

“An Ethical Judiciary: Transparency and Accountability for 21st Century Courts”

Hearing Before the Subcommittee on Federal Courts, Oversight, Agency
Action, and Federal Rights of the Senate Committee on the Judiciary

May 3, 2022

Written Statement of Gabe Roth, Executive Director of Fix the Court

Chairman Whitehouse, Ranking Member Kennedy and members of the Subcommittee:

Thank you for the opportunity to provide a written statement.

Today’s hearing marks the latest effort in what has been a lengthy nonpartisan campaign to bring greater ethics, transparency and accountability to the U.S. Supreme Court and to the federal judiciary as a whole. Before turning to the recently introduced legislation (S. 4010 and H.R. 7426, the 21st Century Courts Act of 2022), I would like to recap some of my own experiences in this work over the last decade.

In 2013, a year before I started Fix the Court, I helped run a panel event¹ at the National Press Club titled “Supreme Court Transparency.” What the panelists said that day has stayed with me ever since. After a round-robin discussion on cameras in the Supreme Court, the moderator, reporter Tony Mauro, pivoted to what other concerns the panelists might have with the Court’s openness or lack thereof. They had a lot to add. Chief Justice of Ohio Maureen O’Connor said that SCOTUS’s self-professed “exceptionalism” should not make them exempt from basic measures of transparency. Former D.C. Circuit Judge and U.S. Solicitor General Ken Starr Starr noted, that, contrary to the ethics code that applies to judges in the lower courts, there was no Supreme Court Code of Conduct, which, if one existed, might help the justices navigate their ethical responsibilities. Former Acting U.S. Solicitor General Neal Katyal said that the federal recusal statute could use some clarification. Mauro even asked this question to the panelists: “How can Congress help move toward more transparency in the Supreme Court?”

The next year, I started my organization, Fix the Court, but I set out on a strategy where I pushed the Supreme Court and the lower courts to open up without congressional intervention. Despite my many letters to the justices and the Judicial Conference, meetings and calls with federal judges and circuit executives, hosting events at the justices’ alma maters, staging protests at One First Street and other related activities, it became clear that the judiciary was not going to modernize itself.

So I enlisted the help of lawmakers, primarily focusing on the Senate Judiciary Committee. In 2018 I worked with Republican and Democratic staff to request same-day audio in *Trump v. Hawaii*, to which Chief Justice Roberts agreed.² Last year, I provided research to Republican and Democratic staff for a letter asking that the justices strengthen their ethics standards and adopt gift, travel and personal hospitality rules that mirror those in the Executive Branch and Congress.³ This year, I worked with Republican and Democratic staff on a bill, the

¹ See “Supreme Court Transparency,” C-SPAN, Oct. 25, 2013, available at <https://www.c-span.org/video/?315864-1/supreme-court-transparency>.

² See “Following Hirono, Cruz Request, Supreme Court Approves Release of Same Day Audio in *Trump v. Hawaii*,” April 16, 2018, available at <https://www.hirono.senate.gov/news/press-releases/following-hirono-cruz-request-supreme-court-approves-release-of-same-day-audio-in-trump-v-hawaii>.

³ See “Whitehouse, Graham Call on Federal Judiciary to Strengthen Judicial Ethics Standards,” Feb. 17, 2021, available at <https://www.whitehouse.senate.gov/download/whitehouse-graham-letter-on-judicial-ethics>.

Courthouse Ethics and Transparency Act,⁴ to require judges and justices post their annual financial disclosure reports online and file the same stock transaction reports that members of Congress must file.⁵ I'm pleased to say this legislation is about to be signed by President Biden.

The courts are not going to fix themselves. But the 21st Century Courts Act of 2022 can be the next chapter in bringing greater transparency and accountability to the courts in a measured, bipartisan manner.

The bill's key provisions would finally require the justices to write a Code of Conduct. It would modernize the recusal statute by updating and refining what constitutes a conflict of interest that requires recusal. It would require judges and justices to take the proactive step of informing themselves of the personal and financial interests of their spouses (and of themselves) and do a better job of discerning whether they or their spouse has any interest that could be impacted by the outcome of a proceeding. And the bill requires a "cooling off" period post-perk, so if you're a judge or a justice, and you've accepted a free trip or a gift by a litigant or amicus, you must wait a few years until you participate in a case involving the benefactor.

I am pleased that the Senate Judiciary's Courts Subcommittee is holding a hearing on this bill, and I was privileged to testify before the House Judiciary's Courts Subcommittee on the topic last week. What I heard on the House side, though, was a bit of a non-sequitur.^{6,7} Rather than lauding or criticizing a single judge or justice (*see generally* Appendix A, which describes ethics lapses of the justices appointed by Republican and Democratic presidents alike), I hope that on the Senate side the fact that clarifying judicial ethics rules and recusal rules has never been a partisan issue will be remembered.

A productive tone can and should be struck — as it was in the Cruz-Hirono request, the Whitehouse-Graham letter and Cornyn-Coons bill noted above.

In 2013, I didn't know the answer to "How can Congress help move toward more transparency in the Supreme Court?" But nearly a decade later, I know that to rein in the most powerful, least accountable part of our federal government, we must pass the 21st Century Courts Act.

⁴ S. 3059 (117th Congress)

⁵ This is a good example of how the Supreme Court and the lower courts could have become more transparent but instead opted to stonewall. It's been 11 years since the STOCK Act became law. Unfortunately, the judiciary was excluded from the section that requires members of Congress to file periodic stock transaction reports (PTRs) and post their annual disclosures online. Since then, and even after a 2021 *Wall Street Journal* investigation found 131 federal judges broke the law by participating in 685 cases in which they had a financial interest in a party, did the judiciary implement a pro-accountability fix, like a PTR or online disclosures requirement? No. So Congress had to step in, and we'll soon have a law that corrects this. The parallels with the 21st Century Courts Act should be obvious.

⁶ *See, e.g.,* Erskine, Ellena, "Republicans call ethics hearing a double-standard; Democrats call for a standard," SCOTUSblog, Apr. 28, 2022, available at <https://www.scotusblog.com/2022/04/republicans-call-ethics-hearing-a-double-standard-democrats-call-for-a-standard>.

⁷ For examples of how judicial accountability work has been bipartisan through the years, *see* "Members of Congress Criticize Lack of Transparency in the Judicial Branch," Fix the Court, July 6, 2016, available at <https://fixthecourt.com/wp-content/uploads/2016/07/Hearing-in-HJC-subcommittee-FTC-highlights-7.6.16-1.pdf>, and *see* "House Panel Blasts Lack of Transparency in Federal Judiciary," Fix the Court, Feb. 14, 2017, available at <https://fixthecourt.com/wp-content/uploads/2017/02/Key-quotes-from-HJC-hearing-2.14.17.pdf>.

See also, "The Federal Judiciary in the 21st Century," hearing before the House Judiciary's Courts Subcommittee, June, 21, 2019, at which then-House Judiciary Committee Ranking Member Doug Collins noted, "I would like to work with the Chief Justice to adopt a [Supreme Court] Code of Conduct that accounts for the unique realities of being a Supreme Court justice while maintaining appropriate public accountability," available at <https://www.youtube.com/watch?v=BBiWeN-uSqM&t=4899s>.

Appendix A: Recent Ethical Lapses by Supreme Court Justices

These lapses were compiled by Fix the Court staff in March and April 2022. They are listed by a justice's seniority, then in chronological order. They comprise mostly those that have occurred since FTC's founding in 2014. Citations were omitted for ease of reading but are available on FixTheCourt.com.

Current justices:

Chief Justice John Roberts

— Failed to recuse in 14-972, *ABB Inc., et al. v. Arizona Board of Regents, et al.* (cert. denied), despite owning shares in Texas Instruments stock, a party on the ABB side. (2015)

— Initially failed to recuse in a merits case, 14-1538, *Life Technologies Corp. v. Promega Corp.*, despite owning shares in Thermo Fisher Scientific, which owns Life Technologies; did recuse after the error was brought to his attention after oral argument. (2016)

— Failed to recuse in 17-1287, *Marcus Roberts et al. v. AT&T Mobility* (cert. denied), despite owning shares in Time-Warner, which had merged with AT&T. (2018)

Justice Clarence Thomas

— Accepted private plane rides and gifts, including a bible once owned by Frederick Douglass valued at \$19,000, from financier Harlan Crowe. Crowe also donated \$500,000 to help Ginni Thomas establish Liberty Consulting in 2011, a platform she used to lobby against laws like Obamacare that were before the Court; gave \$175,000 to a library in Savannah to name a wing after Thomas; and raised millions to build a museum in Thomas' hometown of Pin Point, Ga. (multiple years)

— Attended a Koch Industries-backed retreat in Palm Springs, Calif., at a time in which Koch was bankrolling several litigants with cases before the Supreme Court. (2008)

— Name was used in promotional materials for the nonprofit NRA Foundation, which stated its 2009 National Youth Education Summit included “exciting question and answer discussions with [the] wife of Supreme Court Justice Clarence Thomas.” (2009)

— Was found to have omitted data on five years of Ginni's employment (2003-07), where she earned \$686,589 from the Heritage Foundation, from his annual financial disclosures. (2011)

— Attended the annual Eagle Forum conference, which, at up to \$350 a head, may have been a fundraiser. Ginni Thomas used the justice's appearance as a fig to increase attendance, urging in promotional materials that prospective attendees come to hear “my amazing husband.” (2017)

— Participated in 17-965, *Trump v. Hawaii*, though Ginni earned more than \$235,000 total in 2017 and 2018 from the Center for Security Policy, whose founder Frank Gaffney signed an amicus brief in the case. (2017-18)

— Prominently displays in his Court chambers a photo of Vice President Mike Pence's swearing-in, which Thomas presided over, that's signed by Pence. (2017-present)

— Omitted from his financial disclosure report the reimbursements for transportation, food and lodging he received from Creighton University School of Law, where he taught that year. After FTC's report on justices' lavish trips was released in 2020, amended his report, though the amendment wasn't made public until 2022 (2017-22)

— Omitted from his financial disclosure report the reimbursements for transportation, food and lodging he received from the law schools of the University of Kansas and the University of Georgia, where he taught that year. After FTC's report on justices' lavish trips was released in 2020, amended his report, though the amendment wasn't made public until 2022. (2018-22)

— Documentary about his life financed by several groups, including the Koch Foundation, Judicial Education Project and Scaife Foundation, that were funding Supreme Court litigants and amici around the time the film was produced and released. (2019- 2020)

— Failed to recuse in any of the 2020 election petitions that reached the Supreme Court, even though it is likely Ginni had an “interest,” cf., 28 U.S.C. §455(b)(5)(iii), in the outcome of the election, seeing as how her publicly released text messages and social media and listserv posts show she was actively working with high-level Trump administration officials to subvert and overturn its results. (2020-2021)

— May have been in contact with Fla. Gov. Ron DeSantis possibly around the time in which Florida was a respondent in 21A247, *Ohio v. OSHA, et al.*, over the federal test-or-vax mandate. (2021)

— Failed to recuse in the petition 21A272, *Trump v. Thompson*, over the Jan. 6 Committee’s access to documents related to the insurrection, even though Ginni signed a letter in December denouncing Committee’s very existence, and it’s likely documents that indicate her involvement to invalidate the election results will be turned over to the Committee. (2022)

— Is participating in 20-1199, *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, even though Ginni sits on the board of the National Association of Scholars, which filed an amicus brief in the case. (2022)

— Name is being used on third-party website, JusticeThomas.com, at the bottom of which is written “© 2022 · Justice Clarence Thomas.” Though the domain name was purchased by Domains By Proxy, LLC, it is unlikely that Thomas himself maintains it, and it encourages visitors to purchase his memoir. (2022)

— Posed for a photo in a Supreme Court alcove with Herschel Walker, a Senate candidate in Georgia, seven weeks before Walker’s primary election; photo was tweeted out by Walker’s campaign communications director and hasn’t been deleted as of today, April 10. (2022)

Justice Stephen Breyer

— Failed to recuse in merits case 14–840, *FERC v. EPSA*, despite owning shares in Johnson Controls, a party on the EPSA side. Breyer learned about the conflict the day after oral argument and sold the stock. (2015)

— Attended a \$500-per-plate dinner at the University of Texas at Arlington with finance, legal and oil executives ahead of his talk at the school. The high price suggests the event was a fundraiser. (2016)

— Along with Alito, failed to recuse in 18-6644, *Feng v. Komenda and Rockwell Collins, Inc.* (cert. denied), though he owns shares in Rockwell’s parent company, United Technologies Corp. Said he had “no way of knowing” about the conflict since Rockwell didn’t file a response, which is spurious reasoning. (2019)

— While asking a question during oral argument in a public charge case, apparently gave away the result in 20-601, *Cameron v. EMW Surgical Center*, where Ky. Attorney General Daniel Cameron asked to intervene to defend a state law when no other governmental representative would defend it. (2022)

— Nothing wrong with justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Justice Samuel Alito

— Failed to recuse in merits case 07-582, *FCC, et al., v. Fox Television, et al.*, despite holding 2,000 shares of Disney stock on behalf of his minor children. ABC, which Disney owns, was a party on the respondents’ side. (2008)

— Failed to recuse in merits case 17-290, *Merck Sharp & Dohme Corp. v. Albrecht*, despite owning shares in Merck. Eventually sold shares and unrecused. (2017-2018)

— Along with Kavanaugh, met with the head of the National Organization for Marriage at the Supreme Court. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC* that were unresolved at the time. (2019)

— Attended Secretary of State Mike Pompeo’s taxpayer-funded Madison Dinner with other politicians and GOP donors. (2019)

— Along with Breyer, failed to recuse in 18-6644, *Feng v. Komenda and Rockwell Collins, Inc.* (cert. denied), though he owns shares in Rockwell’s parent company, United Technologies Corp. (2019)

— Speech to Federalist Society annual convention included discussion on COVID’s impact on religious exercise at a time when cases concerning the topic remained active at the Court. (2020)

— Failed to recuse in 20-6256, *Valentine v. PNC Financial Services, et al.* (cert. denied), where one of the respondents was PNC Bank, whose shares Alito owns. (2021)

— Chillingly, given power imbalance between a justice and a journalist, quoted directly from a journalist’s article on the “shadow docket” in speech attempting to rebut the justices’ increasing use of emergency orders to make impactful rulings. (2021)

Justice Sonia Sotomayor

— Failed to recuse in 12-965, *Greenspan, v. Random House* (cert. denied), even though the respondent, her book publisher, had months before spent tens of thousands of dollars sending her around the country to promote her autobiography. (2013)

— Omitted from financial disclosure that the University of Rhode Island paid more than \$1,000 for her round-trip flight for a commencement speech, as well as up to 11 rooms in one of the state’s fanciest hotels for her, her security detail and possibly some family friends. The trip included a five-car motorcade from the airport, and URI ordered 125 copies of her autobiography for the appearance. (2016)

— Failed to recuse in 19-560, *Nicassio v. Viacom, et al.* (cert. denied), where Penguin Random House was a party on the side of the respondents. By this point, Sotomayor had earned more than \$3 million from her book contracts with PRH since becoming a justice. (2019-20)

— Initially failed to recuse from merits case 19-518, *Colorado Department of State v. Michael Baca, et al.*, despite her close friendship with Polly Baca, one of the respondents. After some months, she did recuse. (2020)

Justice Elena Kagan

— Failed to recuse from several Obamacare merits cases — including 11-393, *NFIB v. Sebelius*; 14-114, *King v. Burwell*; 19-840, *California v. Texas* — even though she was the U.S. solicitor general at the time the White House and her office were crafting the legal defense of the law. (2011, 2014 and 2020)

— Initially failed to recuse in the (argued and reargued) merits case 15-1204, *Jennings v. Rodriguez*, despite her previous work on the case when U.S. solicitor general. Stepped aside when the error was brought to her attention. (2016 and 2017)

— A speech she gave at the University of Wisconsin Law School was part of its Dean’s Summit, which is an annual gathering for those who pledge at least \$1,000 per year to the school. (2017)

— Initially failed to recuse in 19-720, *U.S. v. Briones, Jr.*, a case that was remanded to the Ninth Circuit, even though she had previously participated in an earlier version of this case. (2021)

— Nothing wrong with justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Justice Neil Gorsuch

— Gave a talk at Trump International Hotel in Washington to The Fund for American Studies. TFAS is an associate member of the State Policy Network, whose Illinois-based partner organization was at the time representing Mark Janus in a major union dues case, 16-1466, *Janus v. AFSCME*, that was argued the following year. (2017)

— Failed to recuse in 19-560, *Nicassio v. Viacom, et al.* (cert. denied), where Penguin Random House was a party on the side of the respondents. Gorsuch has earned more than \$650,000 from his PRH book contract since becoming a justice. (2019-20)

— Nothing wrong with justices voting but as of 2020 was a registered Republican. (2020)

— Spoke at a Florida Federalist Society event that was closed to the press and included appearances by Gov. Ron DeSantis and former Vice President Mike Pence. (2022)

Justice Brett Kavanaugh

— Told the Senate Judiciary Committee during his confirmation hearing, “As we all know, in the United States political system of the early 2000s, what goes around comes around,” among other musings. Unclear what this was in reference to. (2018)

— Along with Alito, met with the head of the National Organization for Marriage at the Supreme Court. NOM submitted an amicus brief in the merits cases 17-1618, *Bostock v. Clayton Co.*; 17-1623, *Altitude Express v. Zarda*; and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC* that were unresolved at the time. (2019)

Justice Amy Barrett

— Americans for Prosperity spent more than \$1 million to help get Barrett confirmed, and she did not recuse from the merits case 19-251, *Americans for Prosperity Foundation v. Bonta*. (2021)

— Gave a speech at the McConnell Center at the University of Louisville, standing next to Minority Leader Mitch McConnell, during which she exhorted the public not to view the Court as political. The speech, for which video streaming and video recording were prohibited, was preceded by dinner with Barrett, McConnell and 12 to 15 of the senator’s friends. (2021)

Future justices:

Judge Ketanji Brown Jackson

— Nothing wrong with future justices voting but as of April 10, 2022, was a registered Democrat. (2022)

Former justices:

Justice Ruth Bader Ginsburg

— Likened a Sen. Grassley proposal to create a judiciary inspector general’s office to Stalinism, saying that such oversight “is a really scary idea” that “sounds to me very much like [how] the Soviet Union was.” (2006)

— Was a featured presenter at the 100th anniversary gala of liberal magazine *The New Republic*. Worse, the event was underwritten by Credit Suisse, which earlier in the year was a party in a Court petition. (2014)

— Gave an interview to *The New Republic* in which she offered a dim view of a Texas anti-abortion law, HB2. The law was eventually challenged all the way to the Supreme Court, and Ginsburg did not recuse from the case. (2014-16).

— Performed a same-sex wedding weeks before the Court released its opinion in 14-556, *Obergefell v. Hodges*. (2015)

— Called then-candidate Donald Trump a “faker” with “an ego” in an interview with CNN. Said she couldn’t “imagine what the country would be [like] with Donald Trump as our president” in an interview with the *New York Times*. Later apologized, saying, “My recent remarks [...] were ill-advised, and I regret making them. Judges should avoid commenting on a candidate for public office.” Ginsburg never recused from a case in which President Trump was a litigant. (2016; 2017-2020)

— Accepted a lifetime achievement award from the Genesis Prize Foundation, which came with a \$1 million in prize money that she later donated, though judicial gift regulations cap the value of what may be accepted at \$2,000. (2017)

— Following her Genesis Prize acceptance, was the guest of businessman Morris Kahn on a tour of the Middle East; Kahn had business before the Court the previous year — 17-136, *Openet Telecom, Inc. v. Amdocs* (cert. denied) — which preserved a lower court victory for Kahn’s company (Amdocs) and from which Ginsburg did not recuse. (2017-18)

— Accepted the \$1 million Berggruen Institute prize for philosophy and culture (also donated the money). (2019)

— Nothing wrong with justices voting but as of 2020 was a registered Democrat. (2020)

Justice Anthony Kennedy

— Press reports indicate he spoke to the Trump presidential campaign as the campaign was compiling a list of prospective Supreme Court nominees. (2016)

— Initially failed to recuse in merits case 17-269, *Washington v. U.S.*, despite his previous work on it as a lower court judge. Stepped aside once the error was identified. (2018)

Justice Antonin Scalia

— Voiced his opposition to tribunals for Guantanamo detainees weeks before the Court heard a case on that issue (from which he did not recuse, despite public outcry), saying, “We are in a war. We are capturing these people on the battlefield. [...] War is war, and it has never been the case that when you capture a combatant, you have to give them a jury trial in your civil courts. It's a crazy idea to me.” (2006)

— Attended Koch Industries-backed retreat in Palm Springs, Calif., at time in which Koch was bankrolling several litigants with cases before the Supreme Court. (2007)

— Addressed a closed-door, closed-press event, called a "Conservative Constitutional Seminar," hosted by the Tea Party Caucus. (2011)

— During a speech in Brooklyn, and as he and his colleagues were weighing the very issue, said it’s “truly stupid” the Court would have the “last word” on whether an NSA surveillance program oversteps the bounds of the Fourth Amendment. (2014)

— Flew on a private plane, furnished by John Poindexter, from Houston to Marfa, Tex., to stay for free in a \$700-per-night room on Poindexter’s ranch, where Scalia sadly passed away. Poindexter was a 2015 Supreme Court litigant in 15-150, *Hinga v. MIC Group*, cert. denied; Poindexter’s company, J.B. Poindexter & Co., owns MIC Group. (2015-16)