2011 Year-End Report on the Federal Judiciary ([link](#)).

¹⁰ See “Crosstabulation Results,” Morning Consult | *Politico* National Tracking Poll #2205036, May 6-9, 2022, p. 189 ([link](#)).

¹¹ Here’s the math: the Court requested \$143.6 million for FY23 ([link](#)). Taking out \$2.5 million for justices’ salaries and \$19 million for the salaries of the Supreme Court Police Department, assuming a staff of 190 and \$100,000 in compensation per SCPD staff, that leaves \$122 million in discretionary spending.

¹² See Katie Barlow, “Lawmakers urge action after report of other SCOTUS leak,” Fox 5 D.C., Nov. 21, 2022 ([link](#)): “Maryland’s Democratic Senator Chris Van Hollen chairs the appropriations subcommittee that oversees the Supreme Court’s budget. He says they are prepared to look at all options including tying conditions to the court’s funding if they can’t pass a law requiring a code of conduct.”

¹³ The letter has been posted [at this link](#).

a gift is “a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.” Nearly identical rules exist in the Senate.

Section 3 of the aforementioned Supreme Court Ethics, Recusal and Transparency Act would require the Court to abide by gift, travel and personal hospital rules that are at least as strict as those for members of Congress.¹⁴ And it envisions the role of ethics ombudsman to be played by the Counselor to the Chief Justice, a statutory officer that under 28 U.S.C. §677 may be delegated this type of advisory role. A justice might ignore the advice of the Counselor, of course, but at least there would be a written record about such a trip, on which Congress could follow up as needed.

It’s important to point out that the use of the personal hospitality exemption to the gift- and travel-reporting rules is not a new phenomenon, nor is it something a single justice has availed himself or herself of in the recent past. From FOIA requests that Fix the Court sent to the U.S. Marshals Service in 2016 and 2018, we found that justices in 2015, 2016 and 2017 took trips to cities where we know they have friends that were not accounted for in their annual disclosure reports. It’s possible, of course, that the justices paid for these trips themselves.¹⁵ But it’s far more likely that at least some of them received free transportation, lodging or meals, of which no formal record exists.

There’s nothing wrong with the justices having friends, but, for example, a neutral party should have been consulted about Justice Scalia’s plans to stay at the Mississippi governor’s mansion at a time when the state was party to a lawsuit seeking to strike down the Affordable Care Act,¹⁶ and when, just months after the Court denied *cert.* in a patent case that preserved a lower court win for Amdocs and its founder Morris Kahn, Justice Ginsburg was the guest of Kahn on a free trip to Israel and Jordan.¹⁷ These appearances of impropriety are apparent.

Congress Must Step in Given the Court’s Decades-Long Reluctance to Act

Finally, and this is for those who pay lip service to separation of powers when someone proposes a policy for the judiciary that they don’t like, here are the facts: Congress has broad authority to legislate institutional policies in the third branch, including in the Supreme Court — everything from where and when they meet to what types of cases they take to how much money they spend on landscaping the Court grounds — and given the justices’ reluctance to moderate their behavior, or even acknowledge that ethics issues exist, Congress has the responsibility to set them straight.

¹⁴ In 2019 there was a bipartisan effort in the House, in a bill called the Judiciary Travel Accountability Act (see. H.R. 4715; 116th Congress), to require the justices and the rest of Article III to follow the same gift, travel and personal hospitality as members of Congress — another example of judicial oversight not being a traditionally partisan issue.

¹⁵ You can see how many of the marshal-covered trips do not appear on their annual financial disclosures by consulting the FOIA documents Fix the Court has posted [at this link](#) and the annual financial disclosure documents posted [at this link](#).

¹⁶ See Stephen R. Bruce, “‘Any Good Hunting?’: When a Justice’s Impartiality Might Reasonably Be Questioned,” Oct. 5, 2016, p. 24 ([link](#)).

¹⁷ Although Justices Ginsburg’s trip did appear on her 2018 disclosure report ([link](#)), under current practices there is no one inside the Court apparatus who checks whether such a trip might violate best practices in judicial ethics, which it clearly does.

It might surprise you that in the modern era, Chief Justices of the United States have emphasized ethics as part of their role as chief administrator of the Court itself and of the entire judicial branch. For example, a month after the Fortas resignation, Chief Justice Warren Burger called a special session of the Judicial Conference to address judicial ethics and laid out a broad plan for improvement that included capping extrajudicial compensation, requiring financial disclosure, strengthening the codes of conduct and permitting stronger enforcement of ethics rules.¹⁸

In 1991, as a bill strengthening gift- and travel-reporting requirements for Congress and the executive branch was going into effect, Chief Justice William Rehnquist released a memo,¹⁹ with his colleagues' blessing, stating that although the new law didn't apply to SCOTUS, the justices would nonetheless follow its requirements. (That policy remains in effect.)

Two years later, with two new justices having just joined the Court, bringing the number of justices with attorney-spouses or attorney-children to seven, Rehnquist released a second memo²⁰ on recusal policy that discussed the situations in which a justice would, or would not, step aside from a case or petition given the involvement of a family member or their firm. (That policy also remains in effect.)

The Roberts era has seen no shortage of ethics scandals,²¹ yet in contrast to his predecessors, one finds scant examples of the current Chief Justice working to improve to the status quo. In 2017, Roberts did establish a Working Group on Workplace Conduct in response to the Judge Kozinski harassment scandal, which advocates maintain, including before this Committee earlier this year,²² has not yielded satisfactory results. And in 2019, though Justice Kagan told a congressional committee²³ that the Chief Justice was "studying the question of whether to have a code [of conduct...] that's applicable only the United States Supreme Court," no such code, nor even a draft of such a code, has materialized.

Hoping that the latest scandals will compel the Chief Justice to act does not cut it. The Committee must push House Leadership to bring the Supreme Court Ethics, Recusal and Transparency Act to the floor before the lame-duck session ends.

The Supreme Court Historical Society Must Be Investigated

Finally, what is going on at the Supreme Court Historical Society? The *Times*' Nov. 19 story describes in detail the way in which Society donors were using it as a conduit to try to influence the justices. It's clear why: no other institution in American life features a justice or justices at their annual dinner besides

¹⁸ See Andrew J. Lievens and Avern Cohn, "The Federal Judiciary and the ABA Model Code: The Parting of the Ways," *Justice System Journal*, Volume 43, Issue 3, 2007 ([link](#)).

¹⁹ See "Resolution," Supreme Court of the United States, Jan. 18, 1991 ([link](#)).

²⁰ See "Statement of Recusal Policy," Supreme Court of the United States, Nov. 1, 1993 ([link](#)).

²¹ See link at the end of fn 3.

²² See generally "Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change," Hearing before the House Judiciary Committee's Subcommittee on Courts, IP and the Internet, Mar. 17, 2022 ([link](#)).

²³ See "User Clip: Kagan Says Chief Justice 'Studying' Question of SCOTUS Ethics Code," C-SPAN, Mar. 7, 2019 ([link](#)).

SCHS,²⁴ and the justices have been known to attend or speak other Society events that occur throughout the year, most of which take place in the Court building itself.

What benefit does one receive when joining the Society's Board? Its "John Marshall Circle" (besides a "limited edition Constitution Box [with] an interior fitted with velvet fabric and trim that were part of the draperies that formerly adorned the [SCOTUS] Courtroom"²⁵)? Proximity. Though it's likely we may never know if an attorney or business leader or other individual donating to the Society and participating in its events changed justices' views or votes in any given case, that point almost doesn't matter, since the perception problem is so clear.²⁶

Frankly, the argument in favor of the Society's perpetuation is flimsy at best. The Library of Congress can handle any archival materials the Society possesses. Staff hired by the Court can run the gift shop in place of those hired by the Society. The offices of the Marshal and the Clerk office can organize lecture series. Other Society milestones²⁷ since its 1974 founding do not vouch for its continued existence, especially if, as it appears, it's being used for access.

Conclusion

There are plenty of reasons for Congress to act now to improve ethics and related regulations at the Supreme Court (and investigate its favored nonprofit). Waiting for the immediacy of the recent SCOTUS scandals to subside would be not a responsible strategy.

As Sen. Kenneth Keating (R-N.Y.) said after a major scandal rocked the Senate in the early 1960s, "It always seems to require prodding from some unfortunate experience of some kind to ensure action."

With there having been a host of "unfortunate experiences" regarding judicial ethics at the Supreme Court these last few years, Congress can't wait to act.

Thank you again the opportunity to share this statement.

²⁴ See the Society's list of "Annual Lecture Speakers" ([link](#)). See also "The Daily" (a *New York Times* podcast), "A Secret Campaign to Influence the Supreme Court," Nov. 29, 2022 ([link](#)). According to interviewee Rev. Rob Schenck, "At [Supreme Court Historical Society] events, often all nine justices would enthusiastically participate."

²⁵ See "Membership in the Society," Supreme Court Historical Society ([link](#)).

²⁶ Is it coincidence the general counsel of General Dynamics is a Society board member at a time when the company's IT division signs a five-year, \$298 million contract with the judiciary ([link](#))? What other connections exist between the Board and the work of the third branch? These are questions worth asking.

²⁷ For example, in the early 2000s the Society extensively ([link](#)) and successfully lobbied Congress to pass a law to mint John Marshall silver dollars, the proceeds of which, as much as \$4 million, went to the Society's coffers; see Public Law 108-290.