ARTICLES

SCOTUS House: Can a Supreme Court Ethics Lawyer and Inspector General Help Get this Fraternity under Control?

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ABSTRACT

Today, the United States Supreme Court is immersed in an ethics crisis of unprecedented proportions. Public confidence in the Court is at an all-time low and Congress is considering action. The Court is less likely to police itself than it was over fifty years ago when Justice Abraham Fortas resigned over a scandal that was probably less serious than that facing at least one justice today. This article discusses the Court's recent scandals and explains multiple factors that make the Court prone to ethics lapses, perhaps more so than the other two branches of government. This Article then proposes that a partial solution to the Supreme Court ethics crisis would be to have a dedicated ethics lawyer and an inspector general for the Supreme Court. There are specific ways in which an ethics lawyer and an inspector general should help reverse the factors identified in this Article as obstructing a workable ethics regime at the Court. Congress has the power and responsibility to enact these and other reforms necessary to assure that the Court's justices in their personal conduct uphold their duty to be faithful to the law while holding an office that gives them the power to interpret and enforce the law.

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INTRODUCTION

The power of the Supreme Court has increased dramatically in recent years. The Court has struck down key provisions of campaign finance laws,[1] struck down state gun laws,[2] reversed *Roe v. Wade*,[3] prohibited affirmative action in college admissions,[4] required a president to submit to a grand jury subpoena,[5] and struck down President Biden's executive order forgiving a portion of student loans.[6] In July 2024, the Court fundamentally changed the balance of powers in the federal government by ruling that the president is immune from prosecution for crimes committed while acting within his core constitutional duties.[7] The Court expands the power of the states when the majority of the Justices agree with state laws (abortion)[8] and restricts the power of the states when a majority of the Justices disagree (gun control[9] and affirmative action[10]). This Court is extraordinarily powerful, and its decisions impact our daily lives.

Mark Lemley—in the *Harvard Law Review*—made the credible accusation that the only consistent logic of the Court's opinions is the justices' intent to consolidate their power by weakening Congress, the presidency, and the states whenever they like.[11] There is no sign of the Court's power receding, and broader structural reforms of the Court have floundered. There is little support in Congress or the White House to expand the size of the Court or implement other major changes.[12]

This Article does not address the substance of the Court's decisions. This Article also does not address the Court's "shadow docket" in which the justices decide important constitutional and statutory questions in cases that have not reached final judgment—for example, stays and other injunctions—without full

1. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
2. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).
3. Dobbs v. Jackson Women's Health Ctr., 597 U.S. 215 (2022).
4. Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
5. Trump v. Vance, 140 S. Ct. 2412 (2020).
6. Biden v. Nebraska, 600 U.S. 477 (2023).
7. Trump v. United States, 603 U.S. ___ (2024).
8. *See Dobbs*, 597 U.S. at 231.
9. *See* New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 11 (2022).
10. *See* Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
11. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97 (2022).
12. *See generally* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (2021) (avoiding endorsement of major changes to the Court, including its expansion, but proposing an "advisory code of conduct" for the Court).

briefing and oral argument on the merits.[13] These orders of the Court, sometimes not signed by the individual justices and unexplained, raise serious concerns about transparency and bias.[14]

The focus of this Article is the Court's ethics. Many observers realize that the Court's approach to ethics is badly in need of reform. As discussed in Part I below, the Justices don't acknowledge there is a problem, and some members of Congress support them in this denial,[15] but public opinion of the Court is at an all-time low.[16]

In November 2023, the Supreme Court finally gave in to public pressure and promulgated a new Code of Conduct.[17] The Court's new ethics code, for the most part, replicates the ethics code for other federal judges. There are two gaping holes, however. First, unlike the ethics code for other federal judges, the ethics code has no enforcement mechanism. The justices presumably will enforce it themselves. Second, when releasing the ethics code, the justices said that the Code of Conduct "largely represents a codification of principles that we have long regarded as governing our conduct."[18] In other words, little has changed.[19] That, coupled with an April 2023 statement the Court made reassuring the public

13. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J. L. & LIBERTY 1 (2015).

14. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023). The "shadow docket" can also conceal ethics violations. Justice Thomas participated in a 2022 shadow docket case involving enforcement of a House January 6 Committee subpoena in circumstances where he clearly should have recused. *See infra* text accompanying notes 122–29.

15. On June 21, 2023, the author of this Article testified before the U.S. Senate Budget Committee at a hearing on fossil fuel industry dark money and climate change. Senator John Kennedy (R. LA) used his questioning time to attack this author's prior statements about ethics scandals creating the appearance that the Supreme Court is "bought**."** *See Dollars and Degrees: Investigating Fossil Fuel Dark Money's Systemic Threats to Climate and the Federal Budget: Hearing Before the United States Senate Committee on the Budget*, 118th Cong. (2023), https://www.budget.senate.gov/hearings/dollars-and-degrees-investigating-fossil-fuel-dark-moneys-systemic-threats-to-climate-and-the-federal-budget [https://perma.cc/5G9Z-HD23]; *see also* Richard W. Painter, *How the Supreme Court can get its House in Order*, MSNBC OPINION (May 2, 2023), https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-can-finally-get-house-order-rcna82293 [https://perma.cc/823B-4JBE] (proposing installation of an ethics lawyer and an inspector general at the Supreme Court).

16. *See* Jeffrey Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/2DP6-VXCT] (reporting that only "[t]wenty-five percent of U.S. adults say they have "a great deal" or "quite a lot" of confidence in the U.S. Supreme Court"); Devan Cole, *Supreme Court approval rating declines amid controversy over ethics and transparency: Marquette poll*, CNN (May 24, 2023), https://www.cnn.com/2023/05/24/politics/supreme-court-approval-rating-poll-ethics-marquette/index.html [https://perma.cc/D57D-W8PW].

17. SUPREME COURT OF THE UNITED STATES, STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT (November 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/KS7H-UK39].

18. *Id.*

19. The Code itself reiterates that the justices have been complying with financial disclosure laws binding on other federal judges. "For some time, all Justices have agreed to comply with the statute governing financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment." *Id.* at 8. As discussed later in this Article, see *infra* text accompanying notes 77–96, there have been multiple instances in which some of the justices' financial disclosure filings have been inaccurate.

that they are complying with ethics rules,[20] reveals a lot about how the justices interpret the new ethics code to validate what they have already been doing. This Article will describe only some examples of violations of existing law on financial disclosure, gifts, and recusal. If what's been going on at the Court for the past two decades is compliance with the new ethics code, it's not going to change anything.

Congress is considering steps to oversee Supreme Court ethics. H.R. 7647, the Supreme Court Ethics, Recusal, and Transparency Act of 2022,[21] would require Supreme Court justices to adopt and follow a code of ethics, establish advisory review by appellate court judges, require disclosure of gifts and travel, codify recusal standards, and require the court to disclose lobbying and dark money interests before it. On February 9, 2023, Congressman Hank Johnson re-introduced the bill and Senator Sheldon Whitehouse introduced a companion bill in the Senate.[22]

This Article discusses the reasons why the Court has difficulty implementing and consistently enforcing ethics rules for the justices and then proposes a solution not yet included in the proposed legislation pending before Congress: an ethics lawyer and an inspector general for the Court. In 2015, Senator Chuck Grassley introduced a bill providing for an inspector general for the entire judicial branch, including the Supreme Court,[23] but that bill never advanced out of committee. The time has come to revive that idea and have one, or more, inspectors general in the judicial branch, with particular attention to investigating alleged violations at the Supreme Court.

These reforms are necessary but not sufficient. Other reforms such as mandatory disclosures of funding of amicus briefs and broader recusal requirements for justices are included in pending legislation.[24] There also need to be disclosures of funding of confirmation battles before the Court. Furthermore, the ethics lapses on the Court are part of a broader problem of people and organizations with massive amounts of money influencing all three branches of our government. Expenditures that the Court protects as free speech in cases such as

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20. *See* Letter from John Roberts, Chief Justice United States, to Richard J. Durbin, Chair, Committee on the Judiciary United States Senate (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf [https://perma.cc/VPP8-72K9] ("The undersigned Justices today reaffirm and restate foundational ethics principles and practices to which they subscribe in carrying out their responsibilities as Members of the Supreme Court of the United States. . . . In 1991, Members of the Court voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations. Since then, Justices have followed the financial disclosure requirements and limitations on gifts, outside earned income, outside employment, and honoraria. . . . In regard to recusal, the Justices follow the same general principles and statutory standards as other federal judges, but the application of those principles can differ due to the unique institutional setting of the Court.").

21. Supreme Court Ethics, Recusal, and Transparency Act, H.R. 7647, 117th Congress (2021–22).

22. S. 359, Supreme Court Ethics, Recusal, and Transparency (SCERT) Act, 118th Cong. (2023–24).

23. *See* S. 1418, Judicial Transparency and Ethics Enhancement Act, 114th Cong. (2015–16), discussed *infra* text accompanying notes 53–58.

24. *See infra* pages 47–49.

Citizens United v. Federal Election Commission,[25] come from some of the same people and organizations that seek to influence the Court itself with everything from amicus briefs to fishing trips and yacht excursions for justices. A Supreme Court ethics lawyer and inspector general can do a lot to fix the Court, but we should not overestimate the prospect of reforming judicial ethics without a broader reform of ethics in government in general, and in the political system we use to choose our government. Those much-needed broader reforms, which this author[26] and others[27] have addressed elsewhere, are beyond the scope of this Article.

Part I of this Article describes some of the most important federal laws that deal with judicial ethics. Part I also discusses scandals past and present on the Supreme Court and the Court's differing response, suggesting that the Court is less likely to police itself than it was a generation ago. Part II explains multiple factors that make the Supreme Court prone to ethics lapses, perhaps more so than the other two branches of government. Part III proposes an ethics lawyer and inspector general for the Court, explaining how each office would function. The proposed inspector general would be responsible for investigations across the judicial branch, including courts of appeals and district courts, but this Article focuses specifically on how the inspector general would enforce ethics rules and other laws at the Supreme Court. Part IV returns to the troubling factors discussed in Part II and explains how an ethics lawyer, and particularly an inspector general, should help. Part V addresses separation of powers and other potential objections to having a Supreme Court ethics lawyer and inspector general.

I. THE PROBLEM

This Part explains some of the most important ethics rules for the government and the courts, and how those rules lack enforcement capability when it comes to the Supreme Court. This Part also discusses multiple examples of the growing problem of Supreme Court ethics.

The problem is not that existing ethics rules do not apply to the Supreme Court. They do. The problem is there is no workable way to enforce these rules.

We start with the judicial oath of office, required under federal law, which specifically includes the promise to "do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform judicial duties."[28] This oath is a

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25. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

26. *See generally* RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION: THE CONSERVATIVE CONSCIENCE AND CAMPAIGN FINANCE REFORM (TAKE BACK OUR REPUBLIC) (2016).

27. *See, e.g.*, LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO FIX IT (2015).

28. 28 U.S.C. § 453 (Oaths of justices and judges, provides: "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.").

broad standard, not a specific rule. Regardless, an objective of ethics statutes and rules for judges and justices is to assure that they abide by this oath and that the public is confident that they are abiding by this oath.

Existing federal statutes are three-fold. First, senior federal employees, including federal judges and justices, are required to disclose their financial interests and any gifts they receive.[29] Second, federal judges and justices as well as other federal employees are prohibited from receiving most gifts of more than minimal value[30] (the criminal bribery statute of course applies if there is a *quid pro quo* for a gift[31]). A third statute requires federal judges and justices to recuse from cases "in which [their] impartiality might reasonably be questioned."[32]

This Part discusses these laws in more detail below in the context of specific instances in which they appear to have been violated by sitting justices of the Supreme Court.

A. THE RULES

Rules promulgated by federal courts, including by the Supreme Court, must be consistent with Acts of Congress,[33] including the above-mentioned statutes on financial disclosure, gifts, and recusal of judges and justices. Federal law establishes the Judicial Conference of the United States for the purpose of reviewing, modifying, or abrogating rules of courts other than the Supreme

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29. The Ethics in Government Act of 1978, S.555, 95th Cong. (1978) (requiring filing of financial disclosure reports); 5 U.S.C. § 13103 (discussing how persons are required to file, including "a judicial officer as defined under section 13101" which expressly defines a judicial officer to include "the Chief Justice of the United States, the Associate Justices of the Supreme Court, and [other federal judges]").

30. 5 U.S.C. § 7353 - Gifts to Federal employees. ("Except as permitted by subsection (b), no Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person— (1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties."); 5 U.S.C. § 7353(b) ("Each supervising ethics office is authorized to issue rules or regulations implementing the provisions of this section and providing for such reasonable exceptions as may be appropriate."). The Judicial Conference is the supervising ethics office for federal courts other than the Supreme Court. *See also* JUDICIAL CONFERENCE, GUIDE TO JUDICIARY POLICY, GIFT REGULATIONS § 620.35 Acceptance of Gifts by a Judicial Officer or Employee; Exceptions. Chief Justice Roberts has reported that the Justices "observe the same limitations on gifts" that apply to other federal judges and "follow the very same practices" set forth in the Judicial Conferences regulations by virtue of having adopted an "internal resolution in which they agreed to follow the Judicial Conference regulations as a matter of internal practice." SUPREME COURT OF THE UNITED STATES, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/ZP93-VHYP].

31. *See* 18 U.S.C. § 201 (discussing bribery of public officials and witnesses).

32. 28 U.S.C. § 455 (discussing the disqualification of justice, judge, or magistrate judge).

33. "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a) (discussing rule-making power generally).

Court "for consistency with Federal law."[34] Federal law, however, does not give the Judicial Conference the power to enforce federal statutes that apply to the Supreme Court, or to discipline the justices.[35] The Supreme Court Justices are accountable only to themselves.

Congress, by not giving the Judicial Conference jurisdiction over the Supreme Court, apparently assumes that the Court will make sure that its rules and practices adhere to federal law. But nowhere does Congress or the Constitution say that the Supreme Court is exempt from federal law.

We have a similar problem with another branch of government, the executive branch. Some presidents act as if they are above the law, claiming that their Article II powers mean ordinary statutes, including criminal statutes, do not apply to them.[36] A representative democracy cannot survive such an assertion of unlimited power, whether from its president or members of its Supreme Court. The justices' Article III power to interpret the Constitution and the laws of the United States does not mean that they do not have to follow the law.

Unless the Supreme Court wants to take the extraordinary step of saying that federal statutes applying to Supreme Court justices are unconstitutional, existing ethics laws bind Supreme Court justices, including laws governing financial disclosure filings, gifts, and recusal. While Congress should enact additional ethics rules for the Supreme Court, some of which will be discussed in this Article, enforcement of ethics rules at the Supreme Court is the most serious problem. That is why this Article proposes that Congress pass a law requiring the Court to have an ethics lawyer and an inspector general.

B. JUSTICE FORTAS'S RESIGNATION

In 1969, the Supreme Court was a political lightning rod. John Birch Society road signs called for the impeachment of Chief Justice Earl Warren,[37] a Republican and Eisenhower appointee perceived as too liberal, particularly in the segregationist South. Justice Abe Fortas, a close confidant of President Lyndon

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34. 28 U.S.C. § 331.

> The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review.

Id.

35. *Id.* ("The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, *other than the Supreme Court* and the district courts, for consistency with Federal law." (emphasis added)).

36. Claire Finkelstein and this author have written about the expanding power of another branch of government, the presidency, and some presidents' assertions that Article II of the Constitution puts the president above the law. *See* Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93 (2022).

37. *See* Bob Fitch, *John Birch Society billboard calls for the impeachment of Earl Warren*, THE BOB FITCH PHOTOGRAPHY ARCHIVE (June 1966), https://exhibits.stanford.edu/fitch/catalog/bg116nt5712 [https://perma.cc/BA6A-XN8Z].

B. Johnson, a Democrat, was even more liberal. President Richard Nixon had been in the White House only a few months and was eager to name more conservative justices to the Court.

Justice Fortas had a serious ethics problem. Shortly after joining the Court in 1965, he entered an agreement to accept payment of $20,000 a year for life for consulting services from the Wolfson Family Foundation, established by Louis Wolfson, a financier Fortas had met in private practice.[38] Ethics rules at the time did not prohibit a justice from receiving outside income from charitable boards; indeed, Justice William O. Douglas served as president and director of the Albert Parvin Foundation for compensation of $12,000 a year until he resigned from the Foundation in May 1969.[39] Chief Justice Warren Burger served on the Mayo Clinic board for compensation of $2,000 a year until he resigned from Mayo in October 1969.[40] But those board memberships were publicly known; Fortas's arrangement with Wolfson was secret until 1969.[41] Additionally, he would receive a great deal more money *for life*.

Also, Louis Wolfson was indicted for securities law violations in 1966.[42] Fortas resigned his Wolfson Foundation post when Wolfson's legal difficulties first emerged, and Fortas returned all the money to the Foundation when Wolfson was referred by the Securities and Exchange Commission ("SEC") for criminal prosecution.[43] But this was too late, and a political firestorm erupted when the payment was revealed in 1969. Fortas said that he did nothing wrong (there was probably no law that he violated), but he acknowledged that the controversy adversely affected the Court and said that protecting it as an institution was his priority, so he resigned from the Court on May 14, 1969.[44]

It is difficult to imagine a Supreme Court justice today resigning so quickly in the face of scandal, but both Congress and the Court were different in 1969, and the reaction to Supreme Court ethics scandals then was different. On May 11, 1969, shortly after the Fortas news broke, Minnesota Senator Walter Mondale became the first Democrat to call upon Fortas to resign, soon followed by Joseph Tydings of Maryland, a liberal Democrat "who had been one of Fortas's biggest supporters."[45]

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38. *See The Texts of Letters and Statements Involving the Resignation of Justice Fortas*, N.Y. TIMES, May 16, 1969, Letter from Justice Fortas to Chief Justice Earl Warren (describing Fortas's arrangement with Wolfson and his foundation).

39. *Douglas Resigns Foundation Post, Cites his Health*, N.Y. TIMES, May 24, 1969. Albert Parvin "was named as a co-conspirator," but was never tried, in a securities fraud case involving Louis Wolfson who by 1969 was "in prison for securities law violations." *Id.*

40. *See Justice Burger Resigns Mayo Foundation Post*, N.Y. TIMES, Oct. 4, 1969.

41. *See supra* note 38.

42. *See* United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968) (upholding criminal conviction for sale of unregistered securities in violation of the 1933 Securities Act).

43. *See supra* note 38.

44. *See supra* note 38; *see also Fortas Is First Justice To Resign Under Fire*, N.Y. TIMES, May 16, 1969.

45. Adam Cohen, *54 Years Ago, a Supreme Court Justice Was Forced to Quit for Behavior Arguably Less Egregious Than Thomas's*, N.Y. TIMES, Apr. 11, 2023.

Fast forward to 2024. Despite the many recent ethics scandals on the Court, thus far, not a single member of the House or Senate has called for a resignation, or even a Congressional investigation, of a justice appointed by a president of their own political party.

C. CONGRESS'S LIMITED JUDICIAL ETHICS REFORMS

Since Fortas's resignation, Congress has enacted more stringent statutes governing ethics and disclosures by senior government officials. The Ethics in Government Act of 1978 now requires high-ranking officials in all three branches of government, including federal judges and justices, to disclose outside income.[46] Congress also systematized the process for overseeing the ethics and discipline of lower court judges. The Judicial Conduct and Disability Act of 1980,[47] for example, allows any person to file a complaint alleging that a federal judge (except Supreme Court justices) has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts," or because of a mental or physical disability, is "unable to discharge all the duties" of judicial office.[48] A 2006 study of the procedures used to implement the Act, conducted under the leadership of Justice Stephen Breyer, found that the system worked fairly well, although almost all complaints against judges were filed by litigants, and most were dismissed.[49] In 2008, the judiciary promulgated nationally binding rules for judicial conduct proceedings for lower court judges. These Rules for Judicial Conduct and Judicial-Disability Proceedings govern substantive and procedural aspects of proceedings.[50] The key actors in implementing the Act are circuit chief judges and circuit councils.[51] There continues to be skepticism about the ability of federal judges to police themselves,[52] but at least there is a process in place for handling complaints, which we do not have for the Supreme Court.

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46. The Ethics in Government Act of 1978, S.555, 95th Cong. (1978).

47. 28 U.S.C. §§ 351–64.

48. *Id*. For background on the Judicial Conduct and Disability Act of 1980, see Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,* 131 U. PA. L. REV. 283, 291–301 (1982); Stephen B. Burbank & S. Jay Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1, 2 (1993).

49. *See* STEPHEN BREYER, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, A REPORT TO THE CHIEF JUSTICE 5 (2006) (finding a very high degree of accuracy in disposition of complaints about judicial conduct (almost all of which were dismissed) but an unacceptably high error rate (five out of seventeen over a five year period) for mishandling of "high-visibility cases—those that have received national or regional press coverage, including matters that have come to the attention of (or been filed by) members of Congress").

50. *See Rules for Judicial Conduct and Judicial-Disability Proceedings*, *in* 2E GUIDE TO JUDICIARY POLICY, Ch. 3 (2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/6W6T-6D38].

51. *See* Arthur Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. LEGAL ETHICS 341 (2019).

52. *Id*. (discussing implementation of the Act among skepticism about the ability and willingness of judges to police misconduct within their own ranks).

1. SENATOR GRASSLEY'S PROPOSAL FOR AN INSPECTOR GENERAL

In 2015, Senator Chuck Grassley said in a speech on the floor of the Senate, "The fact remains that the current practice of self-regulation of judges with respect to ethics and the judicial code of conduct has time and time again proven inadequate."[53] He then introduced the Judicial Transparency and Ethics Enhancement Act, S. 1418, which in 'Chapter 60—Inspector General for the Judicial Branch' provided for an inspector general ("IG") for the federal judiciary, *including the Supreme Court*.[54] The IG's responsibilities under the bill would include:

> investigations of possible judicial misconduct, investigating waste fraud and abuse, and recommending changes in laws and regulations governing the federal judiciary. The bill would require the IG to provide the Chief Justice and Congress with an annual report on its activities, as well as refer matters that may constitute a criminal violation to the Department of Justice. In addition, the bill establishes whistleblower protections for judicial branch employees.[55]

The bill also expressly provided that the IG would "conduct investigations of alleged misconduct in the United States Supreme Court that may require oversight or other action within the judicial branch or by Congress."[56]

The powers of the IG would be to make investigations and reports, obtain information or assistance from any federal, state, or local governmental agency, or other entity, or unit thereof, including any part of the federal judiciary, subpoena witnesses and documents, administer oaths and take affidavits, employ officers and employees and services of outside experts, contract for audits, studies, analyses, and other services, and pay for the same out of a budget appropriated by Congress.[57]

Senator Grassley's bill was read twice and referred to the Committee on the Judiciary, where it died.[58]

Eight years later, the issue of Supreme Court ethics has come back with a vengeance. Numerous ethics scandals on the Court have become public, although some of the alleged conduct occurred long ago. Senator Grassley's proposal for an inspector general may be needed now more than ever.

2. LUXURY TRAVEL AND OTHER GIFTS TO JUSTICES

Federal judges may not receive gifts, including free travel, from persons whose interests are substantially affected by their official duties, with very few

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53. 114 CONG. REC. S3240 (daily ed. May 21, 2015) (floor speech by Sen. Grassley).
54. *Id.*
55. *Id.*
56. *See* The Judicial Transparency and Ethics Enhancement Act, S. 1418, 114th Cong. § 1023 (2015).
57. *Id.* at § 1024.
58. *See generally* 161 CONG. REC. 3240–41 (2015).

exceptions.[59] The statute is clear on this point, and there is no exemption for Supreme Court justices:

> (a) Except as permitted by subsection (b), no Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person—
>
> (1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or
>
> (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.[60]

Subsection (2) covers, among others, gifts from billionaires whose financial interests are affected by cases before the Supreme Court. The statute allows "reasonable exceptions as may be appropriate" promulgated by the "supervising ethics office," which for the federal courts is defined as "the Judicial Conference of the United States for judges and judicial branch officers and employees."[61] The authorizing statute for the Judicial Conference of the United States, however, does not give it power over the Supreme Court.[62] This implicitly allows the Supreme Court justices to promulgate their own "reasonable exceptions as may be appropriate."[63] It would be unreasonable, however, for individual justices to make up their own exceptions on a case-by-case basis. In any event, choosing to ignore a statute is hardly an act of promulgating an exception to that statute.

The Supreme Court has not promulgated its own exceptions. Presumably, this means that the justices observe the same exceptions promulgated by the Judicial Conference for other federal judges.[64]

The exceptions promulgated by the Judicial Conference include: "(a) social hospitality based on personal relationships; [and] (b) modest items, such as food and refreshments, offered as a matter of social hospitality."[65] There is another exception if the "gift consists of an invitation and travel expenses . . . to attend a bar-related function."[66] But traveling on a free vacation is not a "bar-related function." There is yet another exception if a "gift is from a relative or friend, if the relative's or friend's appearance or interest in a matter would in any event require []

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59. *See* 5 U.S.C. § 7353(a) (discussing gifts to Federal employees).

60. *Id.*

61. 5 U.S.C. § 7353 (b), (d).

62. *See* 28 U.S.C. § 331 ("The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court . . . .").

63. *Id.*

64. *See* 2C GUIDE TO JUDICIARY POLICY Ch. 6, § 620.10 (regulations promulgated by the Judicial Conference of the United States under the authorities of 5 U.S.C. §§ 7351(c), 7353(b)(1), and 7353(d)(1)(C)); Ethics Reform Act of 1989, Pub. L. No. 101-194 (1989).

65. 2C GUIDE TO JUDICIARY POLICY Ch. 6, § 620.25.

66. *Id.* at § 620.35.

the [judge] to take no official action with respect to the matter."[67] This means that the gift from a relative or friend is permissible because the judge already needs to recuse from any case that could affect the financial interests of the donor.

Once again, while these exceptions do not directly apply to the Supreme Court, the underlying statute prohibiting judges and justices from receiving gifts does apply to the Supreme Court, and the justices have not promulgated any additional exceptions to the gift statute for themselves. Furthermore, Chief Justice Roberts's 2011 Year End Report explained that the Justices "observe the same limitations on gifts and outside income as apply to other federal judges," and in 1991 the Justices adopted "an internal resolution in which they agreed to follow the Judicial Conference regulations as a matter of internal practice."[68] The Supreme Court's 2023 ethics code now reiterates that point by replicating the rules that apply to other federal judges (minus the enforcement procedures that apply to other federal judges).

Under a separate federal statute in the Ethics in Government Act of 1978 (this statute also applies to the Supreme Court), all gifts, whether permissible or impermissible, need to be disclosed with very few exceptions.[69] The Act requires disclosure by designated senior officers in all three branches of government of a "brief description" of the "source" and "value of all gifts" that exceed the reporting threshold (currently $480).[70] This includes a "brief description (including a travel itinerary, dates and nature of any expenses provided) of reimbursements received from any source."[71]

This law is binding. In several instances at the Supreme Court, it was not followed.

For more than twenty years, Justice Thomas accepted regular gifts of private jet travel, yacht excursions, and other luxury vacations from billionaire and Republican megadonor Harlan Crow, without disclosing them as gifts on his annual financial disclosure reports filed under the Ethics in Government Act of 1978.[72] *Pro Publica* estimated that one of these trips alone, a luxury trip to Indonesia, could have cost $500,000 if Justice Thomas chartered the plane and yacht himself.[73]

At Topridge, Crow's luxury resort in the Adirondacks, is a painting of Justice Thomas seated next to Mr. Crow, and sitting nearby is Leonard Leo, the Co-Chairman and former Executive Vice President of the Federalist Society.[74]

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67. *Id.*

68. CHIEF JUSTICE ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 5–7 (Dec. 31, 2011).

69. *See* 5 U.S.C. § 102(a)(2)(A) (disclosure requirements for gifts).

70. 5 U.S.C. §§ 13103(f)(11), 13101(10); House Comm. on Ethics, Specific Disclosure Requirements, https://ethics.house.gov/financial-dislosure/specific-disclosure-requirements#:~:text=The%20Ethics%20in%20Government%20Act%20requires%20disclosure%20of%20gifts%20received,be%20counted%20toward%20this%20limit. [https://perma.cc/4TYD-SGK5] (last visited Oct. 28, 2024).

71. 5 U.S.C. § 13104(a)(2)(A)–(B).

72. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/L8CL-C3AS].

73. *Id.*

74. *Id.*

Justice Thomas, furthermore, sold his interest in three Savannah, Georgia properties to Mr. Crow in 2014 for $133,363 without reporting the sales on his financial disclosure report.[75] One of the properties that Justice Thomas sold to Crow is a house in which Thomas's mother still lives.[76]

Finally, Justice Thomas failed to disclose tuition payments by Crow for Thomas's nephew whom Thomas, under his powers as legal guardian of a minor, enrolled in two private schools, where he presumably was contractually obligated to pay the tuition.[77] Citizens for Responsibility and Ethics in Washington ("CREW"), a public interest organization, sent a letter to Chief Justice Roberts and Attorney General Garland requesting an investigation of these undisclosed gifts to Justice Thomas.[78] CREW did not receive a response.

Justice Alito failed to disclose a 2008 fishing trip with billionaire and GOP donor Paul Singer. Singer flew Alito in a private plane to Alaska, where they were housed at the expense of another conservative donor.[79] In the years since, Singer's hedge fund has had cases before the court at least ten times, and Alito has never recused himself.[80] The most prominent of these was a case in which Singer's hedge fund bought Argentine debt in a depressed trading market and then sued Argentina for payment of the entire amount at face value.[81] The Court, with Justice Alito joining the majority, sided with Singer and held that Argentina was required to pay.[82] Justice Alito should have recused from this case after having accepted such an expensive gift from Singer.[83]

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75. Justin Elliott, Joshua Kaplan & Alex Mierieski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/EPF9-JDXA] ("The Crow company bought the properties for $133,363 from three co-owners — Thomas, his mother and the family of Thomas' late brother according to a state tax document and a deed dated Oct. 15, 2014, filed at the Chatham County courthouse.").

76. *Id.*

77. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/73S3-N58H].

78. *See* Letter from Noah Bookbinder, Virginia Canter, Norman L. Eisen & Richard Painter, to Chief Justice John Roberts & Attorney General Merrick Garland (Apr. 14, 2023), https://www.citizensforethics.org/wp-content/uploads/2023/04/Justice-Clarence-Thomas-DOJ-Complaint-April-14-2023-1.pdf [https://perma.cc/GS3F-QRT7] (requesting an investigation of Justice Clarence Thomas' failure to report gifts of private aircraft travel on his public financial disclosure report).

79. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/MV9P-385E].

80. *Id.*

81. *See* Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014)

82. *See id.* This was an 8-1 decision of the Justices (Justice Ginsburg dissenting), so it is unlikely that Justice Alito's interactions with Paul Singer influenced the outcome. Still, we have no way of knowing how deliberations proceeded, and the appearance of conflict remains regardless of the votes of the other justices.

83. *See* 28 U.S.C. § 455 (discussing recusal requirements for judges and justices).

Justice Alito defended his 2008 fishing trip with Singer in a 2023 op-ed in the *Wall Street Journal*,[84] but his defense falls flat. Alito argues that he did not need to recuse from cases involving Singer because he did not have a close relationship with Singer and that he had no reason to be aware of Singer's connection to any case.[85] He also claims that he did not need to report "personal hospitality," and that his seat on Singer's plane "would have otherwise been vacant."[86] This dubious argument is hereinafter referenced as the "empty seat theory" of free luxury travel for Supreme Court justices.

This theory does not work. Not even close. In 2005 and 2006, the author of this Article helped prepare Chief Justice Roberts and Justice Alito for Senate confirmation hearings and held regular meetings with White House staff and incoming cabinet members to explain ethics rules. Across the government, ethics lawyers emphasize repeatedly that free travel on a private plane is almost always an impermissible gift for a government official.[87] Even in the rare instance that it is permissible because the host is a close friend—the "personal hospitality" exception—it still must be disclosed.[88] But Alito says that he had spoken only a few times with Singer,[89] meaning Singer was not a close friend, so Justice Alito should not have accepted a free trip on Singer's plane to begin with.

And in any event, the free travel to Alaska had to be disclosed. Justice Alito says he hitched a ride on Singer's plane that was headed to Alaska anyway, that it did not cost Singer anything additional and thus was not a gift that needed to be disclosed.[90] This focus on the marginal cost to the gift giver is nowhere in federal gift rules defining the value of a gift, and that's for good reason—marginal cost to the gift giver has nothing to do with the gift's potential to influence the recipient.[91]

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84. *See* Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://perma.cc/HPL9-73NS] (the publication levels false charges about Supreme Court recusal, financial disclosures, and a 2008 fishing trip).

85. *Id.*

86. *Id.*

87. *See, e.g.*, Memorandum from U.S. House Comm. on Ethics, Officers for all Members, Officers, and Employees re: Noncommercial Aircraft Travel, at 3–4 (Apr. 10, 2019), https://ethics.house.gov/sites/ethics.house.gov/files/Private%20Plane%20pinksheet%20FINAL.pdf [https://perma.cc/4E5P-2FVG] ("When the value of a gift proposed to be accepted under the personal friendship provision exceeds $250, written approval of the Committee on Ethics is required before the gift can be accepted. Practically any flight on a non-commercial aircraft will exceed $250 in value and hence will require Committee approval.").

88. *See* 5 U.S.C. § 102(a)(2)(A) (requiring disclosure of "[t]he identity of the source, a brief description, and the value of all gifts aggregating more than the minimal value . . . or $250, whichever is greater, received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of an individual need not be reported . . . ."). A free ride on a private plane is not "food, lodging, or entertainment received as personal hospitality" and therefore must be disclosed. *Id.*

89. *See* Alito, *supra* note 84.

90. *Id.*

91. The Executive Branch gift rules explicitly reject any approach to valuing gifts that focuses on marginal cost to the donor instead of value to the recipient. *See* 5 C.F.R. § 2635.203(c) Definitions (2023) ("Market value means the cost that a member of the general public would reasonably expect to incur to purchase the gift.").

A seat on a private plane for a long-haul trip still has substantial value. Any other federal employee or appointee subject to the ethics rules who uses the empty seat theory to board a plane or a cruise ship without a ticket will quickly find out what happens.

Even less convincing is Justice Alito's assurance that "if there was wine it was certainly not wine that costs $1,000."[92] Most Americans splurge when they pay twenty dollars for a bottle of wine and twenty dollars is the limit for permissible gifts in the executive branch.[93] If the trip was so simple and rustic, why didn't everyone, Justice Alito included, fly a commercial airline, and pay their own way?

In the executive branch, undisclosed personal travel on a private plane has resulted in criminal prosecution. In *United States v. Silva*, for example, a senior Drug Enforcement Agency official accepted free personal trips between the United States and Mexico on private planes owned by two friends who were wealthy businessmen and failed to disclose these trips on his annual financial disclosure form.[94] He was indicted, pled guilty to violations of the false statements statute, 18 U.S.C. 1001(a), and was sentenced to two years of probation.[95] The annual financial disclosure filing for Supreme Court justices is nearly identical and is governed under the same statute, but when these rules are violated by the justices, nothing happens.[96]

3. INCOMPLETE DISCLOSURES BY JUSTICE GORSUCH AND CHIEF JUSTICE ROBERTS

Other disclosure lapses by Justice Gorsuch and Chief Justice Roberts are less severe, perhaps sloppy, or even technically legal, but still concerning.

Shortly after he joined the Court, Justice Gorsuch disclosed his sale of a jointly owned tract of land and house in Colorado but did not identify the buyer.[97] He

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Example 2 ("During an official visit to a factory operated by a well-known athletic footwear manufacturer, an employee of the Department of Labor is offered a commemorative pair of athletic shoes manufactured at the factory. Although the cost incurred by the donor to manufacture the shoes was $17, the market value of the shoes would be the $100 that the employee would have to pay for the shoes on the open market."). *Id*. Nowhere does the Judicial Conference of the United States imply in its rules that gifts to judges would be valued any differently.

92. Alito, *supra* note 84.

93. *See* 5 C.F.R. § 2635.204 (discussing exceptions to the prohibition for acceptance of certain gifts).

94. *See* Statement of Offense and Other Conduct, United States v. Silva, Crim. No. 16-69 (D.D.C. 2016), https://www.oge.gov/web/OGE.nsf/0/D80535E5A0FC14AA852585B6005A1C53/$FILE/Silva%20Statement%20of%20Offense.pdf [https://perma.cc/PEJ9-R9VQ]; 5 U.S.C. § 13104(a)(2)(A–B) (requiring gifts, including free transportation, to be reported).

95. *See* Memorandum from David Apol, Acting Director and General Counsel of the United States Office of Government Ethics to Designated Agency Ethics Officers, Re: 2016 Conflict of Interest Prosecution Survey (Aug. 7, 2017), https://www.oge.gov/web/oge.nsf/0/E15D086E908893B1852585BA005BEC3F/$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf [https://perma.cc/KJ92-3M8U]; *Silva*, Crim. No. 16-69 (D.D.C. 2016).

96. *See* 5 U.S.C. § 13104(a)(2)(A–B) (describing the underlying reporting obligation for gifts).

97. Charlie Savage, *Head of a Major Law Firm Bought Real Estate From Gorsuch*, N.Y. TIMES (Apr. 25, 2023), https://www.nytimes.com/2023/04/25/us/neil-gorsuch-property-sale.html [https://perma.cc/Q8ZT-P8VP].

left blank the field on his financial disclosure form asking the identity of the buyer, which may have been permissible because the property was sold through an LLC in which Gorsuch owned a twenty percent interest rather than by Gorsuch himself. Whether the transaction created any actual bias on his part (probably not), and even though the transaction was undertaken through an LLC, the identity of the buyer of real estate partly owned by a Supreme Court justice should be an important part of the disclosure. The undisclosed buyer was Brian L. Duffy, the chief executive of Greenberg Traurig, a large Washington, D.C. law firm that has cases before the Court.[98]

Gorsuch's failure to disclose this did not violate the law (the Ethics in Government Act should be amended to require complete disclosure of the parties to transactions at the LLC level).[99] Still, this undisclosed transaction by an LLC partially owned by a Supreme Court justice with a powerful Washington, D.C. lawyer did not increase public confidence in the Court.

Chief Justice Roberts disclosed spousal income—Jane Roberts earns about $1 million a year in commissions as a headhunter placing lawyers with top D.C. law firms with cases before the Court.[100] But his disclosure form inaccurately labeled Ms. Roberts's income an "attorney search consultants—salary."[101] The term "salary" is misleading because it suggests a fixed income, whereas a legal recruiter is paid a commission earned only if a law firm decides to hire a candidate proposed by the recruiter.[102] Each law firm that hires a candidate proposed by Ms. Roberts increases her income from commissions, not her "salary." Although there is no law requiring Jane Roberts to find alternative employment, there is something unsavory about the spouse of the Chief Justice doing millions of dollars' worth of business with law firms having cases before the Court.

4. SUPREME COURT JUSTICES' BOOK DEALS

For employees of the executive branch, ethics rules on book royalties are strict. An employee "shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's

98. *See id.*

99. This author has previously urged Congress to amend the Ethics in Government Act to require disclosure of transactions at the corporate level. *See Legislative Proposals for Fostering Transparency: Hearing Before the H. Comm. On Oversight and Gov. Reform* (Mar. 23, 2017) (testimony of Richard W. Painter), https://oversight.house.gov/wp-content/uploads/2017/03/Painter-UMN-Statement-Legislative-Proposals-for-Transparency-3-23.pdf [https://perma.cc/7YEE-Q4BZ].

100. *See* Steve Eder, *At the Supreme Court, Ethics Questions Over a Spouse's Business Ties*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html [https://perma.cc/7TTR-W975].

101. *Id.*

102. *See* Sworn Affidavit of Kendal B. Price (Dec. 2, 2022), https://www.documentcloud.org/documents/23791123-2-of-8-sworn-affidavit-of-kendal-b-price-12-02-2022 [https://perma.cc/4XGX-EFYA] (discussing, as a former employee and co-worker of Jane Roberts, the commission structure at Major, Lindsey & Africa, Jane Roberts's legal recruiting firm).

official duties."[103] This regulation bans, among other things, royalties from books on topics related to official duties *or* where the book contract was extended in part because of one's official position.[104] As the Office of Government Ethics explained in the regulations regarding book royalties, a Director of the Division of Enforcement at the Commodity Futures Trading Commission or another financial regulator may earn royalties from a book on stamp collecting or another hobby,[105] but an employee of the Securities and Exchange Commission may not earn royalties for a book on regulation of the securities industry.[106] Regardless of the topic of the book, none of these book deals are permitted if the book contract was awarded because of the employee's official position.[107]

These rules, however, do not apply to federal judges, including the Supreme Court. No statute or regulation limits how much royalties or advances a justice can make from a book, regardless of the subject matter of the book.[108] This is one of several areas where federal law needs to be changed. The same rules should apply to the Justices that apply to other federal officials, most of whom have far less impact than a justice does on federal law.

According to annual financial disclosure forms filed in 2022, Justice Amy Coney Barrett received $425,000 in 2021, her first full year on the Court, as part of a book deal that may be worth as much as $2 million, while Justice Neil Gorsuch received over $250,000 in book royalties.[109] Justice Sotomayor received a more modest $115,000 in royalties from a book in 2021[110] but has earned $3.6 million in book royalties and advances since joining the court in 2009.[111] Justice

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103. 5 C.F.R. § 2635.807(a) (2023).

104. *See, e.g.*, 5 C.F.R. § 2635.807(a)(2)(i)(B) (2023) ("[C]ircumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position."). A book deal signed after one is appointed to a high-ranking position would likely fit this definition, and that would include the Supreme Court but for the fact that these regulations do not apply to the Supreme Court.

105. 5 C.F.R. § 2635.807(a), Example 1 (2023).

106. 5 C.F.R. § 2635.807(a), Example 4 (2023); *see also* U.S. OFF. OF GOV. ETHICS, LA-20-06, RECURRING BOOK DEALS ISSUES FOR INCOMING AND OUTGOING GOVERNMENT EMPLOYEES (Sept. 24, 2020), https://www.oge.gov/web/oge.nsf/News+Releases/B7B3DC5398952B14852585EE004E2DE1/$FILE/LA-20-06%20Recurring%20Book%20Deals%20Issues%20for%20Incoming%20and%20Outgoing%20Government%20Employees.pdf [https://perma.cc/X5PP-8R7U].

107. 5 C.F.R. § 2635.807(a)(2)(i)(B) (2023).

108. Steve Eder, Abbie VanSickle & Elizabeth Harris, *How Supreme Court Justices Make Millions From Book Deals*, N.Y. TIMES (July 27, 2023), https://www.nytimes.com/2023/07/27/us/politics/supreme-court-justices-book-deals.html#:~:text=The%20book%20deals%20are%20not,research%20and%20promote%20their%20books [https://perma.cc/5QTA-EAZM] (explaining that the "book deals are not prohibited under the law" although "income from the advances and royalties are reported on the justices' annual financial disclosure forms").

109. Amy Howe, *Justices Earned Extra Money from Books and Teaching in 2021, Disclosures Show*, SCOTUS BLOG (June 9, 2022), https://www.scotusblog.com/2022/06/justices-earned-extra-money-from-books-and-teaching-in-2021-disclosures-show/ [https://perma.cc/W9LL-BDEN].

110. *Id.*

111. Nina Totenberg, *Supreme Court Justices, Minus Thomas, and Alito, File Financial Disclosure Reports*, NPR (June 7, 2023), https://www.npr.org/2023/06/07/1180896886/supreme-court-financial-disclosure-reports [https://perma.cc/K6LN-76XH].

Sotomayor's Supreme Court staff has coordinated her speaking tours, on several occasions prodding universities and libraries hosting Justice Sotomayor to place large book orders for sale and book signings.[112] "Is there a reminder going out that people need to purchase a book at the event or bring a book to get into the signing line?" Anh Le, Assistant to Justice Sotomayor, wrote to the Multnomah County Library in Oregon, "Most of the registrants did not purchase books."[113] Legal assistants to Supreme Court justices are federal employees with important responsibilities, but selling books should not be one of them.[114] The Supreme Court nonetheless released a statement saying ethics rules had been complied with, without explaining why Supreme Court staff, instead of the publisher, were involved in recommending the number of book orders at venues where the Justice was speaking.[115]

It is conceivable that book royalties correlating with the number of copies sold could influence how justices decide cases and write opinions. Some justices are heroes for millions of Americans on the left or the right of the political spectrum, providing a steady market for their books sold to a loyal audience. That may change, however, if these justices join opinions on the "other side." "Disappointing" votes on the Court, for example, a solidly conservative justice siding with the liberal justices in an important case or vice versa, could kill book sales, and even lead to book boycotts (making up for it with sales to the "other side" can be difficult, particularly if the book was pitched to the first side, to begin with). Author justices could be tempted to adjust their views or the way they express their views to increase book sales. Journalists, including cable news hosts, sometimes go to extremes to pitch their views to a left or right audience,[116] but justices are in a different profession. Their primary

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112. Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, AP PRESS (July 11, 2023), https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/XE6D-48RL] ("For an event with 1,000 people and they have to have a copy of *Just Ask* to get into the line, 250 books is definitely not enough," the aide [to Justice Sotomayor], Anh Le, wrote staffers at the Multnomah County [Oregon] Library. "Families purchase multiples and people will be upset if they are unable to get in line because the book required is sold out.").

113. *Id.* (quoting email dated August 27, 2019, from Anh Le, Assistant to Justice Sotomayor, to Kate Chester, Director of Communications at Portland Community College).

114. Executive Branch ethics rules specifically prohibit use of one's official position to promote book sales or any other private gain. *See* 5 C.F.R. § 2635.702 Use of public office for private gain (2023) ("An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated. . . .").

115. *See* Statement of the Supreme Court (July 11, 2023), https://s3.documentcloud.org/documents/23870397/supreme-court-statement.pdf [https://perma.cc/3KTK-B2G8] ("Asking whether attendees were reminded that they must either buy or bring a book in order to enter a signing line at an event would in no way conflict with the standard outlined above. . . . When [Justice Sotomayor] is invited to participate in a book program, Chambers staff recommends the number of books based on the size of the audience so as not to disappoint attendees who may anticipate books being available at an event.").

116. *See* U.S. Dominion, Inc. v. Fox News Network, LLC. A. N21C-03-257 EMD (Del. Super. Ct. Dec. 16, 2021) (denying defendant's motion to dismiss and reviewing evidence that Tucker Carlson and other FOX

profession is interpreting the law, not writing about it, even if their book royalties dwarf Supreme Court salaries. Allowing justices to earn royalties that depend in part on how popular they are creates a conflict with official duties. Very high royalty earnings are hard to resist, and we simply do not know whether justices' decisions and the way they write their opinions are affected by book sales.

Book deals that involve advances, lump sum payments, or promotion services from publishers and agents are problematic in another way, particularly if the payors have an interest in cases before the Court. Some literary agents working with Supreme Court justices are politically connected themselves. For example, Justice Barrett earned $425,000 from the Javelin Group, "a Virginia-based literary agency founded by Keith Urbahn, a former chief of staff to Secretary of Defense Donald Rumsfeld, and Matt Latimer, a former speechwriter for President George W. Bush."[117] There is no demonstrable link between any of these payments and an attempt to influence the outcome of decisions before the Court. Still, allowing any one individual or company to be a source of such large payments to a Supreme Court justice is problematic and an invitation to mischief.

Contracts with book publishers also can lead to recusal problems. Justices Sotomayor and Gorsuch have lucrative book contracts with Penguin Random House, which was a party to two cases before the Court, in both of which the Court declined to grant cert, allowing lower court rulings favorable to Random House to stand.[118] Justice Sotomayor recused from neither case,[119] and Justice Gorsuch, who joined the court after the first case, failed to recuse from the second.[120]

5. FAILURE TO RECUSE

Recusal on the Supreme Court is more complicated than recusal on a court of appeals where another judge on the circuit can be substituted for the judge who recuses. It is not so on the Supreme Court, where the recusal of a justice might change outcomes, not just for the parties, but for lawyers and judges who rely on Supreme Court decisions in future cases. Because of this, justices interpreting the

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hosts, with encouragement from corporate management, reported news on the 2020 election to reflect what FOX viewers wanted to hear to increase advertising revenue, not what the news hosts knew to be the news).

117. Howe, *supra* note 109.

118. *See* Whitehead v. Netflix, Inc., No. 20-1227 (2021), *cert. denied*. Justices Sotomayor and Gorsuch did not recuse. Justice Breyer recused. *See also* Nicassio v. Viacom Int'l, Inc., No. 19-560 (2019), *cert. denied*. Justices Sotomayor did not recuse. Justice Breyer recused.

119. *See* Madison Hall, *2 Supreme Court Justices Failed to Recuse Themselves From Cases Involving Their Publisher After Receiving Large Amounts in Book Advances and Royalties*, BUS. INSIDER (May 10, 2023), https://www.businessinsider.com/justices-didnt-recuse-themselves-from-cases-with-their-book-publisher-2023-5 [https://perma.cc/YQH9-E8V5].

120. *See* Nicassio v. Viacom Int'l, Inc., No. 19-560 (2019), *cert. denied*; Nicassio v. Viacom Int'l, Inc., No. 18-2085 (3d Cir. 2019) (dismissal of suit against Random House for infringement of copyright in a children's book).

recusal statute[121] may be more reticent to recuse than they would have been on the courts of appeals, even though a precedent tainted by conflict of interest may nonetheless be more damaging to the legal system than a recusal. In close calls—cases where reasonable persons could differ as to whether a justice's impartiality might reasonably be questioned—a justice might decide not to recuse.

But some cases just aren't close calls.

Justice Thomas's spouse, Virginia Thomas, supported President Trump in seeking to overturn the 2020 election. She attended the January 6 *Stop the Steal* rally[122] and strategized with President Trump's White House Chief of Staff, Mark Meadows.[123] In text messages between Ms. Thomas and Meadows, she said Trump was the victim of election fraud.[124] When the House January 6 Committee subpoenaed White House records on January 6, 2021, and former president Donald Trump asked the Supreme Court to stay that subpoena, Justice Thomas was required to recuse because this was a case "in which his impartiality might reasonably be questioned."[125] His wife's texts with Meadows could be among the documents responsive to the subpoena. Yet, in *Trump v. Thompson*,[126] Justice Thomas did not recuse. In fact, he was the only justice to vote in favor of staying the subpoena.[127] This is about as clear a violation of the recusal statute as can be.

In 2022, Justice Thomas refused to recuse from yet another case involving the efforts of his wife and others to overturn the 2020 election.[128] It was publicly known that Ms. Thomas had sent letters to 29 Arizona legislators asking them to fight back against "fraud" and select a "clean slate of Electors."[129] In September 2022, Ms. Thomas had a "voluntary" meeting with the January 6 Committee in

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121. 28 U.S.C. § 455.

122. Kevin Daley, *Exclusive: Ginni Thomas Wants to Set the Record Straight on January 6*, WASH. FREE BEACON (Mar. 14, 2022), https://freebeacon.com/courts/exclusive-ginni-thomas-sets-the-record-straight-on-january-6/ [https://perma.cc/MB46-5PWT].

123. Caroline Linton, Ellis Kim & Melissa Guinn, *Ginni Thomas Tells January 6 Panel Her Husband Was Completely Unaware of Texts with Mark Meadows*, CBS NEWS (Sept. 30, 2022), https://www.cbsnews.com/news/ginni-thomas-jan-6-committee-interview/ [https://perma.cc/9XER-7VS6].

124. Bob Woodward & Robert Costa, *Virginia Thomas Urged White House Chief of Staff to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/ [https://perma.cc/EHJ4-8SRQ].

125. 28 U.S.C. § 455(a).

126. Trump v. Thompson, No. 21A272 (on application for stay of mandate and injunction pending review) (decided Jan. 19, 2022).

127. *Id.* (discussing how "JUSTICE THOMAS would grant the application").

128. *Recent Times a Justice Failed to Recuse Despite a Conflict*, Fix the Court (Sept. 10, 2024), https://fixthecourt.com/2024/09/recent-times-justice-failed-recuse-despite-clear-conflict-interest/ [https://perma.cc/HK9B-MC3Q].

129. Emma Brown, *Ginni Thomas Pressed 29 Ariz. Lawmakers to Help Overturn Trump's Defeat*, WASH. POST (June 10, 2022), https://www.washingtonpost.com/investigations/2022/06/10/ginni-thomas-election-arizona-lawmakers/ [https://perma.cc/25WS-U45K].

lieu of a subpoena.[130] Yet in November 2022, in *Ward v. Thompson*,[131] the Court refused to block a January 6 Committee subpoena of records of Arizona's GOP Chair.[132] Justices Thomas and Alito dissented saying that they would grant the Arizona GOP's application for stay and injunction.[133] This was an order decided on the Court's shadow docket, so few people heard about it. But, as Professor Amanda Frost has pointed out, this was a clear violation by Justice Thomas of the recusal statute — 28 U.S.C. Section 455.[134] The other eight justices all knew about it, yet they did nothing to prevent it nor said anything publicly about it.[135]

In 2024, there were two more cases that came before the Court that also arose out of the January 6 insurrection. The first was an appeal of a Colorado Supreme Court order disqualifying Donald Trump from the presidential primary ballot under 14th Amendment, Section 3.[136] The second was Trump v. United States, an appeal of a district court order denying a motion to dismiss criminal charges in the District of Columbia against Trump on account of presidential immunity.[137] Justice Thomas did not recuse from either case, in both of which he sided with the majority in ruling in favor of Trump.

As discussed above, Justice Alito did not recuse from any of the cases before the Court involving businesses owned by Paul Singer, his host for the 2008 fishing trip to Alaska.[138] If Singer was a good enough friend for Alito to be permitted to accept the free trip under the "personal friend" exception to gift rules,[139] Singer was a good enough friend that Alito needed to recuse himself from these cases. According to Justice Alito's account in the *Wall Street Journal*, they aren't friends at all,[140] in which case Alito did not need to recuse, but he should not have gone fishing with Singer. Alito could easily have avoided this recusal problem by not accepting the trip or by paying his own way.

There are dozens of other cases in which justices did not recuse, and reasonable arguments can be made that they should have recused, and probably equally

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130. *See* Caroline Linton, *Ginni Thomas Will Meet with House Jan. 6. Committee, Lawyer Says*, CBS NEWS (Sept. 22, 2022), https://www.cbsnews.com/news/ginni-thomas-agrees-to-january-6-house-committee-interview-public-hearing-september-28/ [https://perma.cc/6H2D-75EC].

131. Ward v. Thompson, 22A350 (Nov. 14, 2022), https://www.supremecourt.gov/orders/courtorders/111422zr_4gc5.pdf [https://perma.cc/GAQ5-4NPB].

132. *Id.*

133. *Id.*

134. Amanda Frost, *Why the Other Eight Justices Must Censure Clarence Thomas: A Justice Who Does Not Respect the Rules Around Conflict of Interest Will Further Undermine This Court*, SLATE (Dec. 5, 2022), https://slate.com/news-and-politics/2022/12/clarence-thomas-conflict-of-interest-consequences.html [https://perma.cc/WDH6-W8EH].

135. *Id.*

136. Trump v. Anderson, 601 U.S. 100 (2024).

137. Trump v. United States, 603 U.S. ___ (2024).

138. *See supra* text accompanying notes 79–86.

139. Justice Alito was still required to disclose the trips even if Singer had been a personal friend. *See supra* text accompanying notes 84–86.

140. *See supra* text accompanying note 85.

reasonable arguments can be made that recusal was not needed.[141] Ambiguity in the law on judicial recusal is a problem that may lead some justices to refuse to recuse even in cases where it's obvious they should recuse because no reasonable arguments can be made in favor of participating in a case.

Another problem is procedural. Presently, each justice makes recusal decisions on their own. The most blatant violations of the recusal statute, such as Justice Thomas's failure to recuse in *Trump v. Thompson*,[142] taint other recusal decisions that are closer calls because the public does not trust the Justices when it comes to ethics. A more systematic approach to recusal, as well as other ethics matters, is needed to restore public confidence in the Court.[143] As discussed in Part III of this Article, having a Supreme Court ethics lawyer and inspector general, and potentially also advisory opinions from other federal appellate judges, would go a long way toward establishing a more orderly process.

6. STOCK HOLDINGS

Another significant ethics problem is justices' ownership of individual stocks, which creates conflicts of interest.[144] At least two justices currently own individual stocks—Chief Justice John Roberts and Justice Samuel Alito.[145] Justice Breyer owned individual stocks before he left the Court.[146] In 2021, these three justices had combined direct ownership interests in forty publicly traded companies, many of which frequently appear before the Court, although Roberts and Alito appear to have reduced their holdings somewhat in 2022 and 2023.[147]

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141. *See Recent Times a Justice Failed to Recuse Despite a Conflict of Interest*, FIX THE COURT (Jan. 12, 2024), https://fixthecourt.com/2023/07/recent-times-justice-failed-recuse-despite-clear-conflict-interest/ [https://perma.cc/2TPY-JCSM] (reporting 18 cases since 2015 in which one or more justices had a conflict of interest that presumptively required recusal under the recusal statute, 28 U.S.C. § 455, but did not recuse).

This Article will not analyze whether recusal was required in each of these cases, and some of them were close calls. Some of these missed recusals could have been avoided if the justice had taken steps to avoid the conflict of interest to begin with, for example, by divesting shares of stock in individual companies that could have future cases come before the Court.

142. Trump v. Thompson, No. 21A272 (Jan. 19, 2022) (denying former President Trump's motion to stay House January 6 Committee subpoena of White House records).

143. As discussed *infra* text accompanying note 159 (discussing the automated conflicts check systems used at the courts of appeals). It is not clear what automated software is used at the Supreme Court to detect conflicts.

144. *See* Richard W. Painter, *Supreme Court Justices' Stock Ownership Could Pose Conflict of Interest*, NAT'L L.J. (Oct. 12, 2021), https://www.law.com/nationallawjournal/2021/10/12/supreme-court-justices-stock-ownership-could-pose-conflict-of-interest/ [https://perma.cc/7JME-MTCV]. This section of this Article is based in part on this 2021 op-ed with updates through 2023.

145. *See* this footnote's link for a spreadsheet of the justices' individual stock ownership (updated through 2023). Justices' stock ownership, 2010–2024, https://docs.google.com/spreadsheets/d/11O9Kng2KQCGSobEWWP4aAIPKIeXlVQlWoL8T-w_U8Nw/edit?fbclid=IwAR3-DGYuPRefSramevH0sFh0AnL2mizbVdd_C2UakIXh0o4urVqk3z7sfzU#gid=0 [https://perma.cc/2LPS-PNBS] (last visited Sept. 25, 2024) (cited in Richard W. Painter, Supreme Court Justice's Stock Ownership Could Pose Conflict of Interest, NAT'L L. J. (Oct. 12, 2021), https://www.law.com/nationallawjournal/2021/10/12/supreme-court-justices-stock-ownership-could-pose-conflict-of-interest/ [https://perma.cc/5NXH-ZN6P]).

146. *Id.*

147. *Id.*

Justices usually avoid violating judicial ethics rules by recusing from cases in which they have a financial interest. But as the *Wall Street Journal* reported, many federal judges have not been so careful—131 Federal Judges participated in cases involving companies in which they had a financial interest.[148] This is a problem that a judge or justice can easily avoid by investing in diversified mutual funds and owning no individual stocks.

Recusal is a legally permissible alternative to divesting,[149] but recusal on the Supreme Court is a worse option than on the lower courts where substitute judges can be assigned to a case. There are no "replacement" justices on the Supreme Court. A recusal means that the case is decided by eight justices; two recusals mean the case is decided by seven justices.

In 2021, for example, Chief Justice Roberts owned between $500,000 and $1 million of stock in both Texas Instruments and Thermo Fisher, and between $250,000 to $500,000 of stock in Charter Communication.[150] Just these three companies or their subsidiaries have appeared before the Court many times in the past few years. In each case, Roberts should have recused himself from participating. Sometimes he did recuse, and sometimes he didn't.[151]

Stock-based recusals disadvantage parties seeking certiorari review of a lower court's decision. The Supreme Court grants very few of the requests it receives, and it takes four votes for a grant, regardless of how many justices recuse. When fewer than nine justices consider a request for certiorari, the odds of certiorari being granted are lower.

Stock-based recusals are also problematic when the court decides a case. Justices' recusals create a risk the court will split 4-4, leaving the legal issue unresolved. In *Warner-Lambert v. Kent*,[152] the Court split 4-4 in a product-liability suit after Chief Justice Roberts recused because of his stock holdings in Pfizer, one of the parties to the case.[153]

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148. *See* James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL STREET J. (Sept. 28, 2021), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421?mod=searchresults_pos1&page=1 [https://perma.cc/D3GG-XLSH].

149. *See* 28 U.S.C. § 455 (discussing disqualification of justice, judge, or magistrate judge).

150. *See* FINANCIAL DISCLOSURE REPORT OF CHIEF JUSTICE JOHN ROBERTS FOR CALENDAR YEAR 2020, FIX THE COURT, https://fixthecourt.com/wp-content/uploads/2021/06/Roberts-JG-J3.-SC_SR_20.pdf [https://perma.cc/85X4-DRBC].

151. *See* Greg Stohr, *U.S. Chief Justice Roberts Overlooked Stock Conflict in Case*, BLOOMBERG (Dec. 18, 2015), https://www.bloomberg.com/news/articles/2015-12-18/u-s-chief-justice-roberts-overlooked-stock-conflict-in-case [https://perma.cc/WT9S-SUUN] (discussing both justices' failure to recuse in a case involving Texas instruments); Lawrence Hurley, *U.S. chief justice steps aside in patent case over stock conflict*, REUTERS (Jan. 4, 2017), https://www.reuters.com/article/idUSKBN14O2AX/ [https://perma.cc/C74E-PNFZ] (discussing Chief Justice Roberts's recusal from a case involving a unit of Thermo Fisher).

152. Warner-Lambert Co. v. Kent, 552 U.S. 440 (2008).

153. *See* Tony Mauro, *Roberts' Recusal is Poison Pill for Drug Case Before Supreme Court*, NAT'L L.J. (Mar. 4, 2008), https://www.law.com/nationallawjournal/almID/1204544937880/ [https://perma.cc/Q5XG-6AX3].

As the Court itself said in 1993, "Even one unnecessary recusal impairs the functioning of the Court."[154] Recusals due to stock ownership are unnecessary. Justices can own mutual funds and other common investment funds without recusing. Congress has even exempted justices from capital gains taxes if they replace their stock holdings with mutual funds or other like investments to avoid potential conflicts of interest.[155]

Furthermore, there have been some missed recusals, probably inadvertent, but bad for the public image of the Court, particularly when combined with the other ethics problems discussed in this Article. Chief Justice Roberts participated in oral argument in a patent infringement case, *Life Technologies Corporation v. Promega Corporation*,[156] then recused himself due to his ownership of shares in one of the parties' parent companies.[157] Justice Alito missed a recusal in *Valentine v. PNC Financial Services, et. al*,[158] when one of the parties was PNC Bank, whose shares he owned.

Lower federal courts have mandatory software that identifies conflicts with judges' stock holdings by cross-checking stocks owned by judges and their spouses, and subsidiaries of these companies, with names appearing in pleadings.[159] If this software was used at the Supreme Court, it wasn't very effective given the number of missed recusals.

Selling a stock instead of recusing when a case is ready to be decided also may not be a viable alternative. If the justices have material nonpublic information about how the case might be decided, a justice who sells stocks that could be affected by the case could be charged with criminal insider trading. At that juncture, holding onto the stock and recusing may be the only alternative. If the justice sold all the stocks in the portfolio at the outset, they wouldn't be in this quandary.

Supreme Court justices should be required to divest individual stock holdings upon assuming office and to stay divested. Diversified mutual funds are sufficient investments. Congress has taken limited steps to increase transparency, requiring federal courts to post judges' and justices' financial disclosure forms online and requiring judges and justices to report larger stock transactions within forty-five days, but existing law does not ban judges and justices from trading

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154. Statement of Recusal Policy, Supreme Court of the United States (Nov. 1, 1993), https://eppc.org/docLib/20110106_RecusalPolicy23.pdf [https://perma.cc/5XMH-D6T8].

155. *See* 26 U.S.C. § 1043 (discussing the sale of property to comply with conflict-of-interest requirements).

156. Life Techs. Corp. v. Promega Corp., 580 U.S. 140 (2017).

157. *See* Adam Liptak, *The Hazards Justices Face by Owning Individual Stocks*, N.Y. TIMES (Jan. 9, 2017), https://www.nytimes.com/2017/01/09/us/politics/the-hazards-justices-face-by-owning-individual-stocks.html [https://perma.cc/HT7H-YLJT].

158. Valentine v. PNC Fin. Servs. Grp., Inc., 141 S. Ct. 1100 (2021).

159. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY § 410 Mandatory Conflict Screening, https://www.uscourts.gov/sites/default/files/guide-vol02c-ch04.pdf [https://perma.cc/Z9GF-LRMN] (describing mandatory automatic conflict checking system requiring input of judges' financial holdings).

stocks.[160] For the Supreme Court at least, where recusal is a poor alternative, this is not enough.

7. THE "ARMADA OF AMICI"

Many amicus briefs are filed with the Court. The amici and their counsel are disclosed in the brief, and the "interest of amici" is vaguely described. Who is funding the organizations submitting the amicus brief is not disclosed. Some of the justices may know who is paying for these amicus briefs and may know that their friends or acquaintances are behind them, but other justices may not know. Parties to the case may know who is paying for amicus briefs on their side (lawyers for parties and amici often talk to each other although parties are not supposed to assist amici with brief writing). Lawyers on the opposing side often do not know or find out too late to inform the Court about who is paying for amicus briefs filed against them.

Senator Sheldon Whitehouse described an example of this phenomenon in his 2021 article, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, published in the *Yale Law Journal* Forum. Ironically, the case before the Court involved the very issue these organizations care about most—non-profit organizations' "right" not to disclose their sources of funding:

> *Americans for Prosperity Foundation v. Bonta* [594 US _ (2021)] provides a recent and extreme example of the "flotilla" phenomenon. Plaintiff Americans for Prosperity Foundation (AFPF), the 501(c)(3) arm of the Koch network's right-wing 501(c)(4) political-advocacy group Americans for Prosperity, objected to a California state regulation that required 501(c)(4) nonprofits to confidentially disclose their largest donors. The nonprofits had to provide the state Attorney General with a copy of their IRS Form 990 Schedule B—information the organizations must already, of course, provide to the IRS. The case proceeded through the federal courts with little fanfare or media attention. But at the Supreme Court cert stage, a veritable armada of amici supporting AFPF barraged the Court, urging it to grant cert.
>
> This was a highly coordinated effort made possible only by the money and connections of the Koch political enterprise. At least fifty-five of the cert-stage amici in support of the petitioner had taken money either from the Koch political network or from a Koch-linked anonymous account at Donors Trust, an administrator of "donor-advised" funds that has been described as "the dark-money ATM of the right." Subsequently, at the merits stage, at least forty-five filers had apparent financial ties to the Koch network and/or Donors Trust. Additionally, the Center for Media and Democracy found that eleven prominent right-wing

160. *See* The Courthouse Ethics and Transparency Act, S. 3059, 117th Cong. (2021–22), (requiring federal courts to post judges' and justices' financial disclosures online and requiring judges and justices to report larger stock transactions within 45 days).

> groups gave close to $222 million to sixty-nine of the organizations filing amicus briefs in support of AFPF.
>
> It is difficult—if not impossible—to credibly argue that such amici are independent of the plaintiff, because AFPF is itself a central political organization of the Koch network. Yet none of these groups disclosed their financial ties to the plaintiff.[161]

Dark money funding of amicus briefs is a question of judicial ethics. This is particularly true if the same monied interests deploy other means of influencing justices, for example, gifts of luxurious travel. Some of the gift donors omitted from justices' financial disclosure forms—including Harlan Crow[162] and Paul Singer[163]—are involved with organizations filing amicus briefs. This is in addition to whatever "amicus curiae" (friend of the court) briefing may or may not take place in private conversations during a justice's free travel on yachts or private planes. The two problems are interrelated, and the common theme is that the "dark money" paying for the justices' free luxury travel and amicus briefs is not disclosed, and in some instances, the source of that money may be the same.

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161. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency,* YALE L.J. F. (Oct. 24, 2021), https://www.yalelawjournal.org/forum/a-flood-of-judicial-lobbying-amicus-influence-and-funding-transparency [https://perma.cc/8J6C-9NDQ].

162. The National Multifamily Housing Council, a trade group that is currently chaired by Ken Valach, who took over as CEO of Crow Holdings Inc. in 2015, filed a series of friend-of-the-court, or amicus, briefs in cases related to racial discrimination in housing, the Clean Water Act and rent control, according to research from Accountable US. *See* Paul Blumenthal, *Clarence Thomas Said His Billionaire Friend Didn't Come Before The Court—But His Business Interests Did: A Real Estate Trade Group Now Chaired By Crow Holdings' CEO Has Filed Briefs in Supreme Court Cases Relevant to Harlan Crow's Financial Interests*, HUFF. POST (Apr. 26, 2023), https://www.huffpost.com/entry/clarence-thomas-harlan-crow-business-interests_n_64494a12e4b0d840388c2935 [https://perma.cc/E3UQ-NKCS]. Harlan Crow also since 1996 has been a member of the American Enterprise Institute's ("AEI") Board of Trustees. *Board of Trustees*, AM. ENTERPRISE INST., https://www.aei.org/about/board-of-trustees/ [https://perma.cc/SYE4-7ETQ] (last visited Feb. 20, 2024). AEI has supported and published Supreme Court amicus briefs written by scholars affiliated with AEI during Thomas's tenure on the Court. *See, e.g.*, John E. Calfee, Robert W. Hahn, Tomas J. Philipson & Ernst R. Berndt, *Supreme Court Amicus Brief Regarding Wyeth v. Diana Levine* (June 3, 2008), https://www.aei.org/research-products/testimony/supreme-court-amicus-brief-regarding-wyeth-v-diana-levine/ [https://perma.cc/SHH6-2GZ6]; Peter J. Wallison, *Supreme Court Amicus Brief Seeking Certiorari in AT Corp. v. Lila T. Gavin* (Feb. 8, 2007), https://www.aei.org/research-products/speech/supreme-court-amicus-brief-seeking-certiorari-in-at-corp-v-lila-t-gavin/ [https://perma.cc/SM8F-T24E].

163. Paul Singer is Chairman of the Board of the Manhattan Institute. *Paul Singer*, MANHATTAN INST., https://manhattan.institute/person/paul-singer [https://perma.cc/GFA7-ZZCE] (last visited Feb. 20, 2024). The Manhattan Institute has submitted amicus briefs to the Court repeatedly, including two as recently as March 2023. *See* Brief for Center for Equal Opportunity et al. as Amici Curiae Supporting Petitioners, Roberts v. McDonald, No. 22-757, https://media4.manhattan-institute.org/sites/default/files/amicus-brief-roberts-v-mcdonald.pdf [https://perma.cc/M9CH-EDB3] (asking the Supreme Court to review a case involving the ability to challenge government directives instructing medical providers to allocate Covid-19 treatments on the basis of race); *see also* Brief for the Manhattan Inst. et al as Amici Curiae Supporting Petitioners, Moore v. United States, No. 22-800, https://duyrl8j74t5sy.cloudfront.net/wp-content/uploads/amicus-brief-moore-v-united-states.pdf [https://perma.cc/BEW6-LXTF] (asking the Supreme Court to hold that Congress does not have the power to tax citizens on their ownership of shares in a corporation without realization of income under the 2017 Tax Cuts and Jobs Act which assessed a one-time "deemed repatriation tax" on investments in some corporations abroad).

8. DO THE JUSTICES RECOGNIZE THEY HAVE AN ETHICS PROBLEM?

The short answer—No.

After news reports that Justice Thomas failed to disclose numerous gifts and transactions with the same billionaire, Harlan Crow, U.S. Senator Richard Durbin, Chairman of the Senate Judiciary Committee, wrote Chief Justice Roberts asking him to testify before the Committee.[164] Roberts declined to testify, citing separation of powers concerns. (Query whether Roberts would have told the Senate at his 2005 confirmation hearing that while on the Court he would refuse a Congressional invitation to testify about the Court).

Chief Justice Roberts wrote Senator Durbin saying that "Testimony before the Senate Judiciary Committee by the Chief Justice of the United States is exceedingly rare, as one might expect in light of separation of powers concerns and the importance of preserving judicial independence."[165] Roberts attached to his letter a "Statement of Ethics Principles and Practices" signed by all nine justices representing that they are complying with ethics rules.[166]

This Statement says that sources the justices consult on ethics include "judicial opinions, treatises, scholarly articles, disciplinary decisions, and the historical practice of the Court and the federal judiciary" and that the justices "may also seek advice from the Court's Legal Office and from their colleagues."[167] Noticeably absent is mention of consultation with a lawyer specializing in ethics, or the Court having a designated ethics office like the ethics office in most executive branch agencies.

The Statement says that the Judicial Conference of the United States, "which binds lower courts, does not supervise the Supreme Court" (true); that the justices supervise themselves (doubtful); and that since 1991, the justices have "voluntarily" followed Judicial Conference regulations on financial disclosure (the Ethics in Government Act which covers the Supreme Court says reporting is required

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164. Letter from Senator Richard Durbin (D. IL), Chairman of the Senate Judiciary Committee, to Chief Justice John Roberts (Apr. 20, 2023), https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf [https://perma.cc/CT4A-RDGM].

165. Letter from Chief Justice John Roberts to Senator Richard Durbin (D. IL), Chairman of the Senate Judiciary Committee (Apr. 25, 2023) [hereinafter "Roberts April 25 Letter"], https://www.documentcloud.org/documents/23789636-roberts-letter-to-durbin-4-25-2023 [https://perma.cc/7Q25-SWRJ]. The Chief Justice noted that "The Supreme Court Library compilation of 'Justices Testifying Before Congress in Matters Other Than Appropriations or Nominations' has identified only two prior instances—Chief Justice Taft in 1921 and Chief Justice Hughes in 1935. Both hearings involved routine matters of judicial administration relating to additional judgeships in the lower courts and jurisdiction over appeals from lower court injunctions." *Id.* Roberts also noted that his predecessor, Chief Justice Rehnquist, appeared before House committees twice to testify on improvements to the federal civil service system and again on the John Marshall Commemorative Coin Act. *Id.*

166. Statement of Ethics Principles and Practices, attached to Roberts April 25 Letter, *supra* note 165, [hereinafter "Statement of Ethics Principles and Practices"] ("The undersigned Justices today reaffirm and restate foundational ethics principles and practices to which they subscribe in carrying out their responsibilities as Members of the Supreme Court of the United States.").

167. *Id*. *See infra* text accompanying notes 252–65 for further discussion of the Court's Legal Office.

not "voluntary," and as explained above, some justices have not been following the regulations).[168] The Statement says that the justices file their reports with the Conference's Committee on Financial Disclosure which sends a letter of inquiry if filings on their face are incomplete and gives guidance on interpreting disclosure rules[169] (true, but the Committee on Financial Disclosure can't advise on how to disclose plane and yacht trips they are not told about).

The Statement then invokes the Judicial Conference's 2023 "clarification on the scope of the 'personal hospitality' exemption to the disclosure rules"[170] that has been relied upon by defenders of Justices Thomas and Alito to argue that before 2023, the obligation to disclose travel on private planes and yachts was ambiguous.[171]

Concerning outside earned income, the Statement says that "Justices may not have outside earned income—including income from teaching—in excess of an annual cap established by statute and regulation. In calendar year 2023, that cap works out to less than 12 percent of a Justice's pay."[172] But the Statement then notes a gigantic loophole: "Compensation for writing a book is not subject to the cap."[173] That exception alone has allowed several of the justices to make millions of dollars in book royalties.

Concerning recusal, the Statement notes that "[i]ndividual Justices, rather than the Court, decide recusal issues. If the full Court or any subset of the Court were to review the recusal decisions of individual justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate."[174] Explanations for recusals are sometimes provided and sometimes not.[175] While the Statement notes that a justice may explain why they did not recuse themselves from a case, the Statement cites only one example where that was done.[176]

Senator Durbin responded with a letter to Chief Justice Roberts stating that "[i]t is noteworthy that no Justice will speak to the American people after numerous revelations have called the Court's ethical standards into question, even though sitting Justices have testified before Senate or House Committees on at least 92 occasions since 1960."[177] Senator Durbin asked the Chief Justice additional

168. *See* Statement of Ethics Principles and Practices, *supra* note 166.

169. *Id*.

170. *Id*.

171. As pointed out above, across the federal government this obligation of officeholders to disclose gifts of travel on private planes and yachts was never ambiguous. *See supra* text accompanying notes 61–71.

172. Statement of Ethics Principles and Practices, *supra* note 166.

173. *Id*.

174. *Id*. at 2.

175. *Id*.

176. *Id*. at 2–3 (citing Microsoft Corp. v. United States, 530 U.S. 1301 (2000)) (Chief Justice Rehnquist's explanation of his decision not to recuse even though his son was representing Microsoft in another unrelated case).

177. Letter from Senator Richard Durbin (D. IL), Chairman of the Senate Judiciary Committee, to Chief Justice John Roberts (April 27, 2023), https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20Chief%

questions, including: the date on which the justices agreed to sign the Statement, whether the Court requires unanimity among the justices to adopt a resolution agreeing to follow the substance of Judicial Conference regulations on ethics, what authorities the justices consult to address specific ethics issues and whether this consultation process is documented, what the consequences, if any, are for a justice who fails to respond appropriately to allegations of errors in financial disclosure reports and whether there has "ever been any censure, reprimand, admonition, sanction, or other penalty imposed on a Justice for failure to abide by any of the principles and practices now contained in the Statement on Ethics Principles and Practices."[178] All good questions. Thus far, there has been no response from the Chief Justice.

II. WHAT'S WRONG WITH ETHICS AT THE SUPREME COURT?

Why is it so hard for the Supreme Court to abide by ethics rules? This Part provides a breakdown of the different factors that make ethics so difficult for the Supreme Court and reasons why the Court has thus far failed to address ethics credibly.

No external oversight. Professionals are not good at regulating themselves. Wall Street firms and stock exchanges once resembled tightly knit social clubs and were disastrous as self-regulatory organizations, necessitating federal regulation in the 1930s.[179] The bar has failed to regulate its most powerful law firms, leading Congress to enact federal regulation of securities lawyers after the collapse of Enron and WorldCom in 2002.[180] Self-regulation without external oversight does not work.

Same for the Supreme Court. Nobody enforces ethics rules because there is no external supervision. This is very different from lower court judges who are subject to the jurisdiction of the Judicial Conference. Not only can lower court judges be disciplined for violating ethics rules, but their decisions can be overturned when they fail to recuse from a case despite an appearance of bias.[181] State court

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20Justice%20Roberts%20-%204.27.23.pdf [https://perma.cc/R427-J5R5] (responding to Roberts's letter and asking follow-up questions).

178. *Id.*

179. *See generally* Richard W. Painter, *The Dubious History and Psychology of Clubs as Self Regulatory Organizations*, *reprinted in* RESTORING TRUST IN AMERICA'S BUSINESS (Jay Lorsch et al. eds., 2004).

180. *See* Sarbanes-Oxley Act § 307, 15 U.S.C. § 7245 (2002); Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Securities Act Rel. No. 8185 (Sept. 26, 2003), 17 C.F.R. §§ 205.1–205.7. Sarbanes-Oxley Act § 307 was based on a proposal in a letter written by the author of this Article and signed by 40 law professors. *See* Letter from Professor Richard Painter and professors of securities regulation and/or professional responsibility to Harvey Pitt, Chairman of the Securities and Exchange Commission (March 7, 2002); *see also* Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225 (1996) (suggesting that Congress mandate that lawyers representing public companies report known securities law violations to boards of directors or a designated committee of the board).

181. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) (reversal of federal district judge's ruling in case because of failure to recuse under 28 U.S.C. 455).

judges can also be disciplined by courts in their states and their decisions can be reversed by federal courts on due process grounds if conflicts of interest create an appearance of bias.[182] Only nine judges in the United States are never held accountable by other judges, the nine who sit on the Supreme Court.

Justices also reject congressional oversight. In refusing Senator Durbin's invitation to testify before the Senate Judiciary Committee, the Chief Justice apparently had the backing of the eight other justices who signed the accompanying Statement attesting to their compliance with ethics rules. The only recourse Congress has is a subpoena fight with the Supreme Court, with an uncertain outcome, or impeachment of a justice by the House and removal by the Senate. For reasons explained separately below, that is almost certainly not going to happen.

Colleagues cover for colleagues. This is a phenomenon in many workplaces. In police departments, the "thin blue line" all too easily means a "blue wall of silence."[183] The Church is another example, as investigations worldwide have revealed.[184] The fewer colleagues there are in an organization, the more likely they may have close personal relationships and cover for each other. Of the active justices, there are only nine!

But the circle of colleagues extends well past nine justices. The justices are at the center, but adjacent rings of colleagues circle the wagons around them. The first ring includes appellate court judges, some of whom previously were colleagues of Supreme Court judges on the courts of appeals and may not want to get involved in controversy over Supreme Court ethics (this is a potential drawback to proposals to rely on appellate judges to review Supreme Court ethics, discussed in Sections III and IV of this Article). Second, Supreme Court clerks and active members of the Supreme Court bar have much to lose by criticizing the Court, and in fact, much to gain by ingratiating themselves with the justices. Former clerks and members of the Supreme Court bar often socialize with justices *and* argue cases before them. They are not colleagues in the sense of being professional equals of the justices, yet there is inequality going the other way too, as many lawyers make more money than the justices and have clients who make even more. Colleagues cover for colleagues at the very top of a professional hierarchy against the backdrop of an economic hierarchy that is intrinsically intertwined.

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182. Caperton v. Massey Coal, 556 U.S. 868 (2009) (reversing West Virginia Supreme Court holding on 14th Amendment due process grounds because a justice of that Court failed to recuse after receiving substantial campaign contributions from a party to the case).

183. *See* Matthew L. M. Fletcher, *Erasing the Thin Blue Line: An Indigenous Proposal*, 2021 MICH. ST. L. REV. 1447 (2020) (drawing on political theories of indigenous nations to recommend proposals for judicial oversight of policing).

184. *See* OFFICE OF THE MARYLAND ATTORNEY GENERAL, ATTORNEY GENERAL'S REPORT ON CHILD SEXUAL ABUSE IN THE ARCHDIOCESE OF BALTIMORE, INTERIM PUBLIC RELEASE (Apr. 2023), https://www.marylandattorneygeneral.gov/news%20documents/OAG_redacted_Report_on_Child_Sexual_Abuse.pdf [https://perma.cc/DDV3-466R]. "Time and again, members of the Church's hierarchy resolutely refused to acknowledge allegations of child sexual abuse for as long as possible." *Id.* at 9.

Lifetime tenure and fear of retaliation. Lifetime tenure reinforces the "colleagues covering for colleagues" phenomenon. Nobody is going anywhere, and the justices know that they will be working with each other for a long time. Law clerks and others who are aware of ethics violations will think twice before saying anything, fearing retaliation not only from a justice on the Court, but also from colleagues whose tenure lasts a lifetime, as well as their former clerks.

Academic departments are a close parallel. In sexual harassment scandals, tenured colleagues often cover for colleagues. In many departments, harassers are an "open secret" yet are not sanctioned.[185] One reason victims do not come forward is fear of retaliation by colleagues of the perpetrator. When Harvard's Title IX office found a professor guilty of violating its sexual harassment policy, other tenured professors at Harvard defended him.[186] He was still teaching even after three graduate students sued for harassment and retaliation.[187] Harvard denied legal responsibility for the alleged retaliation, drawing a rebuke from the U.S. Department of Education and the Justice Department in a 2022 Statement of Interest siding with the plaintiffs.[188]

Lifetime tenure of judges, and fear of retaliation by judges, similarly enable judicial branch cover-ups. No Supreme Court justice has been accused of sexual harassment or assault while on the court, although two of the justices (Thomas and Kavanaugh) were accused at their confirmation hearings before they joined the Court.[189] On the Ninth Circuit, two high-profile judges, Judge Stephen Reinhardt[190]

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185. Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty,* 2018 UTAH L. REV. 671, 709 (2018).

186. Isabella B. Cho & Ariel H. Kim, *38 Harvard Faculty Sign Open Letter Questioning Results of Misconduct Investigations into Prof. John Comaroff*, HARV. CRIMSON (Feb. 4, 2022) https://www.thecrimson.com/article/2022/2/4/comaroff-sanctions-open-letter/[https://perma.cc/H3CQ-ZLNM]. After the students filed their lawsuit, most of these faculty retracted their support for Comaroff. Ariel H. Kim & Meimei Xu, *35 Harvard Professors Retract Support for Letter Questioning Results of Comaroff Investigations*, HARV. CRIMSON (Feb. 10, 2022), https://www.thecrimson.com/article/2022/2/10/comaroff-faculty-letter-retraction/ [https://perma.cc/Z9HR-EJXD].

187. Czerwienski, v. President and Fellows of Harvard Coll., Case 1:22-cv-10202 (D. Mass. 2022). Graduate students sued under Title IX, alleging harassments by Harvard anthropology Professor John Comaroff.

188. *Id.*; U.S. DEP'T OF JUST., STATEMENT OF INTEREST (2022), https://www.justice.gov/crt/case-document/file/1553801/download [https://perma.cc/7VXQ-VNHZ]. "Harvard argues that Plaintiffs' retaliation claims should be dismissed because they allege that Harvard employees, rather than 'Harvard itself,' engaged in retaliatory conduct. . . .This argument not only ignores that retaliation is typically carried out by individuals employed by the recipient, but also conflicts directly with Supreme Court and other relevant case law." *Id.* at 3.

189. Michael S. Rosenwald, *A high-tech lynching': How Brett Kavanaugh Took a Page From the Clarence Thomas Playbook*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/history/2018/09/25/high-tech-lynching-how-clarence-thomass-fury-saved-his-supreme-court-nomination/ [https://perma.cc/NNU2-MUXM].

190. Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html [https://perma.cc/EK6J-9CFF] ("Detailing her experience working for Judge Reinhardt in 2017 and 2018, Olivia Warren, the former clerk, testified before a subcommittee of the House Judiciary Committee that Judge Reinhardt openly commented on his female clerks' physical appearances and on her sexual relationship with her spouse").

and Judge Alex Kozinski[191], were accused of sexually harassing law clerks, and in both cases, law clerks and perhaps other judges were aware of the alleged behavior for a long time.[192] Judge Reinhardt's conduct was not made known publicly until after he died.[193] Judge Kozinski eventually faced a disciplinary process that persuaded him to resign from the Court.[194] Had he been on the Supreme Court, however, he might very well have stayed, knowing that the disciplinary process then used by the Ninth Circuit (referral of his case to an independent investigation by the Second Circuit) would not be used for a justice of the Supreme Court, and that impeachment by the House and removal by two-thirds of the Senate would be highly unlikely.

Judicial misconduct, of course, goes well beyond sexual harassment, yet the shield of tenure protects all of it. The fear of retaliation may discourage law clerks and others from reporting it.

Professional Superiority and Overconfidence. A robust literature of psychology studies evaluates the problem of overconfidence of powerful decision-makers.[195] High-status decision-makers may tend to be more overconfident than others, perhaps because they attribute their high status to their presumed ability to make good decisions. As Jennifer Robbennolt and Jean Sternlight observed in their 2013 article, *Behavioral Legal Ethics*, "social status tends to be negatively associated with ethics, with those in higher status positions tending to engage in more unethical behavior."[196] In sum, highly successful people may be overconfident in their own judgment, including their judgment about ethics.

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191. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html [https://perma.cc/ZXU8-3KBZ].

192. Dylan Hedtler-Gaudette & Sarah Turberville, *Sexual harassment by Judges Operating with Impunity Shows Courts Need Their Own #MeToo: The Branch of Government Charged with Enforcing Federal Discrimination and Harassment Laws Does Not Police Its Own,* NBC NEWS THINK (Feb. 15, 2020), https://www.nbcnews.com/think/opinion/olivia-warren-s-testimony-sexual-harassment-judges-shows-courts-need-ncna1137321 [https://perma.cc/8QGC-WTFJ].

193. Edmondson, *supra* note 190 ("The former clerk told a House committee that Judge Stephen R. Reinhardt, a prominent liberal judge who died in 2018, routinely sexually harassed her and other women who worked for him.").

194. On December 14, the chief judge of the Ninth Circuit referred the allegations for investigation and assigned them to the Second Circuit. On December 18, 2017, after additional allegations were made, Kozinski announced his retirement from the Ninth Circuit. *See* Chokshi, *supra* note 191.

195. *See, e.g.*, Hyoseok (David) Hwang, Hyun-Dong Kim & Taeyeon Kim, *The Blind Power: Power-Driven CEO Overconfidence and M&A Decision Making,* 52 N. AM. J. ECON. & FIN. 1 (2020) (finding that increased CEO power increases the probability of a CEO being overconfident).

196. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1143 (2013) (providing overview of behavioral ethics and psychology concepts applied to lawyers' ethics) (citing Don A. Moore & Paul J. Healy, *The Trouble With Overconfidence*, 115 PSYCH. REV. 502, 502 (2008)); Paul K. Piff, Daniel M. Stancato, Stéphane Côté, Rodolfo Mendoza-Denton & Dacher Keltner, *Higher Social Class Predicts Increased Unethical Behavior*, 109 PROC. NAT'L ACAD. SCI. 4086, 4088 (2012); Bella L. Galperin, Rebecca J. Bennett & Karl Aquino, *Status Differentiation and the Protean Self: A Social-Cognitive Model of Unethical Behavior in Organizations*, 98 J. BUS. ETHICS 407, 416 (2011); Joris Lammers, Diederik A. Stapel & Adam D. Galinsky, *Power Increases Hypocrisy: Moralizing in Reasoning, Immorality in Behavior*, 21 PSYCH. SCI. 737, 742 (2010).

Professional success is the new religion for many,[197] particularly at the bench and bar, and success is indicative of being the chosen one. Never mind that the justices, while qualified for their positions, are not demonstrably more qualified jurists than judges on district courts, courts of appeals, and state courts. They are able jurists, but they got on the Supreme Court through personal relationships and politics. That is true of most prestigious appointments, including in government, in academia,[198] and on other courts. People who hold such appointments are mostly qualified, but often not demonstrably more qualified than others. The fact that lots of people envy a job, for example, an appointment to the Supreme Court, and many angled to get it, does not mean that the person who gets it is necessarily more qualified.[199]

For the legal profession, one cannot achieve a higher status than the Supreme Court. Furthermore, even before joining the Court, justices' professional superiority has been reinforced by years of prominent appointments, promotions, and other indicia of professional success. This goes back to the Ivy League law school degree possessed by all but one of the current nine justices (Justice Barrett is a graduate of another prominent law school, Notre Dame).

Some justices may "look down" on others in less prestigious positions, including other senior officials without lifetime tenure. Chief Justice Roberts' refusal to testify before the Senate Judiciary Committee is premised on separation of powers concerns,[200] but this is intrinsically linked to his status as head of the judicial branch and perhaps his knowledge that he will probably still be Chief Justice years from now (he is 69) when some of the senators who want him to testify will no longer be there. Justices' sense of professional superiority is also reinforced over time. After years of having the power to define the Constitution and law, and to hire law clerks with stellar resumes, justices may assume that they are inherently better jurists than other people. If psychological studies tying high social status to unethical decision-making are correct, this overconfidence may detrimentally affect the justices' decisions about ethics.

Insularity inside the ultimate club. It is difficult to imagine a more closely-knit club of professionals than the United States Supreme Court. The members of this club—only nine at any one time—often disagree about the law, but they see each other and work together all the time.

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197. "For many are called, but few are chosen." *Mathew* 22:14 (King James).

198. Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUDIES 1, 32 (2017) (finding based on analysis of political donations that 15 percent of law professors, compared to 35 percent of lawyers, are politically conservative).

199. This could be said about any competition involving lots of aspiring candidates. *See* Thomas H. Noe & Dawei Fang, *Superstars: Talented or Merely Lucky? The Effect of Competition on Rank-Based Talent Attribution*, SSRN (July 22, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456646 [https://perma.cc/SU3V-GSFA] (observing that increasing the number of competitors in a competition presumably based on talent does not tend to increase the chance of the winner being more talented than with fewer competitors).

200. *See* Roberts April 25 Letter, *supra* note 166.

The Chief Justice, in writing for the majority in *Biden v. Nebraska*, went out of his way to emphasize that disagreement among the justices should not mean disparagement and to remind his colleagues that they should write their opinions accordingly.[201] The justices often ignore such instructions and disparage each other frequently in their opinions on jurisprudential and ideological grounds, but they do not extend the acrimony further by criticizing each other's approach to personal conflicts of interest, gifts, financial reporting requirements, and recusal.

Also, even though the justices are divided along ideological lines, in matters concerning the Court itself, the justices are closely aligned. None of the justices, for example, have expressed support for expanding the Court, for public dissemination of draft opinions, for tolerating breaches of confidentiality by law clerks, or even for allowing television cameras in the courtroom (Justices Kagan and Sotomayor were open to cameras in the courtroom before joining the Court, but they apparently changed their minds afterward).[202] Additionally, the 2023 Statement signed by all nine justices attached to Chief Justice Roberts's letter to Senator Durbin suggests a consensus among the Justices that the Court does not have an ethics problem.

Psychologist Irving Janis identified groupthink as

> [A] mode of thinking that people engage in when they are deeply involved in a cohesive ingroup, when the members striving for unanimity, override their motivation to realistically appraise alternative courses of action. Groupthink refers to a deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures.[203]

Social identity is a factor in reinforcing groupthink.[204] In matters concerning the administration of the Court itself, including ethics, there appears to be a lot of groupthink among the justices.

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201. Biden v. Nebraska, 143 S. Ct. 2355 (2023).

> It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. . . . We have employed the traditional tools of judicial decisionmaking in doing so. Reasonable minds may disagree with our analysis—in fact, at least three do (citation omitted). We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and the country.

Id. at 2375–76.

202. *See Sotomayor, Kagan backtrack on cameras in the Supreme Court*, CBS NEWS (Feb. 3, 2015), https://www.cbsnews.com/news/sotomayor-kagan-backtrack-on-cameras-in-the-supreme-court/ [https://perma.cc/ES7Z-BNUJ]; Gavin Broady, *Kagan, Sotomayor Backtrack On Cameras In The Courtroom*, LAW360 (Feb. 2, 2015), https://www.law360.com/articles/617541/kagan-sotomayor-backtrack-on-cameras-in-the-courtroom [https://perma.cc/9J8W-FGNA].

203. IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (2nd ed. 1982).

204. *See* Michael A. Hogg, *Social Identity Theory*, *in* UNDERSTANDING PEACE AND CONFLICT THROUGH SOCIAL IDENTITY THEORY: CONTEMPORARY GLOBAL PERSPECTIVES 3, 6 (Shelley McKeown, Reeshma Haji & Neil Ferguson eds., Springer Cham 2016).

The only people the justices seem willing to discuss ethics with are the other justices. After consulting with one another, they almost invariably conclude that their fellow club members are doing nothing wrong.

Justices have special friends. Supreme Court justices make a lot of "special friends" and there is temptation on both sides of those relationships. From Justice Abraham Fortas in the 1960s to Justice Clarence Thomas and Justice Samuel Alito today, special friends have created ethical problems for the Court.

These problems are exacerbated because the social network that helps justices get on the Supreme Court continues to interact with them after they join the Court. Justice Fortas's colleagues and clients from private practice, including Louis Wolfson, continued their relationship with him after he joined the Court. Today, ideological affinity—and the money behind it (probably more than private law practice)—defines justices' social networks.

For example, the Federalist Society, a well-known and well-funded organization of conservative and libertarian lawyers and judges, provides networking opportunities for aspiring judges and plays an *ad hoc* role in advising the White House and Justice Department on judicial nominations in Republican administrations.[205] They also help with the confirmation battle. Leonard Leo, a Federalist Society co-chair, worked closely with Senate staff dealing with allegations against Brett Kavanaugh during the confirmation process[206] and raised over $400 million for judicial confirmation activities from 2014 to 2018.[207] Once a justice is on the Court these friendships do not go away. The same Leonard Leo arranged the 2008 fishing trip that Justice Alito took with billionaire Paul Singer two years after he joined the Court[208] (both Singer and Robin Arkley II, the owner of the lodge where the fishing expedition was hosted, were major donors to Leo's political groups[209]). The Court's more conservative justices often attend the Federalist

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205. *See* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court [https://perma.cc/PZB8-2VDP].

206. *See* E-mail from Mike Davis, Chief Couns. for Nominations, U.S. S. Comm. on the Judiciary, Sen. Chuck Grassley (R-IA), Chairman, to "Nominations Strategy" [recipient field redacted] (Sept. 16, 2018, 10:20 PM) ("Just spoke to Leonard Leo for 30 mins. He is pushing BK [Brett Kavanaugh] to call on us to reopen the hearing, so BK can address these allegations. I made it clear that this is a recipe for disaster. I also asked Abegg to call Leonard, to relay the same message. I called Travis Lenkner, BK's point man, and relayed the same."). Travis Lenkner is a former law clerk to Judge Kavanaugh and apparently was very much involved in the confirmation process for his nomination to the Supreme Court.

207. *What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary*: *Hearing Before U.S. Senate Comm. on the Jud. Subcomm. on Fed. Courts, Oversight, Agency Action & Fed. Rights* (Mar. 10, 2021) (testimony of Lisa Graves, President, Center for Media and Democracy).

208. *See* Jake Johnson, *Alito's WSJ Op-Ed Didn't Mention SCOTUS Takeover Architect Leonard Leo's Key Role in Ethics Scandal*, SALON (June 21, 2023), https://www.salon.com/2023/06/21/alitos-wsj-op-ed-didnt-mention-scotus-takeover-architect-leonard-leos-key-role-in-ethics-scandal_partner/ [https://perma.cc/8VVP-8WT3] ("According to ProPublica, Leo 'invited Singer to join' and asked the hedge fund tycoon 'if he and Alito could fly on the billionaire's jet.'").

209. *Id.*

Society's annual dinner in Washington.[210] Then comes the "armada of amici," when various organizations submit amicus briefs to the Court.[211] Some amici are funded by the same people who are friends of justices, and sometimes like Paul Singer,[212] are parties in cases before the Court.

Justices have lots of these "special friends," many of them wealthy or well-connected with wealthy people. Harlan Crow was recently interviewed by the Dallas Morning News, and the reporter asked him if he would be friends with Thomas if he were not a Supreme Court justice. Crow's answer: "It's an interesting, good question. I don't know how to answer that. Maybe not. Maybe yes. I don't know."[213]

The "friendship paradox" has been observed across society—on average, an individual's friends have more friends than that individual.[214] People tend to gravitate toward friendships with people who have a lot of friends—more friends than they do. This may be even more true for Supreme Court justices who are on the Court in part because they effectively cultivated a network of friends who in turn could enlist other friends to advance the justices' careers. Friendship also has a powerful emotional pull that has been shown to change political opinions,[215] and friendship probably impacts ethical decision-making as well.

Closing this loop of friendship are the close friendships that justices have with each other, and the fact that close friends are not likely to hold each other to account for doing something wrong. Lawyers who are close friends with directors and officers of corporate clients usually are not effective gatekeepers.[216] This author more than once has been told that he should not publicly criticize the ethics of a friend holding high political office, or even the ethics of a friend of a

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210. *See* Mark Sherman, *Justices Cheered at Conservative Group's Anniversary Dinner*, ASSOC. PRESS (Nov. 11, 2022), https://apnews.com/article/abortion-voting-rights-us-supreme-court-samuel-alito-donald-trump-f0926d7b4a8bbaf7b698ada1a791ab25 [https://perma.cc/BDP3-EYQE] ("Four of the five Supreme Court justices who overturned the constitutional right to abortion showed up at the conservative Federalist Society's black-tie dinner marking its 40th anniversary.").

211. *See* Whitehouse, *supra* note 161 (describing the "armada of amici" flooding the Court).

212. *See* discussion *supra* notes 79–86 and accompanying text (detailing Justice Alito's fishing trips with Singer).

213. Cheryl Hall, *Harlan Crow: There's Nothing Wrong with My Friendship with Clarence Thomas*, DALLAS MORNING NEWS (Apr. 17, 2023), https://www.dallasnews.com/news/2023/04/17/harlan-crow-theres-nothing-wrong-with-my-friendship-with-clarence-thomas/ [https://perma.cc/7HM6-2A38].

214. Scott L. Feld, *Why Your Friends Have More Friends than You Do*, 96 AM. J. SOCIO. 1464, 1477 (1991).

215. A survey of French university students' political opinions demonstrated that after six months, friendship caused a reduction of differences in opinions by one quarter of the mean difference; friendship caused politically-similar students to join political associations together, reinforcing political similarity. Yann Algan, Nicolò Dalvit, Quoc-Anh Do, Alexis Le Chapelain & Yves Zenou, *Friendship Networks and Political Opinions: A Natural Experiment among Future French Politicians,* SSRN (May 31, 2019), https://ssrn.com/abstract=3397092 [https://perma.cc/MZ3B-L28H].

216. Lawyers who see themselves as friends for managers of institutional clients are not likely be effective gatekeepers. *See* Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV. 1867, 1895 (2016). The same is likely true for Supreme Court justices.

friend.[217] Others have surely experienced this as well. That includes Supreme Court justices. As close friends with their colleagues on the Court, justices are not likely to be good ethics gatekeepers for the Court. Someone outside the Court must do the job.

On top of these natural emotional ties of friendship are the obvious material benefits that ensue when justices have friendships with the very wealthy. Saying "no" to a trip on a private plane or yacht with a friend, or that was arranged by a friend, is difficult. Friendship also becomes its own value, perhaps even a moral principle, blinding the justices to the bias that friendship creates, and rendering them incapable of complying with ethics rules or holding each other to account for doing the same.

Exceptionalism. The justices have the power to interpret the law, and this includes the power to make exceptions to laws passed by Congress premised on the justices' interpretation of the Constitution.[218] Short of amending the Constitution, the justices' rulings cannot be reversed by anyone but themselves. A serious credibility problem arises, and in extreme cases, there could create a constitutional crisis, when in interpreting ethics laws, the justices carve out exceptions for themselves.

The justices' assertion of "ethical exceptionalism" under Article III of the Constitution is analogous to presidents asserting their power under Article II to redefine laws and carve out exceptions for themselves. Much has been written about the dangers of runaway presidential power and having a president who thinks he is above the law.[219] The problem of runaway power of the Supreme Court needs attention as well. Putting aside concerns about the substance of the Court's decisions and credible claims that the Court is asserting too much power over the other two branches and the states,[220] a separate problem arises when justices exempt themselves from ethics laws and regulations that apply to other judges. The Court's own admonitions, repeated most recently in *Trump v. Vance*,[221] that no person is above the law[222] should apply equally to the Justices themselves.

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217. *See, e.g.*, E-mail from a prominent attorney to this author (January 2017) (on file with author) (stating that this author should not criticize the ethics of a senior Trump White House official after having attended that official's wedding twenty years ago: "It is one thing to attack the President. It is another to attack the dear spouse of your longtime friend").

218. *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the principle of judicial review).

219. Professor Claire Finkelstein and this author have examined the intersection of criminal law with assertions of presidential privilege and power. *See, e.g.*, Claire O. Finkelstein & Richard W. Painter, *"You're Fired": Criminal Use of Presidential Removal Power*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 307 (2023); *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93 (2022).

220. *See* Lemley, *supra* note 11 and accompanying text.

221. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020).

222. *Id.* at 2432 (Kavanaugh, J., concurring) ("In our system of government, as this Court has often stated, no one is above the law.").

Defending the independence of the Court transcends ideological divisions on the Court. The nine justices agree on one thing: protecting the Court's independence as an institution. All nine justices apparently supported Chief Justice Roberts's refusal of Senator Durbin's invitation to testify before the Judiciary Committee, and all nine signed the Statement assuring that the justices were complying with ethics rules.

This resistance to oversight fits a pattern where all three branches of government guard their power and privilege against encroachment by the other two. Presidents, regardless of party, often defend each other's executive privilege; the Biden Administration, for example, defended privileged communications of the Trump Administration from discovery by Democrats in Congress.[223] Prosecuting a former president also is a rarity, never done until Donald Trump was indicted by a special prosecutor in June 2023.[224] Congress also zealously guards its evidentiary privileges under the Speech and Debate Clause of the Constitution,[225] for example successfully suing to enjoin a warrant for an F.B.I. search of a congressman's office.[226] The justices of the Supreme Court, regardless of their sharp disagreements on cases before them, will join to defend the Court from encroachment by the president or Congress.

But there needs to be checks and balances. An unaccountable Supreme Court is as dangerous to democracy as an unaccountable president or Congress that does anything it wants. Congress passing ethics laws that apply to the Supreme Court, including installing an inspector general as this Article suggests, and Congress asking the Chief Justice to testify about Supreme Court ethics, are reasonable oversight measures, not fairly compared with more extreme and

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223. Up through 2023, the Biden Administration continued the Trump Administration's opposition to requests from Congress for General Services Administration documents concerning a lease with the Trump Hotel. *See* Nina Totenberg, *Supreme Court Will Hear a Subpoena Case that—Surprise—Trump and Biden Agree on*, NPR (May 15, 2023), https://www.npr.org/2023/05/15/1163241734/supreme-court-subpoena-case-congress-trump-biden [https://perma.cc/WYC6-4BCW]. 5 U.S.C. § 2954 allows individual members of Congress to request information from executive branch agencies without a formal subpoena. 5 U.S.C. § 2954. The Court of Appeals for the District of Columbia Circuit ruled that members of Congress have standing under Article III to enforce this right to information. Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020). The Biden Administration disagreed and sought review by the Supreme Court. After the Supreme Court agreed to hear the case, House Democrats dropped the lawsuit in June 2023. Carnahan v. Maloney, 143 S. Ct. 2653 (2023), *vacated and remanded for dismissal*.

224. This is also a reason why, absent special counsel, it may be difficult to get the Justice Department to prosecute any former president. *See* Claire O. Finkelstein & Richard W. Painter, *Restoring the Rule of Law through Department of Justice Reform*, *in* OVERCOMING TRUMPERY: HOW TO RESTORE ETHICS, THE RULE OF LAW, AND DEMOCRACY (Norman Eisen ed., Brookings Inst. 2022) (discussing reluctance of the Justice Department, even under a different political party, to investigate or prosecute officials from a previous administration).

225. The Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, protects Members of Congress from being questioned about their deliberations in Congress. There is no similar clause in the Constitution creating an express evidentiary privilege for either the president or for the Supreme Court.

226. *See* United States v. Rayburn House Office Bldg., Room 2113, Wash., D.C. 20515, 497 F.3d 654, 656 (D.C. Cir. 2007).

constitutionally problematic measures such as Congress subpoenaing drafts of Supreme Court opinions or requiring justices to testify under oath to explain their opinions. Nobody disputes that a Supreme Court Justice who commits a crime could be charged for that crime, although the Supreme Court surely would not allow the F.B.I. to obtain a search warrant on a justice's chambers from a lower court judge without an opportunity for the Supreme Court to review the warrant first. The Court's resistance to excessive oversight is understandable, but resistance to any oversight at all is not reasonable, and furthermore, is inconsistent with the Court's own rulings subjecting the legislative and executive branches to measured oversight by the courts, one of three co-equal branches of government.[227] The Supreme Court cannot be the only part of the federal government that is not accountable to any other.

This Article does not explore the outer limits of constitutionally permissible oversight of the Supreme Court, but as discussed in Part IV of this Article, the limited measures proposed herein—an ethics lawyer and an inspector general—are reasonable, necessary, and constitutional. Ironically, however, constitutionality is a question about which the Justices themselves, despite their obvious conflict of interest,[228] will make the final decision.

Little transparency. Justice Louis Brandeis, writing about Wall Street and the titans of finance before he joined the Court, said: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[229] The same is true for the Supreme Court.

But there is little transparency at the Court. If a justice decides not to recuse from a case, we rarely hear the reasons why. If a justice interprets ethics rules to allow acceptance of a gift, including free travel on a yacht or plane, or failure to disclose that gift, we do not learn the reasons why until years later, if at all.

There are good reasons for confidentiality rules protecting the justices' deliberations about cases before them. In 1998, this author strongly criticized the publication of a former Supreme Court clerk's book that quoted from leaked emails, drafts, and other materials improperly obtained from the Court.[230] Chief Justice

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227. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803) (establishing the principle of judicial review); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (enjoining President Truman's executive order seizing privately owned steel mills during a wartime strike); United States v. Nixon, 418 U.S. 683 (1974) (ordering the president to comply with a subpoena from the Department of Justice special prosecutor for White House tapes).

228. Arguably, Supreme Court justices ruling on the constitutionality of a statute passed by Congress to regulate Supreme Court ethics might violate an existing statute, 28 U.S.C. § 455, requiring a judge or justice to recuse in a case in which their impartiality might reasonably be questioned. However, given that the Court has asserted the power to overturn acts of Congress, the Court might still use that power to protect itself if the justices truly believed a statute regulating the Court to be unconstitutional.

229. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Company 1914).

230. *See generally* Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1430–71 (1999) (reviewing Edward Lazarus, CLOSED CHAMBERS (Times Books 1998)).

Roberts was rightly concerned about the leak of the *Dobbs* opinion in 2022,[231] although the investigation he ordered has not yet revealed who did it. These confidentiality concerns, however, pertain to deliberations about cases before the Court. The argument for confidentiality is less persuasive when the subjects are conflicts of interest and other ethical issues for the justices themselves.

The financial disclosure rules of the Ethics in Government Act have bound the justices since 1978,[232] casting some light on justices' affairs, but these rules are ineffective if they are not enforced. Presently, there is nobody to make sure they are enforced. Also, the financial disclosure rules are incomplete and should be amended by Congress. There is too little transparency, for example, about sources of spousal income. Who are Virginia Thomas's clients?[233] Which law firms paid Jane Roberts a headhunter's fee for placing new lawyers?[234] Who bought the property Justice Gorsuch partially owned in Colorado, and why?[235]

Most importantly, however, there is no public report on allegations of ethics breaches on the Court. In an executive branch agency, allegations of wrongdoing are forwarded to an inspector general who investigates, writes a report, and, upon request, submits it to Congress.[236] The Supreme Court does not have that—yet. Of course, one might argue that Supreme Court justices are not the same as executive branch agencies because they, like the president, head up an entire branch of government. But that just means they have more power, and, like presidents, this is perhaps a reason for more accountability, not less. That more general problem—bringing accountability to power—is discussed later in this article.

Plausible Deniability – Sargent Shultz could not have written a better letter to Senator Durbin. Sargent Schultz, the iconic bungling World War II German POW camp guard on the 1970s T.V. show *Hogan's Heroes*, repeatedly summed up a very familiar stance towards other people breaking the rules: "I see nothing, know nothing."[237]

See no evil, hear no evil.

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231. *See* Richard W. Painter, *SCOTUS Draft Opinion Leak Is a Breach of Legal Ethics*, BLOOMBERG NEWS (May 6, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/scotus-draft-opinion-leak-is-a-breach-of-legal-ethics [https://perma.cc/DR8U-XNGK].

232. The Ethics in Government Act of 1978 requires filing of financial disclosure reports by all federal judges, including justices of the Supreme Court. *See* 5 U.S.C. § 13103; *supra* text accompanying note 29.

233. *See* Brian Schwartz, *Inside the consulting firm run by Ginni Thomas, wife of Supreme Court Justice Clarence Thomas*, CNBC (April 5, 2022, 6:43 PM), https://www.cnbc.com/2022/04/05/inside-the-consulting-firm-run-by-ginni-thomas-wife-of-supreme-court-justice-clarence-thomas.html [https://perma.cc/7489-7VKR] ("Very little is known about her company, Liberty Consulting, which is listed as an asset on her husband's Supreme Court disclosures.").

234. *See supra* text accompanying notes 100–102.

235. *See supra* text accompanying notes 97–98.

236. See *infra* Part III (discussing the role of inspectors general in the executive branch agencies).

237. Des Hammond (@deshammond1599), *The very best of sergeant schultz*, YOUTUBE (Mar. 20, 2017), https://www.youtube.com/watch?v=OsXrpxo4uC0 [https://perma.cc/JQ3L-QPCM].

The justices, including the Chief Justice, do not know everything the other justices are doing. Sometimes information is shared with other justices and sometimes it is not. And there is some information—particularly concerning each other's ethical lapses—that the justices may not want to know.

The Chief Justice is supposed to oversee the administrative aspects of the Court, but it is not clear that ensuring other justices comply with ethics rules is among his duties.[238] He does not review their financial disclosure reports, and he apparently does not interfere with their decisions about whether to recuse themselves from a case (we do not know for sure, because what the justices say to each other is not disclosed).

Chief Justice Roberts apparently persuaded all of the justices to sign the aforementioned Statement he sent to Senator Durbin. The Statement was written before public disclosure of Justice Alito's fishing trip with Paul Singer and said nothing about it. Although, presumably, Roberts would have found out about Alito's fishing trip, and perhaps more if he had asked his colleagues about any free travel they had accepted. Indeed, that was an obvious question Roberts could have asked his colleagues after the news stories about Justice Thomas and Harlan Crow. But the Chief Justice apparently did not ask; he and his colleagues just signed the Statement saying they were complying with ethics rules. Attached to that memo is Roberts's own letter to Senator Durbin which was vintage Sargent Schultz. "I see nothing, know nothing" is all the letter needed to say. The rest was superfluous.

Removal of justices is close to impossible. After one Clinton impeachment[239] and two Trump impeachments[240] ended in acquittal in the Senate, we see how difficult it is to impeach, much less convict, a holder of high office. If a president cannot be convicted for trying to overturn an election to stay in power and for inciting a lawless mob to go to the Capitol,[241] it is hard to imagine any offense that would lead to the conviction of a Supreme Court justice.

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238. *See The Chief Justice of the United States: Responsibilities of the Office and Process*, EVERYCRSREPORT (Sept. 23, 2005), https://www.everycrsreport.com/reports/RL32821.html [https://perma.cc/NZP8-BE3U]. This Report, prepared at the time Chief Justice Roberts was nominated by President Bush and confirmed by the Senate, described specific duties of the Chief Justice, but noticeably absent is a suggestion that the Chief Justice is responsible for assuring that other justices comply with standards of judicial ethics. *Id.*

239. *See* Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998); 144 CONG. REC. 28110–28111 (1998) (House resolutions to impeach President Clinton for obstruction of justice and false testimony under oath). The Senate acquitted Clinton. *See* 145 CONG. REC. 274 (1999) (1999 trial of Clinton in the Senate).

240. *See* H.R. Res. 755, 116th Cong. (2019) (enacted) (impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, namely abuse of power and obstruction of Congress, December 18, 2019). On February 5, 2020, the Senate adjudged that Trump was not guilty as charged in the articles of Impeachment. 166 CONG. REC. S871 (2020). H.R. Res. 24, 117th Cong. (2021) (enacted) (impeaching Donald John Trump, President of the United States for high crimes and misdemeanors, namely incitement of insurrection); *see generally* 167 CONG. REC. S589-S717 (2021) (trial and acquittal in the senate, February 9 to February 13, 2021).

241. *See* H.R. REP. NO. 117-663 (2022).

Only one justice, Samuel Chase, was impeached by the House in 1804 on allegations he allowed partisanship to affect his decisions on the Court, and he was acquitted by the Senate.[242] Today, with all the partisanship in the Senate surrounding confirmations to the Supreme Court, it is highly unlikely that the removal of a justice—which requires two-thirds of the Senate—would be any different. If thirty-four or more senators belong to the political party of the president who nominated a justice to the Court, acquittal is all but certain.

III. AN ETHICS LAWYER AND AN INSPECTOR GENERAL FOR THE SUPREME COURT

A. THE SUPREME COURT ETHICS, RECUSAL AND TRANSPARENCY (SCERT) ACT

This Part analyzes pending legislation on Supreme Court ethics and proposes changes that could make that legislation even more effective, including a discussion of how an ethics lawyer and IG could be used to address the ethics issues at the Supreme Court.

The Supreme Court Ethics, Recusal and Transparency (SCERT) Act of 2023 is sponsored by Senator Sheldon Whitehouse and Representative Hank Johnson.[243] The bill would require the Supreme Court to adopt and publish a code of conduct.[244] The Supreme Court has accomplished this with the Code of Conduct it issued in November 2023.[245] But that is all the Court has done. SCERT would also require the Court to have rules and procedures related to judicial misconduct, to have a process for the public to submit ethics complaints against the justices and for a review panel of appellate court judges[246] to investigate and make recommendations on those complaints.[247] The bill would also require the Court to adopt additional disclosure rules for gifts, travel, and income received by justices and law clerks at least as rigorous as the House and Senate disclosure rules, require greater disclosure of *amicus curiae* funding, require parties and *amici curiae* to disclose any recent gifts, travel, or reimbursements they have given to a justice

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242. *See* Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. OF LEGAL HIST. 49 (1960); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); *see generally* TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Samuel H. Smith & Thomas Lloyd eds., 1805).

243. S. 359, 118th Cong. (2023). The bill is cosponsored by, among others, Jeff Merkley (D-OR), Cory Booker (D-NJ), Kirsten Gillibrand (D-NY), Jack Reed (D-RI), Richard Durbin (D-IL), Dianne Feinstein (D-CA), Mark Warner (D-VA), Bernie Sanders (I-VT), and Mazie Hirono (D-HI). *Id.*

244. *Id.*

245. *See* SUPREME COURT OF THE UNITED STATES, *supra* note 17.

246. *See* S. 359, 118th Cong. § 367(b) (2023) (the 2023 Senate Version of SCERT) (providing for a "judicial investigation panel, which shall be composed of a panel of 5 judges selected randomly from among the chief judge of each circuit of the United States").

247. *See* S. 359, *supra* note 246, at § 2 (Code of Conduct for Supreme Court justices) (including an amendment to 28 U.S.C. adding a new § 367 governing complaints against justices and a judicial investigation panel of appellate judges).

and require parties and *amici curiae* to disclose any lobbying or money they recently spent promoting a justice's confirmation to the Court.[248] Finally, the bill would require justices to have rules requiring recusals on account of gifts, income, or reimbursements, a party's lobbying or spending money to campaign for a justice's confirmation or a justice's connection to an *amicus curiae* brief and the bill requires that requests for recusal be reviewed by the rest of the Justices.[249] The bill would require the Federal Judicial Center to study and report to Congress every two years on the extent to which the judiciary is complying with recusal requirements.[250]

The SCERT Act contains very helpful proposals, particularly in two areas: shedding light on the shadowy funding of amicus briefs by organizations that may also use other methods of influencing the justices and a more transparent and orderly process for determining when justices must recuse from cases. The weak link is enforcement. Relying on the Federal Judicial Center to study and report to Congress every two years on the conduct of Supreme Court justices probably will not prevent ethics lapses when they occur. Also, a process for allowing members of the public to file complaints against Supreme Court justices could flood the intake office with massive paperwork based almost entirely on the public record, with many complaints motivated more by substantive disagreement with a justice's ruling than by demonstrable breaches of ethics rules. Furthermore, relying on appellate court judges to tell Supreme Court justices when they must recuse themselves from a case does not consider that the "colleagues covering for colleagues" problem could extend to these judges also, particularly when the Supreme Court justices have the power in other cases to overrule them. Appellate court judges can provide helpful advice on judicial ethics but should not be relied upon to be the primary enforcement mechanism for ethics at the Supreme Court.

Instead, this Article proposes that the Court use the bifurcated approach to ethics that is already used in most executive branch agencies: 1) an ethics office headed by a chief ethics lawyer to give the justices, their clerks, and other Court employees ethics briefings, to advise on particular ethics questions when they arise, and to assist with preparation of financial disclosure filings; and 2) an independent Supreme Court Inspector General ("IG") with broad investigative powers to conduct an investigation when there is a credible allegation of a breach of ethics rules or other law, and then prepare a report to Congress. This approach has been reasonably successful in addressing ethics lapses, including waste, fraud, and abuse, in federal agencies and with some modifications could be effective for the Supreme Court. The public still would have a role; a public tip line or website could provide the IG with valuable information from lawyers, public interest groups and the public (e.g. "amicus X did not disclose in their brief that

248. *See* S. 359, *supra* note 246, at § 3 (disclosure by justices), § 6 (disclosure by parties and amici).
249. *See* S. 359, *supra* note 246, at § 4 (circumstances requiring disqualification).
250. *See* S. 359, *supra* note 246, at § 9 (studies and reports).

they were funded by Company Y", "Company Y's CEO took Justice Z on a fully paid one-week fishing trip two years ago"). Each complaint from the public, however, would not become a formal complaint as it does for lower federal courts under the Judicial Conduct and Disability Act of 1980.[251] What to investigate and how the matter is to be investigated would be determined by the IG using protocols and procedures like those now used by IGs in executive branch agencies.

B. AN ETHICS LAWYER FOR THE SUPREME COURT

Executive branch agencies each have a designated ethics officer ("DAEO")[252] who coordinates the agency's ethics program. The DAEO must have knowledge of federal ethics statutes and regulations promulgated by the United States Office of Government Ethics ("OGE")[253] and the ability to work with OGE and agency employees to ensure compliance with those rules.

The responsibilities of the DAEO in an executive branch agency include serving as a liaison to OGE and responding to OGE requests for information, maintaining agency ethics program records, carrying out an ethics education program and advising employees on ethics laws and regulations, providing former agency employees with counseling on post-employment restrictions applicable to them, taking appropriate action to resolve conflicts of interest and appearance of conflicts of interest through recusals, divestitures, waivers, reassignments, and other appropriate means, notifying the Department of Justice (if there is evidence of a criminal law violation) and/or the Inspector General (if there is evidence of any significant violation), recommending disciplinary or corrective action, providing the inspector general upon request with assistance in interpretating ethics laws and regulations, requiring timely compliance with senior officials' ethics agreements, conducting ethics briefings for certain senior officials (5 C.F.R. § 2638.305 requires that senior officials receive special briefings), and evaluating the agency's ethics program and making recommendations to the agency for improvement.[254] Federal regulations provide a detailed description of these functions in an agency program.[255]

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251. *See supra* text accompanying note 49–50 (public complaint process for lower federal courts under the Judicial Conduct and Disability Act of 1980, and the Breyer committee study in 2006 finding that almost all these complaints are dismissed).

252. 5 C.F.R. § 2638.104(a) (2024) ("Each agency head must appoint a Designated Agency Ethics Official (DAEO). The DAEO is the employee with primary responsibility for directing the daily activities of the agency's ethics program and coordinating with the Office of Government Ethics.").

253. 5 C.F.R. § 2638.104(b)(2) (2024) ("The DAEO must be an employee who has demonstrated the knowledge, skills, and abilities necessary to manage a significant agency program, to understand and apply complex legal requirements, and to generate support for building and sustaining an ethical culture in the organization.").

254. 5 CFR § 2638.104(c) (2024) (describing responsibilities of the DAEO).

255. Specific regulations address an Agency Ethics Program's Mission and Responsibilities (Subpart A), Procedures (Subpart B), Government Ethics Education (Subpart C), Correction of Executive Branch agency Ethics Programs (Subpart D) and Corrective Action involving Individual Employees (Subpart E). *See generally* 5 C.F.R. §§ 2638.101–2638.604 (2024).

Particular attention is given to the financial disclosure program. The DAEO must establish written procedures for the filing, review, and public availability of financial disclosure reports, require filers to comply with deadlines and requirements for filing financial disclosure reports, take appropriate action in the event of noncompliance, impose late fees for untimely filing of financial disclosure reports, make referrals to the Inspector General or the Department of Justice in cases involving knowing and willful falsification of financial disclosure reports or knowing and willful failure to file financial disclosure reports, certify financial disclosure reports and take appropriate action if financial disclosure reports cannot be certified, and use information disclosed in financial disclosure reports to prevent and resolve potential conflicts of interest, including by consulting with financial disclosure filers and their supervisors.[256]

Each agency ethics program is designed to conform to the needs of the specific agency (the author of this Article ran the White House ethics program from 2005 to 2007 and later described some of how the White House ethics program worked, including ethics screening of Supreme Court nominees, in a book published in early 2009[257]). However, the standards outlined in OGE regulations apply across the executive branch. Agencies don't just design their own ethics programs *ad hoc* and then reassure Congress in short letters saying they are following government ethics regulations.

The Supreme Court needs a DAEO. The Court has a senior lawyer who serves as its Legal Counsel,[258] who provides legal services to the Court and may have some responsibilities related to ethics,[259] but this is not the same as a DAEO. Much of the Legal Counsel's job is advising the justices and their clerks on complex procedural aspects of litigation relevant to cases before the Court.[260] Ethics compliance is an entirely different job and needs a designated lawyer. The Legal Counsel on numerous occasions, at the direction of the Chief Justice, responds to

256. *See* 5 C.F.R. §§ 2638.101–2638.108 (2024).

257. *See generally* RICHARD W. PAINTER, *Implementation and Enforcement of Ethics Rules in the Executive Branch: How Big Are the Gaps in the System?, in* GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE (Oxford Univ. Press 2009).

258. The position is currently occupied by Ethan V. Torrey. Mr. Torrey's areas of expertise apparently are "Ethics, Litigation, Appellate Practice & Procedure (Litigation), and Complex Litigation". *See ALI Members*, THE AM. L. INST., https://www.ali.org/members/member/456627/ [https://perma.cc/8Y4Y-5JM3] (last visited Feb. 19, 2024).

259. The Court says that the "[t]he Court's Legal Office, established in 1973, provides support to the Justices on a variety of case-related issues and legal services for the Court as an institution." Press Release, Supreme Court of the United States (November 20, 2013), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-20-13 [https://perma.cc/2VSW-TULR] (announcing appointment of Ethan Torrey as Legal Counsel to the Court). Torrey replaced Scott S. Harris, who became Clerk of the Court in September 2013.

260. The role of the Supreme Court Legal Counsel's office has traditionally been focused on procedural and jurisdictional issues. *See* John W. Winkle III & Martha B. Swann, *When Justices Need Lawyers: The U.S. Supreme Court's Legal Office*, 76 JUDICATURE 244 (1992–93) (discussing the operations of the Supreme Court Legal Counsel's office).

inquiries by Members of Congress about Supreme Court ethics,[261] invariably reassuring Congress that ethics rules are being complied with,[262] but providing no information about a Supreme Court ethics program. That's because there isn't one.

The appointment of a Supreme Court DAEO should be made by the Chief Justice with the concurrence of all the justices. A Supreme Court ethics lawyer who loses the support of the majority of the justices, or perhaps even of a substantial minority of the justices (for example, four) probably should be removed by the Chief Justice. Because the ethics lawyer's role is advisory, not enforcement, an ethics lawyer without the support of most of the justices, like any other lawyer without the support of a client, would likely be ineffective in gathering information and rendering advice. Justices requesting the removal of the ethics lawyer, however, should be required to explain why, and this information should be provided to both the ethics lawyer and the Court's inspector general.

The ethics lawyer would not be an investigator (that would be the role of a Supreme Court IG, discussed below). Rather, the ethics lawyer would have an attorney-client relationship with the Court.[263]

The attorney-client privilege with the Court's ethics lawyer probably should be waivable only by a majority of the justices in much the same manner as the majority of the board of directors of a corporation or other organization can vote to waive attorney-client privilege. Absent a waiver—or some other exception to the attorney-client privilege[264]—communications between the ethics lawyer and the justices, clerks, or other Court employees, would be confidential and not be discoverable by persons outside the Court (the relationship between the ethics lawyer and the Court's inspector general is discussed further below). The objective of this attorney-client relationship is to have a lawyer that the justices, clerks, and employees of the Court can consult about ethics issues, knowing that the

261. *See, e.g.*, Letter from Ethan Torrey, Legal Counsel to the Supreme Court, to Senator Sheldon Whitehouse and Representative Henry Johnson (November 7, 2022), https://www.whitehouse.senate.gov/imo/media/doc/2022.11.7%20-%20Letter%20to%20Chairman%20Whitehouse%20and%20Chairman%20Johnson.pdf [https://perma.cc/2D59-QJMZ] (referencing Torrey's prior letter of July 12, 2021, explaining that the Justices rely on the Code of Conduct for United States judges in evaluating ethics issues and "follow the same financial disclosure rules that are applicable to other federal judge").

262. *See* Letter from Ethan Torrey, Legal Counsel to the Supreme Court, to Senator Sheldon Whitehouse and Representative Henry Johnson (Nov. 28, 2022), https://www.documentcloud.org/documents/23320580-letter-from-scotus-counsel [https://perma.cc/8X7P-BZH7] (explaining that Justice Alito had no role in improperly leaking the Court's decision in Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014)).

263. The Supreme Court ethics lawyer would represent the Supreme Court as an institution, not the individual justices. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2023) [hereinafter MODEL RULES] (clarifying that the lawyer for an organization represents the organization, not its individual constituents).

264. The attorney-client privilege is waived if the communications are in furtherance of a crime or fraud. A Judge recently ruled in a sealed opinion that former President Trump's attorney Evan Corcoran must answer grand jury questions regarding his client's retention of documents and obstruction of investigators, and that the attorney must turn over his notes. *See* Rebecca Beitsch, *Appeals Court Backs DOJ, Forcing Trump Attorney to Aid Documents Probe*, THE HILL (Mar. 22, 2023), https://thehill.com/regulation/court-battles/3913007-appeals-court-backs-doj-forcing-trump-attorney-to-aid-documents-probe/ [https://perma.cc/W7HV-J54B].

conversation will not be disclosed outside the Court unless the Court decides it should be disclosed.

The Court's ethics lawyer would assist the justices in filing financial disclosure forms, review the gift rules, and make recommendations about speaking engagements, spousal income, offers of free travel, and any other situation that might give rise to ethics issues. A small staff of paralegals and other professionals could assist the ethics lawyer in these tasks. Instead of coordinating with OGE, which only has jurisdiction over ethics in the executive branch, the Supreme Court ethics lawyer would be a liaison between the Court and ethics experts at the Judicial Conference of the United States.

The ethics lawyer would have no power to compel action on any matter but when the resolution of a matter is arguable, the ethics lawyer could recommend that the Chief Justice seek an advisory opinion from the Judicial Conference ethics staff or from one or more circuit judges on recusal, financial disclosure, gifts, and other ethics issues. Circuit judges themselves face many of the same issues, are bound by many of the same laws, and could provide valuable advice to justices on how best to comply. The ethics lawyer could facilitate this advisory process, sometimes asking circuit court judges more general questions ("should a justice be required to recuse in such and such circumstances") and sometimes being more specific about which justice is considering recusal. These advisory communications between the ethics lawyer and circuit court judges, and similar communications between justices and circuit court judges, should also be kept confidential in most circumstances unless a majority of the Justices were to decide they should be disclosed.

The ethics lawyer would represent the entire court as an institution, not any one justice, and would be required to report to the Chief justice, or to all the justices, and to the IG, evidence of a material violation of law by any justice, clerk, or employee of the Court. ABA *Model Rules of Professional Conduct* Rule 1.13 requires a lawyer representing an organization to report unresolved law violations up the ladder to the highest governing authority in the organization,[265] and that should be the obligation of the Supreme Court ethics lawyer as well.

C. PRE-CONFIRMATION ETHICS AGREEMENTS FOR NEW JUSTICES

The confirmation process is the point when meaningful ethics pledges can be obtained from nominees to the Supreme Court. Since they want the job, this is the time for the Senate to get specific commitments on ethics. Unfortunately, Supreme Court nominees do not enter into written pre-confirmation ethics agreements, although some nominees are asked very general questions about recusal and other ethics issues in their confirmation hearing, and in response,

265. MODEL RULES R. 1.13.

almost always make very general— and meaningless, as well as unenforceable— promises to comply with standards of ethics for judges.[266]

As the chief White House ethics lawyer from 2005 to 2007, this author screened potential Supreme Court nominees for compliance with ethics rules when they were court of appeals judges. Almost all the work on ethics screening of Supreme Court nominees, however, was retrospective rather than prospective. The White House counsel's office used a painstaking process of cross-checking a judge's financial holdings with every case in which the judge participated to detect any actual or apparent violation of the federal recusal statute.[267] Lawyers in the White House ethics office also looked at other ethics issues, knowing that if the White House wasn't exacting in its scrutiny of a nominee's past behavior, the Senate Judiciary Committee would fill the gap, and confirmation hearings could get ugly. Some judges who otherwise would have been good Supreme Court picks, for whatever reason, usually relatively minor slip-ups, did not make the "ethics cut."[268]

Two judges who made the cut and were deemed exceptionally well qualified by President Bush and his advisors, were then-Judge Samuel Alito of the Third Circuit and then-Judge John Roberts of the District of Columbia Circuit. This author helped prepare both for their confirmation hearings, once again focusing on judicial ethics questions likely to be put to nominees by the Senate Judiciary Committee. Pre-confirmation briefing sessions covered recusal from cases, gifts, and financial conflicts of interest. Both confirmation hearings were almost entirely free of controversy over judicial ethics.[269]

But little attention was paid to what these justices would do about ethics *after* they got on the Supreme Court. Senators ask nominees a few questions about recusal in confirmation hearings, but there is no formalized process by which a nominee agrees in writing to what they will and will not do once on the Supreme Court other than vague commitments to follow judicial ethics rules on recusal and other matters.

By contrast, executive branch nominees for Senate-confirmed positions undergo a process far more precise and exacting. The United States Office of Government Ethics (OGE) has guidance on issues that should be considered in drafting ethics agreements for executive branch officials.[270] The agreement is

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266. *See, e.g.*, *Supreme Court nominee Jackson says she would recuse herself from Harvard affirmative action case*, WASH. POST (March 23, 2022), https://www.washingtonpost.com/politics/2022/03/23/ketanji-brown-jackson-supreme-court-hearing-live-updates/ [https://perma.cc/S8TG-YDUH].

267. 28 U.S.C. § 455.

268. For a discussion of this process of vetting Supreme Court nominees for ethics, see PAINTER, *supra* note 257.

269. *See* Richard W. Painter, *I did Alito's ethics prep for his confirmation hearing. His new excuses are nonsense. Nearly 20 years later, I must ask: What happened?,* MSNBC (June 25, 2023), https://www.msnbc.com/opinion/msnbc-opinion/alito-supreme-court-ethics-scandal-vacation-rcna90819 [https://perma.cc/8VGM-CS8Y].

270. *See* Program Advisory from David J. Apol, General Counsel, to Designated Agency Ethics Off., U.S. Off. of Gov't. Ethics (July 31, 2020), https://www.oge.gov/Web/OGE.nsf/News+Releases/FE34D4F80EB2A

usually a letter from the nominee to the DAEO for the agency with a copy sent to OGE and the Senate committee considering the nomination.[271]

These agreements may not be legally enforceable contracts, but some of the code provisions cited therein are criminal.[272] Failure to follow an ethics agreement also could lead to a Congressional investigation, firing by the President, or in particularly egregious cases, even impeachment.

For a Supreme Court nominee, a pre-confirmation ethics agreement should address 1) divestment of certain stocks and other investments to avoid conflicts of interest and 2) conflicts of interest and recusal arising from prior employment, nonprofit board memberships (including relationships with organizations that file amicus briefs), the employment of a nominee's spouse and other activities, and known activities of grown children of the nominee. The ethics agreement would also include more general covenants in which the nominee agrees to abide by existing law, such as recusal requirements, restrictions on gifts, including gifts of free travel, and disclosure rules in the Ethics in Government Act of 1978. Another provision in the ethics agreement should be routine: The nominee agrees in the future to testify upon request before Congress about ethics on the Supreme Court, although not about the Court's deliberation process or its decisions in particular cases.

The Supreme Court ethics lawyer would work with each nominee for the Court on the ethics agreement that would be presented to the Senate as part of the confirmation package. Although circumstances would change over the many years a justice serves on the Court, the initial ethics agreement would at least address specific conflicts of interest and other problems known at the time of confirmation. Justices may also be required to update, and publicly disclose, their ethics agreements every five years.

Some of the enforcement mechanisms available for the executive branch would be more difficult in the case of a Supreme Court justice, who cannot be fired by the president. A Congressional investigation could ensue, although justices might refuse to honor a subpoena to testify or provide evidence. This is where the Supreme Court IG, discussed below, is critical. A justice's breach of the ethics agreement would probably initiate an IG investigation, an IG finding of wrongdoing might or might not ensue, and if there were a finding of wrongdoing an IG report would be submitted to Congress.

056852585C20056BD26/$FILE/PA-20-05%20Revised%20Guide%20to%20Drafting%20Nominee%20Ethics%20Agreements.pdf [https://perma.cc/2TFQ-XZBU].

271. *See, e.g.*, Letter from Janet L. Yellen, nominee of President Elect Joe Biden for Sec'y of the Treasury, to Brian J. Sonfield, Designated Agency Ethics Off., United States Department of the Treasury (Dec. 29, 2020), https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/18A4D129DD5675888525864F0081071C/$FILE/Yellen,%20Janet%20L.%20final%20EA.pdf [https://perma.cc/SG7U-D76D].

272. *See, e.g.*, 18 U.S.C. § 208.

D. AN INSPECTOR GENERAL FOR THE SUPREME COURT

The Court also needs an investigator and enforcer, or at least someone who can begin the enforcement process. That person would be an inspector general.

The inspector general could be for the Supreme Court alone, but probably should be responsible for investigations across the entire judicial branch. For lower court judges, an inspector general would assist the Judicial Conference in enforcing its Code of Conduct for U.S. judges and investigate wrongdoing by others, including clerks, parties, lawyers appearing before the courts, and amici. The focus of this Article, however, is on how a judicial branch inspector general would interact with the Supreme Court.

Once again, the executive branch is a useful role model.

Under the Inspector General Act of 1978,[273] as amended by the Inspector General Reform Act of 2008,[274] there are over seventy statutory inspectors general in federal agencies throughout the Executive Branch. They are "appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[275] IG's report to the head of their agency but "[n]either the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."[276]

IG's can be removed by the president, but Congress must be given thirty days advance notice of removal and told the reason for removal.[277] Except for the Trump Administration,[278] removals of inspectors general have been rare, in part because of the appearance of impropriety when an IG is removed. An IG, thus, is inside the agency, yet independent from it. They have the authority and responsibility to investigate alleged waste, fraud and abuse involving the agency, make recommendations to the agency head and to the White House, send criminal referrals to the Department of Justice, and send reports to Congress.[279]

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273. Inspector General Act of 1978, 92 Stat. 1101 (1978) (codified as amended at 5a U.S.C. § 3).

274. Inspector General Reform Act of 2008, 122 Stat. 4302 (2008).

275. 5a U.S.C. § 3.

276. *Id.*

277. *Id.*

278. *See* Melissa Quinn, *The Internal Watchdogs Trump Has Fired or Replaced*, CBS NEWS (May 19, 2020), https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list [https://perma.cc/M6ZB-NF9W]; Charlie Savage, *Endorsing Trump's Firing of Inspector General, Barr Paints Distorted Picture*, N.Y. TIMES (April 10, 2020), https://www.nytimes.com/2020/04/10/us/politics/barr-inspector-general-firing.html [https://perma.cc/Z7F3-K2S5] (discussing President Trump's firing of Michael K. Anderson, the intelligence community inspector general, over his handling of a whistleblower complaint that led to Trump's 2019 impeachment).

279. 5a U.S.C. § 4.

Inspectors general in turn appoint an assistant inspector general and other staff including a Whistleblower Protection Coordinator to prevent retaliation against agency employees for protected disclosures, which is a separate violation of federal law.[280] IGs in the executive branch coordinate with each other through the Council of Inspectors General on Integrity and Efficiency,[281] and the Supreme Court IG could participate in the work of the Council as well. The Supreme Court IG would have to be careful not to disclose the confidences of the Court to executive branch IGs but could benefit from the information these IGs are willing to share—for example, evidence that a particular outside individual or organization is trying to unduly influence both executive branch agencies and the judiciary.

The Supreme Court, of course, is different from the executive branch. No single person is head of the judicial branch. Although the Chief Justice has special administrative duties, the other justices are not his subordinates; he cannot suspend them or remove them. Each justice has one vote on the Court. The Court collectively heads up an entire branch of government, as does the president. There is no IG specifically assigned to the president, but the Justice Department has specific regulations for investigation of the president by a Special Counsel,[282] and in fact, independent counsels have been appointed to investigate the president in the past two administrations.[283] The IG proposed here for the Court would similarly have independent investigative authority.

For these reasons, an IG for the Court ideally should be appointed with the consent of all nine justices (query, however, whether that is possible given some of the justices' resistance to outside supervision). An IG could be appointed with the consent of fewer justices, perhaps a majority, but this could result in accusations of bias if one of the other justices were the subject of an IG investigation. If one or more justices refuse to consent to the appointment of an IG for the Court, an IG could be appointed by a majority of the justices, by the Chief Justice, or, if the Court declines to nominate an IG, by the President or by the Attorney General of the United States. An IG appointed without the consent of the entire Court, or at least a substantial majority of the Court, probably should serve a shorter term in office, for example two years, allowing the justices later an opportunity to agree

280. 5a U.S.C. § 3.

281. *See The Council of the Inspectors General on Integrity and Efficiency* (CIGIE), https://www.ignet.gov [https://perma.cc/X74A-AAMK] (last visited Feb. 19, 2024) ("[CIGIE] is an independent entity established within the executive branch to address integrity, economy and effectiveness issues that transcend individual Government agencies and aid in the establishment of a professional, well-trained and highly skilled workforce in the Offices of Inspectors General.").

282. *See* 28 C.F.R. § 600 (1999).

283. *See* Office of the Deputy Attorney General, Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download [https://perma.cc/QN6T-JHQ8]; Office of the Attorney General, Appointment of Special Counsel (Jan. 23, 2023), https://www.justice.gov/opa/pr/appointment-special-counsel-1 [https://perma.cc/9C4D-SSG6] (appointing Robert K. Hur as special counsel to investigate the possible unauthorized removal and retention of classified documents discovered at the Penn Biden Center and the private residence of President Biden).

on nomination of an IG. An IG nominated by the entire Court should probably be allotted a longer term, perhaps eight to ten years.

IGs in the executive branch are confirmed by the Senate and the same probably should be required for the Supreme Court IG. The Senate confirmation process would involve, among other things, a discussion of the nominee's understanding of the IGs' responsibilities to report to Congress. Advice and consent to the nomination of the IG from the Senate as well as from the justices is the best way to instill public confidence in the performance of the IG's duties. An IG nominated by all the justices and confirmed by the Senate would be ideal.

At the Supreme Court, the IG would initiate an investigation when there is probable cause to believe there was a violation of an ethics rule or other law by a justice, a clerk, or other employee of the Court or by a party, an amicus party, or a lawyer in connection with a case before the Court. Examples of investigations undertaken by the IG would include the alleged failure of a justice to recuse themselves from a case when required to do so, improper attempts to influence justices, financial reporting lapses, leaks of draft opinions or other confidential information, sexual harassment, substance abuse, failure of parties or amici to make required disclosures to the Court, and other matters.

The IG would need to take special care to protect the confidentiality of the Court. A lot more information is confidential in the Court than in an executive branch agency. The Court's deliberations, draft opinions, emails, and other communications are not subject to Freedom of Information Act ("FOIA")[284] requests as similar communications often are in the Executive Branch. This means that the IG should examine only documents which are necessary to examine to conduct a thorough investigation of an alleged ethics breach, and not delve into matters unrelated to the alleged breach. For example, in a recusal scenario, 28 U.S.C § 455 requires recusal regardless of how a judge might decide a case; there is little need for an IG to go through records of a justice's thought process in deciding a case if the IG is investigating whether the justice should have been recused from the case. The *facts* of the case might be relevant to recusal, but the facts can be discerned from the pleadings or other public records. Facts about a justice's relationship with parties or amici would be relevant to recusal, but these are distinguishable from the justice's thoughts about the merits of legal arguments in the case. The Supreme Court IG should only investigate facts that need to be investigated and leave the rest alone. If the IG does see communications about the justices' deliberations, these should never be disclosed by the IG unless they are directly linked to a demonstrated act of serious wrongdoing by one or more of the justices.

There is of course the risk that parties, lawyers, and amici who seek to influence the Court might also seek to influence the IG to gain improper access to the Court. Executive branch agencies face this risk with their IG's, which is why the

284. 5 U.S.C. § 552.

Senate confirmation process is important for assuring the independence and integrity of the IG. Concerning the IG's potential conflicts of interest, the Supreme Court IG should be bound by the ethics rules that bind IGs in the executive branch (these include statutes prohibiting financial conflicts of interest for government employees,[285] rules requiring recusal from matters in which an employees' impartiality might reasonably be questioned because of personal or business relationships,[286] and the same Ethics in Government Act annual disclosure requirements that bind the justices[287]). All these requirements should also apply to the IG.

The IG would investigate relevant facts and laws and reach conclusions outlined in a formal report provided to all the justices. In some instances, the IG should have the power to request advisory opinions on recusals, financial disclosure, and other matters from one or more federal appellate judge. Unlike the Supreme Court ethics lawyer, who should probably only be permitted to seek such advisory opinions with the permission of the justices, the IG should be permitted to initiate a more formal review. For example, if a justice refuses to recuse themselves from a case even though it appears that 28 U.S.C. Section 455 requires recusal, the IG could refer the matter to one or more appellate judges. Likewise, if a justice were to insist that a certain gift did not need to be disclosed on the annual disclosure form, the IG could consult appellate judges. The advisory opinion of the appellate judges would not be binding, but the IG would report to Congress a justice's decision to act contrary to that advice. Alternatively, if the IG disagrees with the determination of the appellate judges, the IG could explain that in the report.

If anything, appellate judges would likely be deferential to Supreme Court justices on matters of ethics because they in some ways are colleagues of the justices. This is a reason for a Supreme Court ethics regime not to rely too much on consultation with appellate judges. Nonetheless, their input, coupled with an independent IG investigation, could help prevent the worse lapses of professional judgment on the Supreme Court.

The IG should also report to Congress annually on any IG investigation in which there was a finding by the IG of clear and convincing evidence of a breach of federal statutes, the Code of Conduct for United States Judges, or other improper conduct by any justice or employee of the Court, or by any lawyer, party, or amici appearing before the Court. IG investigations where there is no finding of violations should not be reported to Congress, or the IG should inform Congress that there was no finding of a violation and explain the reasons why.

The IG should be required to protect the Court's confidences as much as possible. The IG's report to Congress thus should only disclose confidential information

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285. *See, e.g.*, 18 U.S.C. § 208 (prohibiting certain financial conflicts of interest for federal employees).

286. *See, e.g.*, 5 C.F.R. § 2535.502 (OGE impartiality rule for executive branch officials).

287. *See* discussion of Ethics in Government Act annual financial disclosure requirements, text accompanying notes 68–94.

of the Court to the extent *necessary* to support a finding of wrongdoing. Information the IG learns about the justices' deliberations in a case and drafts of opinions seldom would be disclosed except in rare instances where the IG concludes that a justice changed a vote in a case on account of a bribe, an impermissible *ex-parte* contact by a party or amicus group, or other improper influence.

Unless there is clear and convincing evidence of 1) a serious ethics violation *and* 2) that the violation affected a justice's vote or opinion in a particular case, the IG should not disclose to Congress any information about deliberations and drafts of opinions in a case. Also, absent probable cause concerning both a violation and its impact on a case, the IG should not be allowed to examine such deliberative materials to begin with. The wrongdoing would be established by other means. For example, a justice who accepted a free vacation from an amicus in a pending case would violate ethics rules regardless of the impact on the justice's vote in the case, and the IG should report that to Congress. The IG would need probable cause that the free vacation influenced the justice's decision in the case to examine deliberative materials, and only if there were clear and convincing evidence that the free vacation influenced the justice's vote in the case would that information be reported to Congress. Absent such findings grounded in clear and convincing evidence, information about drafts and deliberations in a case before the Court should remain confidential.

Removal of the Supreme Court IG should require a vote to be removed by a majority of the justices. Alternatively, Congress could stipulate that the IG could only be removed by unanimous decision of the justices or by a supermajority (six, seven, or eight justices). If the IG is removed by the Court, the reasons for removal should be outlined in a written opinion of the Court or a letter to Congress.[288] The IG should also be subject to impeachment by the House and removal by the Senate.

IV. WILL A SUPREME COURT ETHICS LAWYER AND IG HELP FIX ETHICS ON THE SUPREME COURT?

Colleagues cover for colleagues. Someone needs to stand in between. This author was the White House ethics lawyer for President Bush with precisely that role from early 2005 to mid-2007. And with mixed results. The White House ethics lawyer has no White House IG to investigate allegations of wrongdoing. A year after leaving the White House, this author recommended that the White House have an IG.[289] That is a story for another publication. This Article's focus is on the need for an IG at the Supreme Court.

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288. Inspectors general in the executive branch are removable by the president, but the president is required to give Congress thirty days advance notice. *See supra* text accompanying note 275 (discussing 5a U.S.C. § 3). A similar rule could apply to an IG removed by the justices of the Supreme Court, although they could state their reasons in an opinion instead of in a report to Congress.

289. *See* PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES, *supra* note 257, ch. 3 (discussing the need for an IG in the White House).

The Court needs a measure of supervision of its internal affairs in a way that does not violate separation of powers by injecting Congress or the executive branch unnecessarily into the Court's business. The Court having an ethics lawyer and an IG would help accomplish that purpose. An ethics lawyer and an IG also might help restore public confidence in the Court, a matter that should be of concern to the justices now.

The first line of defense for ethics on the Supreme Court is the ethics lawyer. The ethics lawyer in many instances may help the most by resolving an ethics issue so that it never gets to the IG. Because the ethics lawyer does not report to Congress and has an attorney-client confidential relationship with the Court, the ethics lawyer is in the best position to find out about potential ethics problems in time to resolve them. The Supreme Court's Code of Conduct should require justices and their clerks to consult with the ethics lawyer whenever there is an arguable question of judicial ethics, and if they do, a lot of problems could be avoided. The Court also might authorize the ethics lawyer to, on a confidential basis, seek advice from courts of appeals judges about the best approach for particular situations.

The ethics lawyer's role is advisory only, so installing an ethics lawyer in the Court is not likely to be controversial. The IG, however, could be a sticking point.

Below, this Part revisits each of the factors undermining Supreme Court ethics discussed in Part II above and discusses how an IG might help. Where appropriate, this discussion refers to the Supreme Court ethics lawyer as well.

The IG provides some external oversight for the Court. An IG is sometimes required to conduct an independent investigation of alleged wrongdoing. This is very different from the present situation of the Court conducting its own investigation or no investigation at all. The IG also reports to Congress. Executive branch agencies have IGs because Congress determined external oversight was required, and the IG is a midway point between no external supervision and direct oversight by Congress itself. Legislation installing an IG at the Supreme Court should assure sufficient oversight of ethics compliance, without allowing the IG to interfere with the substance of the Court's work or to interfere unduly with the Court's procedures. Having a Supreme Court IG is also preferable to the Chief Justice or other justices being called to testify before Congress whenever there are concerns about an ethics violation, although such testimony might be appropriate later if an IG finds serious violations.

The IG is not a "colleague covering for colleagues." The IG is not a colleague of the justices. Neither is the ethics lawyer. The IG does not dine with the justices; the IG does not sit in on deliberations with the justices. The IG's office might even be outside the Supreme Court, with the IG entering the building only in specified circumstances. The ethics lawyer also would not be a colleague of the justices either but would be closer to them than the IG, and like law clerks, should have an office in the Supreme Court building. The IG also would have the power

to involve court of appeals judges by seeking advisory opinions on recusal and financial disclosure issues. These judges, while colleagues of the justices in a sense, would be more distant, and perhaps more objective than the justices' colleagues on the Court itself. And finally, the IG would be obligated to report violations to Congress.

The IG has no lifetime tenure and would help prevent retaliation against whistleblowers. The IG appointment would be for an eight or ten-year term, subject to removal by the Court or impeachment proceedings in Congress. This would provide a measure of job protection sufficient to assure independence but not the unaccountability too often associated with lifetime tenure. The IG could also provide some measure of protection for whistleblowers against retaliation, particularly if the IG's staff, like executive branch IGs, were to have a Whistleblower Protection Coordinator to prevent retaliation against Court employees for protected disclosures, and it was clear that retaliation was a separate violation of federal law.[290]

The IG is not professionally superior and not as likely as the Justices to be overconfident. The IG is not a Supreme Court justice, and while the position should carry significant stature, it is not so much that the IG should become overconfident in the IG's judgment. Both the IG and the ethics lawyer know that the justices interpret the law; they don't. And only if the justices' interpretation of an ethics law is unreasonable, and a violation ensues, does the IG have the responsibility to report the matter to Congress.

The mechanism of the IG referring matters to courts of appeals judges for assessment before issuing a report should mitigate overconfidence on the part of the IG. Also, the IG would be subjected to severe criticism in Congress if the IG were to use poor judgment either in condemning a justice for conduct that was proper or allowing improper conduct. There is a risk of having an abusive or overzealous IG, and the nomination and confirmation process should be designed to ensure that doesn't happen. If it does, the IG would likely be removed by a vote of the justices, and a less overconfident IG appointed in their place.

The IG is not a member of the Club. The IG does not ordinarily confer with the justices. The IG is in some ways like the general manager of a private club who makes members pay their dues and adhere to house rules but is not a member of the club. The ethics lawyer would monitor ethics matters in the first instance and the IG would address the more serious situations where a justice or a clerk, court employee, attorney, party, or amicus party likely violated the law.

Circling back to the groupthink problem, psychologist Irving Janis proposed a "devil's advocate" approach in which someone in the group argues a contrary

290. See *supra* note 280 and accompanying text (discussing protection of whistleblowers in the Executive Branch by federal law prohibiting retaliation and also a Whistleblower Protection Coordinator in the IG's office.)

position to challenge the others.[291] In deliberating over cases, the Supreme Court justices are good at playing this "devil's advocate" role arguing different sides. But as discussed in Parts I and II above, in matters of ethics and personal conduct, they apparently do not do that—they just give each other a pass.

The role of the IG, and even more so, the ethics lawyer in an advisory function, is to present justices with the other side of an ethics argument if one or more justices, or someone else does something or proposes to do something that is probably unethical. Even in situations where a justice has a reasonable but narrow interpretation of an ethics rule—for example, an interpretation that allows the justice not to recuse from a case or to attend an extravagant party hosted by an organization that files amicus briefs with the Court—the ethics lawyer and the IG can present arguments on the other side and raise with the justices the negative public appearances ensuing from a proposed course of conduct. The ethics lawyer can advise the Court, and the IG advise the Court and Congress, on how to prevent wrongful conduct and mitigate the impact of wrongful conduct after it occurs. They would advise the Club, and help enforce the house rules, without being members of the Club.

The IG has fewer special friends than the justices. The IG is not likely to make anywhere near as many new friends as the justices. It is possible that someone could try to influence the IG, and the IG thus should file financial disclosure reports and recuse from matters in which the IG has a conflict of interest.[292] But Harlan Crow is not likely to invite the IG on his yacht, nor Paul Singer invite the IG to join him on an expenses paid fishing expedition with one of the justices (if that did happen, the IG would have to disclose it, as would the justice).

The IG does not have the power to embrace exceptionalism. The IG has no power to make binding decisions about the law or to carve out exceptions to the law. If the law is unclear, a justice's interpretation is likely to prevail over that of the IG. The IG's job is to apply the law to the facts and issue a report. If there is evidence of wrongdoing, the Court and Congress both can decide what to do with it.

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291. *See* JANIS, *supra* note 203, at 2. In 2020, Muqtafi Akhmad, Shuang Chang and Hiroshi Deguchi of the Tokyo Institute of Technology published a paper using an agent-based model of groupthink and simulations to assess the effectiveness of "devil's advocacy" techniques to overcome groupthink in different situations. *See generally* Muqtafi Akhmad, Shuang Chang & Hiroshi Deguchi, *Closed-Mindedness and Insulation in Groupthink: Their Effects and the Devil's Advocacy as a Preventive Measure*, J. COMPUT. SOC. SCI. (2020) (describing the agent based model and various simulations) (citing a wide range of literature on groupthink including Robert S. Baron, *So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making*, 37 ADVANCES IN EXPERIMENTAL SOC. PSYCH., 219–53 (2005); Marco Brambilla, Simona Sacchi, Stefano Pagliaro & Naomi Ellemers, *Morality and Intergroup Relations: Threats to Safety and Group Image Predict the Desire to Interact with Outgroup and Ingroup Members*, 49 J. EXPERIMENTAL SOC. PSYCH., 811–21 (2013)).

292. As discussed earlier in this article, the Supreme Court IG, like IGs in executive branch agencies, should be subject to the criminal financial conflict of interest statute and OGE ethics regulations that apply to all executive branch employees other than the President and Vice President. 18 U.S.C. § 208.

If criminal conduct is involved, the IG should refer a matter to the Department of Justice which would be expected to open an investigation, and, if appropriate, obtain an indictment. Although the complexities involved with the criminal prosecution of a Supreme Court justice are beyond the scope of this article, and a special prosecutor would probably be required, sitting federal judges have been indicted while in office,[293] and there is no legal authority for the proposition that a sitting Supreme Court justice cannot be indicted.[294]

The IG is not unduly interested in defending the independence of the judiciary. The IG is juxtaposed between Congress and the Supreme Court. By the very nature of the position, the IG should not be as headstrong as the justices in protecting the Court's power and independence as an institution, yet the IG should be vigilant in not allowing his position to be used to enable political interference with the Court by Congress. IGs in the Executive Branch can counter the unchecked accumulation of presidential power, at least at the margins, and an IG similarly could check at least some abuses of power by the Court.

Requiring the IG to be nominated by all the justices, or at least a supermajority, and confirmed by the Senate, also reduces the likelihood of an IG being politically aligned with one party or faction in Congress that might try to use the IG to subject the Court to intimidation or interference by Congress. An IG should not be appointed by the justices and confirmed by the Senate if the IG does not understand the proper balance between the independence of the judicial branch and its accountability. An IG who unduly threatens the independence of the Court should be removed from office and probably will be. An IG who personifies Sergeant Shultz and just looks the other way when there is wrongdoing would likely be rigorously examined by Congress, and perhaps impeached and removed by Congress.

The IG provides for more transparency. The IG report to Congress would provide some additional information about ethics compliance at the Supreme Court. As discussed earlier in this Article, transparency at the Supreme Court is a difficult and controversial matter, and considerations are different than for transparency in the executive branch. This Article does not address arguments for and against transparency concerning substantive deliberations of the Court, such as television cameras in the courtroom, disclosure of draft opinions, and the like.

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293. For example, United States Court of Appeals for the Seventh Circuit Judge Otto Kerner, former Governor of Illinois, was indicted by a federal grand jury on charges of bribery, perjury and tax evasion. *See* Seth S. King, *Federal Judge Kerner Indicted on Bribe, Perjury, Tax Charges*, N.Y. TIMES, Dec. 16, 1971, at 1. Judge Kerner resigned from the Court of Appeals on July 22, 1974 after he lost his final appeal of his criminal conviction, and seven days before he went to prison. *See* Seth S. King, *Otto Kerner Goes to Jail Today His Once Shining Career at End*, N.Y. TIMES, July 29, 1974, at 47.

294. The Department of Justice Office of Legal Counsel in memoranda in 1973, 2000 and 2019, has taken the position that a sitting president should not be indicted, although as Professor Claire Finkelstein and this author have explained this is a policy position of DOJ without firm constitutional foundation. *See* Finkelstein & Painter, *supra* note 36. DOJ has not taken a similar position against indictment of any other federal officer besides the president.

However, transparency about ethics is critical to public confidence in the Court, and findings of violations supported by sufficient evidence should be reported by the IG to Congress. The IG also should probably be required to testify about matters in the IG report if asked to do so by either house of Congress.

An end to plausible deniability. A Supreme Court ethics lawyer and IG will weaken the Chief Justice's and other justices' "Sargent Schultz defense." The Chief Justice and other justices who receive reports from the Court's ethics lawyer can no longer credibly say "I know nothing, I see nothing." When the IG gets involved and issues a report, Congress also will have a role. An IG who adopts the Sargent Schultz posture and ignores or whitewashes violations would be abandoning the duties of the office, could be investigated by Congress, and if necessary, removed.

The IG will help Congress oversee the Court and, if necessary, impeach a justice, censure a justice, or seek another remedy. The IG can't remove a justice, but the IG's report to Congress can at least open an impeachment investigation, which might make it easier for Congress to subpoena testimony, including from the justices themselves. The Supreme Court has held that Congress has broader powers to enforce its subpoenas if there is an open impeachment investigation or other specific legislative purpose than if there is not.[295] The Court could refuse to comply with, or refuse to enforce, Congressional subpoenas of the justices' own records, triggering a Constitutional crisis. But with a sufficiently compelling IG report of wrongdoing, the majority of the Court should let the process take its course.

Finally, it is important to have remedial measures short of impeachment of a justice, as it is highly unlikely that two-thirds of the Senate will vote to remove a justice. Censure of a justice by one or both houses of Congress is an option. Also, an IG's report and the Congressional investigation that follows can be a type of censure. A statute establishing the office of the IG could also give either House of Congress standing, upon receipt of an IG report and conclusion of a Congressional investigation, to petition the entire Court for an injunction against a particular justice or justices committing future violations. Making Supreme Court ethics itself an occasional case before the Court would force the justices to own up to their collective responsibility to assure ethics rules are complied with on the Court and to acknowledge when they have failed or to explain in an opinion why they believe they have complied with the law.

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295. Trump v. Mazars, 591 US (2020) (holding that because of separation of powers concerns judicial enforcement of Congressional subpoenas of the president's personal records would require a showing of a legitimate legislative purpose, which could include an open impeachment investigation, but a more open-ended Congressional investigation probably would not suffice).

V. SEPARATION OF POWERS AND OTHER OBJECTIONS TO A SUPREME COURT ETHICS LAWYER AND IG

This Part breaks down the arguments that could be made against having a Supreme Court ethics lawyer and IG and suggests responses and solutions to these arguments.

A. WHY CAN'T THE LAW CLERKS DO IT?

One objection to having a Supreme Court ethics lawyer is that justices already get advice from law clerks. Judicial ethics rules are relatively straightforward, and clerks, even if recent law school graduates, are presumably intelligent enough to figure it out.

The problem is that clerks are not experts in judicial ethics, and as explained in this Article, some judicial ethics rules are not as straightforward as they might appear. Law clerks' advice also may be inconsistent so, for example, one justice recuses from a case in a situation where another justice would not recuse. Some justices may want law clerks to be overly cautious on matters of ethics, and some may prefer a more permissive stance. Furthermore, clerks leave every year or two, so there is no institutional memory of how particular ethics matters are resolved. Finally, law clerks expect to take away from their experience a lifelong close relationship with the justice and other clerks (they are part of that circle of "colleagues" who may reinforce unethical behavior rather than call out violations). Expecting a clerk to tell a justice they are doing something unethical is an unreasonable expectation. That likely won't happen.

It is here that the Supreme Court ethics lawyer will be invaluable. That lawyer would be expected to have expertise in judicial ethics and government ethics in general and would likely serve for more than the one- or two-year span of a typical Supreme Court clerkship. The ethics lawyer would work for the entire court and not have an allegiance to a particular justice. To the extent law clerks are influenced by ideological divides, the ethics lawyer would be expected to stand apart from those battles. And the ethics lawyer would be expected to give consistent advice to all the justices, not advice tailored to the substance and style that particular justices most likely want to hear.

B. WHY CAN'T THE JUSTICES DO IT THEMSELVES?

Another objection is that the justices themselves can discuss ethics matters with each other, or with the Supreme Court Legal Counsel, and they have plenty of institutional memory and would want to strive for consistency. Do they really need an ethics lawyer?

We don't know how much the justices discuss ethics issues amongst themselves. Justice Thomas said he consulted his colleagues about his financial

disclosure issues,[296] but we don't know who he consulted (Justice Alito appears to have had no better understanding of the disclosure rules on gifts of free travel).[297] If justices do consult with each other, their strive for consistency may be a one-way ratchet toward looser application of ethics rules. Once a justice has decided in favor of not recusing or not disclosing in a certain situation, other similarly situated justices may decide to do the same, simply in order not to embarrass a colleague. Choosing the "less ethical" option may be easier. In any event, the Court's present difficulty with ethics issues suggests that if the Justices are acting as ethics lawyers for each other, it is not working.

As discussed above, the Court's Legal Counsel at best has an *ad hoc* process for advising the justices about ethics (there is no evidence of a Supreme Court ethics program at all, much less one resembling ethics programs in executive branch agencies). The Legal Counsel periodically writes letters to Congress reporting that the justices are complying with ethics rules,[298] but it is not clear what if anything he does behind the scenes to make sure that's true.

The SCERT bill uses panels of appellate judges to resolve ethics issues for the Supreme Court.[299] This is better than having the justices do it themselves, but here also there could be inconsistency if randomly selected panels of appellate judges adjudicate ethics issues involving different Supreme Court justices. While there is no guarantee that a Supreme Court ethics lawyer and IG would be consistent in their legal analysis and approach, it is probably easier for them to achieve consistency than for appellate judges. Appellate judges furthermore have a different orientation. Their expertise is adjudicating questions of law, not investigating facts, and applying the law (the function of an IG) or advising (the function of an ethics lawyer).

C. WILL CONFIDENTIALITY BE LOST?

Confidentiality has always been vitally important to the Court, and the Justices will insist on strict limits on what is conveyed to Congress about what is said inside the Court. It is the IG, not the ethics lawyer, who is most likely to raise confidentiality concerns for the Court.

As already discussed in this Article, however, controls can be put in place, so the IG only learns information essential to investigating an alleged breach of ethics rules or law by a justice or other employee of the court. Specifics of deliberations about cases before the Court ordinarily would be off limits for the IG. Special arrangements could be made for an investigation in the rare situation where a justice is accused of changing his position in a case because of a bribe, or

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296. Mark Sherman, *Justice Thomas says he didn't have to disclose luxury trips*, THE ASSOCIATED PRESS (Apr. 7, 2023), https://apnews.com/article/supreme-court-justice-clarence-thomas-ethics-trips-2c0f59fd1b0d5d3617c1537a767c5325 [https://perma.cc/ET2D-JYYM].

297. *See supra* text accompanying notes 90–91.

298. *See supra* text accompanying notes 260–63.

299. *See supra* text accompanying note 247.

a clerk is accused of trying to influence a justice in exchange for a bribe or an offer of employment. Only internal communications essential to the alleged wrongdoing would be examined by the IG and only if there is a finding of wrongdoing would the Court's internal communications be described in a report to Congress, as well as potentially a criminal referral to the Justice Department.

As discussed earlier in this Article, IG inquiries into the Court's deliberations on cases before it would not be allowed in an investigation into alleged failure to recuse. Recusal is a strict liability rule (it does not matter what the justice's position is in the case; he either must recuse or fail to do so). The written opinions of the Court, and votes on cert. petitions, on their face, sufficiently describe the justices' role in the case and would be enough to conduct an IG inquiry into whether recusal was required.

The IG probably should be required to sign a confidentiality pledge specifying what information may or may not be disclosed in a report to Congress depending on the type of investigation. The statute creating the office of Supreme Court IG could impose specific penalties, including immediate dismissal, on an IG who makes unauthorized disclosures of the Court's confidential information.

D. WILL THE IG GET THE LAW RIGHT?

One could argue that in some instances ethics is not a bright line, and an IG might reach a conclusion on an arguable question of ethics in which one or more justices take a different view. In that situation should not the justices' view control? If the justices' job is to interpret the law and apply the law to facts, should they not be able to do so in their own case? An alternative to an IG might be for the justices to take a more proactive, and formal role, in addressing each other's ethics issues, deciding by majority vote, or perhaps a six-vote supermajority as to whether there has been a violation.

Letting the justices decide the ethics law that applies to their own case, of course, violates that ancient rule "*aliquis non debet esse Judex in propria causa*"—no man ought to be a judge of his own cause—articulated by Edward Coke in 1610[300] and quoted by Supreme Court justices when they apply the same rule to parties other than themselves.[301]

There are also other downsides to this approach. First, it will further divide the Court to have justices ruling on whether another justice behaved unethically. Recusal scenarios could be difficult if justices who disagree with a colleague's likely position on a case would be deciding on the colleague's recusal from that same case.

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300. *Dr. Bonham's Case*, 8 Co. 107a, 114a, 118a (C. P. 1610) (The College of Physicians, although given power under the Physicians Act of 1523 to punish unlicensed practice of medicine, may not be "judges, ministers, and parties" in a case).

301. *See* Tellabs, Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308, 329 (2007) (Scalia, J. concurring in the judgment) (citing and quoting *Dr. Bonham's Case*, *supra* note 300 for this same Latin phrase).

A Supreme Court IG making a separate finding or referring the issue to one or more appellate judges to render an advisory opinion probably is a better solution. If a justice still refuses to recuse themselves from a case despite a clear showing that the justice should recuse, the other justices have the option of weighing in. But expecting the justices to tell a colleague he must recuse from a case or do anything else to comply with ethics rules is an unreasonable expectation. The IG can't make the justice recuse either, but the IG's independent position, and duty to report to Congress, would be a powerful deterrent for a justice determined to violate the recusal statute or any other ethics rule.

E. THE SEPARATION OF POWERS ARGUMENT

Next, there is the separation of powers objection already highlighted in Chief Justice Roberts's letter to Senator Durbin declining Durbin's invitation to testify before the Senate Judiciary Committee about Supreme Court ethics.[302] The Court apparently takes the position that it is entirely independent of the other two branches of government. This, however, is simply not true.

Judges and justices are not immune from criminal prosecution by the Department of Justice. Indeed, federal judges have been criminally charged while in office.[303] Congress can impeach and remove judges and justices, which means judicial conduct is not entirely independent from Congress either.

There will always be the argument that Congress does not have the power to regulate the ethics of the Supreme Court.[304] There are also more persuasive counterarguments.[305] This article does not analyze that constitutional issue in depth, but it is important to note that Congress already regulates the Court by setting the number of justices,[306] setting their pay,[307] and allocating the budget of the Court.[308] Justices are also subject to generally applicable criminal and civil laws. Arguably, Congress could overstep its authority with an excessively broad recusal statute—

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302. *See* Roberts April 25 Letter, *supra* note 166 and text accompanying note.

303. *See supra* note 293 (discussing prosecution of Court of Appeals judge Otto Kerner who only resigned from the Court a week before he went to prison).

304. *See* Roberts April 25 Letter, *supra* note 166 (citing separation of powers in declining to testify before Congress); CHIEF JUSTICE ROBERTS, 2011 YEAR-END REPORT, *supra* note 68 (stating that "[a]s in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested").

305. *See Supreme Court Ethics Reform: Hearing Before S. Comm. On Judiciary* (May 2, 2023) (testimony of Amanda Frost) ("The Justices' claim to be above the laws that govern all federal judges, as well as officials in the other two branches of the federal government, has no basis in constitutional text or history."); Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443 (2013) (concluding that Congress has broad constitutional authority to regulate the Justices' ethical conduct, although Congress's power to regulate justices' ethics is constrained by separation of powers principles, and the need to preserve judicial independence).

306. 28 U.S.C. § 1.

307. 28 U.S.C. § 5.

308. ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2025 CONGRESSIONAL BUDGET SUMMARY 1 (2024).

for example, requiring justices to recuse from all cases involving the president who appointed them—but the current statute, 28 U.S.C. § 455, has never been construed that broadly.

Enacting statutes that impose reasonable ethics rules for justices, like the ethics rules for the other two branches of government, should be within the powers of Congress. Congress did just that in the Ethics in Government Act of 1978 which requires the financial disclosure forms filed annually by the justices as well as by senior executive branch officials and Members of Congress.[309] Congress presumably has the power to establish a system for enforcement of ethics rules in the judicial branch, just as it does in the executive branch where Congress created IG's for most agencies and the OGE to promulgate and interpret ethics regulations. The President can fire executive branch IGs (this Article suggests that the Court's justices also should have the power to fire a judicial branch IG), but presidents do not argue that it is constitutionally impermissible for Congress to require there to be an IG in executive agencies. An argument that it is unconstitutional for Congress to require a judicial branch IG is no more persuasive.

Indeed, a judicial branch IG who works within the courts, but who also reports to Congress and makes criminal referrals, when appropriate, to the DOJ does not expand the substantive scope of ethics rules for the judiciary. The IG, however, could make ethics laws Congress has already enacted for the judiciary—including financial disclosure rules, gift rules, and recusal rules—more likely to be enforced.

Very different from these procedural regulations of the Court's functions would be Congress regulating the substantive decisions of the Court. Trying to overturn the Court's decisions on constitutional questions by statute would raise much more difficult constitutional questions. Congress instructing the IG to sit in on justices' deliberations and report to Congress on what was said also would be problematic, as would Congress instructing the IG to obtain and release to Congress drafts of the Court's opinions. Without exploring the constitutional limits on these and other more intrusive steps Congress could take, the best way for the Court to preserve its independence would be to work with Congress to address the ethics crisis currently confronting it. Having a judicial branch IG would be an important part of the solution.

The justices, of course, are different from an executive branch agency to which an IG is normally assigned. Collectively, the justices are the head of the judicial branch just as the president is the head of the executive branch. But that does not mean either is above the law or beyond the reach of an investigation. The Court in *Trump v. Vance*[310] in 2020 held that the president is amendable to a grand jury

309. The Ethics in Government Act of 1978 requires filing of financial disclosure reports. *See* 5 U.S.C. § 13103 (formerly 5a U.S.C. § 101).

310. Trump v. Vance, 591 U.S. ___, at *1 (2020).

subpoena, and the Court in *Morrison v. Olson*[311] in 1988 upheld a federal statute creating an independent counsel who could investigate the president and who could not be fired by the president. While there is no IG in the White House, most federal agencies have an IG and their investigations can implicate the president. It is simply not true that the head of a branch of the U.S. government is above the reach of an investigation, and the Court should be no exception.

Most importantly, there needs to be a change in the culture at the Supreme Court. Taking great care to follow ethical rules should be the norm (the formal ethics program recommended in this Article should help move the Court in that direction). Instead of embracing the most permissive interpretations of ethics rules (e.g., Justice Alito's "empty seat theory" of permissible private plane travel),[312] the justices should err on the side of over-compliance, for example, never accepting free vacations from anyone, including close personal friends. The justices need to stop invoking separation of powers arguments as an excuse for viewing themselves as being above the law and beyond the reach of accountability mechanisms vital to the integrity and legitimacy of senior officers in all branches of government.

CONCLUSION

The Framers never intended one branch of the government to be entirely independent of the others. The president nominates justices, the Senate confirms them, and even though it's never been done, the House and Senate can remove them through the impeachment process. Statutes passed by Congress set the number of justices, their salary, and their budget, require recusal from some cases, and require financial disclosure. Giving the Supreme Court an ethics lawyer and an IG who reports to Congress in instances of demonstrable wrongdoing is not a dramatic expansion of Congressional oversight of the Court. It is also a necessary step.

Necessary, but not sufficient. As discussed earlier in this article, other reforms are needed as well. Some, such as mandatory disclosure of funding of amicus briefs, are included in Senator Whitehouse's SCERT Act, which should be passed by Congress and become law. Others will require broader reform of our political system, including disclosure of funding of electioneering communications, lobbying, and nonprofit organizations. Some of the same people and organizations behind electioneering communications the Court deems constitutionally protected also fund confirmation battles for the Court. Closing the loop of influence, some of these same people and organizations bankroll the "Armanda of Amici" who appear before the Court. A few of them go so far as to bestow undisclosed gifts of luxury vacations on the Justices themselves. If these expenditures are not prohibited—and many of them perhaps cannot be given the Court's broad

311. Morrison v. Olson, 487 U.S. 654, 655 (1988).

312. *See supra* text accompanying note 86.

application of the First Amendment and equation of expenditures of money with free speech—at least more disclosure can be required.

Shortly after the Court decided *Citizens United*, unleashing a flood of corporate money in politics, President Obama in his January 2010 State of the Union Address criticized the Court's decision and urged that Congress respond by passing legislation at least requiring disclosure of dark money funding elections.[313] Justice Alito sat with the other justices watching, shaking his head as the President spoke and appeared to mouth the words "not true."[314] The very idea of limiting billionaires' influence over any of the three branches of government and the President recommending a law requiring more disclosure must have been unsettling for him. The previous May he had filed his 2008 financial disclosure form reporting his assets, income, and gifts in 2008. His fishing trip with Paul Singer wasn't there.

313. *See* Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), https://www.nytimes.com/2010/01/29/us/politics/29scotus.html [https://perma.cc/38BM-6974].

314. *See id.* ("Justice Samuel A. Alito Jr., one of the justices in the majority in the decision under attack, shook his head as he heard the president's summary of Citizens United v. Federal Election Commission, and he appeared to mouth the words 'not true.'").