

United States Senate, Committee on the Judiciary  
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights

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

May 3, 2022

Amanda Frost

Bronfman Professor of Law & Government, American University Washington  
College of Law

## **I. Introduction**

Thank you for inviting me to testify on judicial ethics and the role of the U.S. Congress in regulating the ethical conduct of judges who hold office under Article III of the U.S. Constitution.

I am the Bronfman Professor of Law & Government at American University Washington College of Law in Washington, D.C. My areas of expertise include federal courts, judicial ethics, and immigration law. I have authored numerous articles and op-eds on the operation of the federal courts generally, and in particular on judicial ethics. *See*, Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 *GEORGETOWN JOURNAL OF LEGAL ETHICS* 443 (2013); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 *UNIVERSITY OF KANSAS LAW REVIEW* 531 (2005).

I will begin my testimony by describing the need for improvements in two specific areas: first, the law governing judicial recusal; second, the ethics guidelines for all federal judges, and in particular for the justices on the U.S. Supreme Court. I will then discuss potential legislative solutions to these problems, referencing the Twenty-First Century Courts Act. I will conclude by defending Congress's constitutional authority to regulate the ethical conduct of all judges who hold office under Article III of the U.S. Constitution.

## **II. Deficiencies in Existing Ethics Laws Regarding Judicial Conduct**

### **A. Deficiencies in Recusal Legislation**

Congress enacted the first law governing judicial recusal of lower court judges in 1792, and expanded that law to apply to U.S. Supreme Court justices in 1948. Today, the federal recusal statute requires “[a]ny justice, judge, or magistrate judge of the United States,” to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). That same statute requires recusal for other listed grounds, including when the judge has “personal knowledge of disputed evidentiary facts,” or knows that “he . . . or his spouse or minor child residing in his household, has a financial interest . . . or any other interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(1), (b)(4).

The goal of recusal legislation is not only to bar judges from sitting on cases in which they have an *actual* conflict of interest, but also to avoid creating the *appearance* of bias. As the Supreme Court explained in *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847, 860 (1988), Congress enacted recusal laws to avoid even “the appearance of impropriety,” because doing so will

“promote public confidence in the integrity of the judicial process.” *See also* S. Rep. No. 93-419, at 5 (1973); H.R. Rep. No. 93-1453, at 5 (1974).

Unfortunately, the federal recusal statute has too often failed to serve its stated purpose because it does not include a clear process governing recusal. Section 455 does not describe how a party would seek to have a judge disqualified from a case. Nor does the statute state who decides whether a judge should be disqualified, which often leads judges to decide for themselves whether they can be impartial despite the obvious conflict of interest in doing so. Finally, the statute does not require that a judge explain her decision either to recuse or remain on a case when her impartiality is challenged.

The absence of procedures governing judicial recusal undermines the dual purpose of the recusal statute to protect the integrity of the federal judiciary as well as the rights of litigants to an impartial decisionmaker. Over the past few years, judges and justices have been involved in numerous cases in which they should have recused due to an actual conflict or the appearance of such a conflict—situations that could have been avoided had these judges been required to follow clear procedures regarding recusal questions. Cumulatively, their failure to do so has undermined the integrity of the judiciary.

Most recently, Justice Clarence Thomas was criticized for failing to recuse himself from former president Donald Trump’s emergency application for an injunction to block disclosure of White House Records concerning the January 6th attack on the U.S. Capitol. Eight of the justice allowed the records disclosure to go forward; Justice Thomas alone dissented. *See Trump v. Thompson*, 595 U.S. \_\_\_, No. 21A272 (Dec. 192, 2022). A few months later, the public learned that Justice Thomas’ wife, Virginia “Ginni” Thomas, was the author of dozens of texts to White House Chief of Staff Mark Meadows regarding efforts to overturn the results of the 2020 election—texts that were turned over to the congressional committee investigating the January 6, 2021, attack on the U.S. Capitol. In addition, it was revealed that Ginni Thomas was present at the January 6, 2021, “Stop the Steal” rally on the Ellipse, though she left before the violent attack on the U.S. Capitol that followed. *See* Kevin Daley, *Exclusive: Ginni Thomas Wants to Set the Record Straight on January 6*, Washington Free Beacon, Mar. 14, 2022; Adam Liptak, *Justice Thomas Rule on Election Cases. Should His Wife’s Texts Have Stopped Him?* N.Y. Times, Mar.25, 2022.

Assuming that Justice Thomas was aware of his wife’s involvement in the events leading up to the events of January 6th, he violated the plain language of the recusal statute, 28 U.S.C. § 455, by not recusing himself. Ginni Thomas had an “interest that could be substantially affected by the outcome of the proceeding,” as

evidenced by her text messages turned over to the January 6 Commission during its investigation, requiring Justice Thomas to recuse himself under § 455(b)(5). In addition, Justice Thomas’ “impartiality” in cases regarding the events of January 6, 2021, could “reasonably be questioned” by the public under § 455(a) in light of his wife’s presence at the January 6th rally and her communications with White House staff seeking to challenge the results of the election.

To date, Justice Thomas has not explained why he sat on a case in which his wife had an interest. Nor has he stated that he will recuse himself from any future related cases, despite calls that he do so. Most telling, the other eight justice have also remained silent despite the apparent violation of a federal law that serves to protect not just litigants, but also the integrity of the Supreme Court itself.

This recent incident highlights the procedural vacuum that permits the very justice whose impartiality is questioned to control access to the relevant information, as well as to retain sole control over the decision to recuse. Nor is Justice Thomas alone in being criticized for a lack of transparency around his recusal choices. The absence of clear and fair procedures for recusal has created problems for several of the current justices, and by extension for the Court as an institution.

For example, Justice Ruth Bader Ginsburg was criticized for failing to recuse herself from cases involving National Organization for Women’s Legal Defense and Education Fund in 2004 due to her close affiliation with that organization. That same year, Justice Scalia was the subject of a motion to recuse after he vacationed with Vice President Cheney, who was a litigant in a case before him at the time. Both Justice Elena Kagan and Justice Thomas were criticized in 2012 for failing to recuse themselves from a challenge to the Affordable Care Act—Kagan because she had been a member of the Obama administration and Thomas because his wife had worked with and funded organizations that opposed it. Calls for Justice Ginsburg to recuse herself from the case challenging President Trump’s travel ban came after she criticized his 2016 candidacy for President. At her recent confirmation hearings, Judge Ketanji Brown Jackson was questioned about whether she would recuse herself from the affirmative action challenge to Harvard’s admissions policies due to her multiple connections to Harvard University, including her membership on Harvard’s Board of Overseers. (Judge Jackson replied that she plans to recuse herself from that case.) *See Aaron Blake, How Clarence Thomas’ Recusal Controversy Compares to Others*, Wash. Post, Mar. 28, 2022.

In all of these cases, each justice, alone, decides whether to recuse, and in most cases also has sole access to the relevant information about whether recusal is

necessary. The absence of a clear process for disclosing that information, for allowing litigants to seek disqualification, and for allowing other judges to make the decision leads to the very harm to the reputation of the judiciary that the recusal statute is intended to prevent.

## **B. Deficiencies in the Code of Conduct**

The U.S. Supreme Court is the only federal judicial body that is not governed by a code of ethics—an omission that has undermined the integrity of the nation’s highest court.

The lower federal courts are subject to the *Code of Conduct for United States Judges*, which was adopted by the Judicial Conference in 1973 as a guide for judges on the lower federal courts. The *Code of Conduct* lays out a set of ethical principles to protect the “integrity and independence of the judiciary.” The Judicial Conference has created a Committee on the Codes of Conduct, which is authorized to issue advisory opinions about the Code “when requested by a judge to whom this Code applies.” These opinions provide further guidance for judges seeking to avoid ethics problems. Although the *Code of Conduct* is framed as “guidance,” its canons are not optional. Violations of the *Code* can serve as a basis for investigation and various types of sanctions under the Judicial Conduct and Disability Act. 28 U.S.C. §§ 351-364.

The nine Supreme Court justices are excluded from the *Code of Conduct for United States Judges*. In his 2011 Year-End Report on the Federal Judiciary, Chief Justice John Roberts stated that the “Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance” because “every Justice seeks to follow high ethical standards.” Roberts also stated that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations.” See 2011 Year-End Report on the Federal Judiciary, at 4-5, available at <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

Events both before and after 2011, however, suggest some justices are not abiding by the *Code of Conduct*, and that all would benefit of clearer ethical guidelines. For example, in 2011, Justices Scalia and Thomas were speakers at a fundraising event for the Federalist Society, which is contrary to the *Code of Conduct* provision stating that a judge “may not be a speaker, guest of honor, or featured on the program” of a fundraiser. See *A Question of Integrity: Politics, Ethics, and the Supreme Court*, Alliance for Justice; Andrew Rosenthal, *Step Right Up. Buy Dinner for a Justice*, op-ed, N.Y. Times, Nov. 10, 2011. Justice Ruth Bader Ginsburg spoke at events sponsored by the National Organization for Women, and Justice Stephen Breyer attended the Renaissance Weekend, an event closely associated with Bill and Hillary Clinton. Attendance at such events was

criticized as violating the *Code of Conduct*'s requirements that judges "refrain from political activity."

Citing these activities, Members of Congress from both parties, as well as newspaper editorials and op-eds, have called for the justices to agree to be bound by the *Code of Conduct* or a variation on it. *See, e.g.*, Letter from Richard Durbin, et al., U.S. Senators, to John Roberts, Chief Justice of the United States (Feb. 13, 2012); Judiciary ROOM Act of 2018, H.R. 6755, 115<sup>th</sup> Cong. (2018) (co-sponsored by Representative Darrell Issa); Editorial, *Judicial Ethics and the Supreme Court*, N.Y. Times, Jan. 6, 2012, at A24. The bipartisan Commission on the Supreme Court also agreed that the Supreme Court should adopt a code of conduct, stating "adoption of an advisory code [of conduct] would be a positive step on its own, even absent binding sanctions." *See* Presidential Commission on the Supreme Court of the United States, *Final Report*, Dec. 2021, at 221.

Indeed, the justices themselves have acknowledged that the Court would benefit from a code of conduct to guide them. In 2019, Justice Elena Kagan testified before the House Appropriations Subcommittee that the justices were "studying the question of whether to have a Code of Judicial Conduct that's applicable only to the United States Supreme Court," adding that it's "something that's being thought very seriously about." *See* 2020 Supreme Court Fiscal Year Budget, House Appropriations Subcommittee on Financial Services and General Government, March 7, 2019 *available* <https://www.c-span.org/video/?458421-1/justices-alito-kagan-testify-supreme-courts-budget>. To date, however, the Court has taken no action on this proposal.

## **II. Legislative Solutions**

### **A. Amending the Federal Recusal Statute**

Federal legislation is needed to address the problems described above. First, the federal recusal statute should be amended to establish clear procedural mechanisms governing recusal to ensure the decision is made by an impartial decision-maker acting transparently. Although litigants can file motions to disqualify under 28 U.S.C. § 455, the absence of clear procedures for making such a motion compounds the difficulty of doing so. Accordingly, that statute should be amended to provide that the parties have the right to seek a judge's recusal by motion filed within an appropriate amount of time after learning the relevant information. Adding a provision permitting such a motion would normalize motions to disqualify judges and justices.

In addition, the recusal statute should be amended to require that judges and justices disclose all relevant information about their relationship to the case and the parties—be it a financial interest in the case, personal connections to the parties or subject, or firsthand knowledge of the facts. Disclosure should be required even if the judge or justice does not believe the information justifies recusal.

Most important, the recusal statute should be amended to require that a judge other than the one whose partiality is being questioned decide the matter. Although 28 U.S.C. § 455 does not prevent a judge from referring a recusal motion to a colleague or a panel of judges from the same court, nothing in the statute requires it. *See, e.g., In re United States*, 158 F.3d 26, 34 (1<sup>st</sup> Cir. 1998). In the case of the lower courts, the law should be amended to require that a judge refer a motion to recuse to a different judge, or panel of judges. If a Supreme Court justice is asked to recuse, the motion should be decided by either the other eight justices, or alternatively by the full Court.

Finally, the recusal statute should be amended to require a reasoned explanation for the decision whether to recuse in any case in which the issue is raised. The norm today is for judges and justices to decide the question without explaining their reasoning for recusing or remaining on the case. As a result, there is no clear body of law to guide judges and litigants in future cases in which a judge's partiality is questioned. *See* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 UNIVERSITY OF KANSAS LAW REVIEW 531 (2005)

In his 2011 report on the state of the federal judiciary, Chief Justice John Roberts declared that each justice is allowed to decide for him or herself whether to recuse, stating “I have complete confidence in the capability of my colleagues to determine when recusal is warranted.” 2011 Year-End Report on the Federal Judiciary, at 10. Unfortunately, however, the examples discussed in Part I demonstrate otherwise, and suggest that all Article III judges would benefit from a clearer set of procedures governing recusal.

## **B. Creating a Code of Conduct for the U.S. Supreme Court**

Congress should also enact legislation requiring the Supreme Court to adopt a code of conduct, which would protect litigants and safeguard the Court's reputation.

A written code of conduct drafted by the members of the Court, and which applies explicitly to them, would be beneficial for at least two reasons. First, it would provide clearer guidance to the justices and their families as they make choices about speaking engagements, acceptance of gifts, travel, and employment. Second, the existence of a code of conduct that applies to the U.S. Supreme Court

would reassure the public that the justices take their ethical obligations seriously—something that many Americans today have reason to question.

Supreme Court justices and their spouses and children regularly navigate hard questions about their extra-judicial activities. The justices must decide whether to accept speaking engagements with advocacy organizations, whether to accept gifts or payment of travel expenses, and when and whether to socialize with friends and acquaintances who may have cases before the Court. Their spouses and children must determine whether to accept employment or otherwise associate themselves with corporations, advocacy organizations, or law firms that bring cases before the Court. Likewise, these organizations and law firms must make decisions about whether to hire or work with those family members.

As described above, the justices and their families have struggled with these questions. It is time for legislation to require the Court to develop its own code of conduct, and then to adhere to it going forward. The result would benefit the justices and their families, who will have clear standards to rely on when making these determinations. In addition, a Supreme Court-specific code of conduct would reassure the nation that the justices take their ethical obligations seriously. Clear ethical rules would not only enable the justices and their families avoid ethically borderline conduct, such a code of conduct would reduce the negative publicity and criticism that inevitably follow questionable ethical choices.

\*\*\*

Ideally, the federal judiciary would regulate itself, obviating the need for Congress to do so. If the federal courts established procedures to govern recusal, and if the Supreme Court created its own code of ethical conduct, then Congress would not need to act. Perhaps Congress's serious consideration of the Twenty-First Century Courts Act and related legislation will inspire the federal courts to make these changes on their own. If not, Congress should take upon itself the responsibility to enact legislation that accomplishes these goals, working with the courts cooperatively to ensure that they retain their role as an effective branch in our tripartite system of government.

### **III. Congress Has the Constitutional Authority to Regulate Judicial Ethics**

Congress has the constitutional authority to enact legislation concerning judicial administration generally, and judicial ethics in particular. Indeed, Congress has an obligation to enact such legislation to enable the federal courts to fulfill their constitutionally-assigned role under Article III of the U.S. Constitution.



Congress's power to regulate the ethical conduct of Article III judges is evident from the text and structure of the U.S. Constitution, and has been confirmed by centuries of historical practice. *See NLRB v. Noel Canning*, 573 U.S. 513 (2014) (noting the significance of historical practice in constitutional interpretation). Article III of the Constitution states that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” But the Constitution left it to Congress, acting pursuant to the Necessary and Proper Clause under Article I, to enact legislation establishing the Supreme Court and the lower federal courts. As legal scholar James Pfander has explained, Article III “leaves Congress in charge of many of the details” necessary to implement federal judicial power, and “Article I confirms this perception of congressional primacy by empowering Congress to make laws necessary and proper for carrying into execution the powers vested in the judicial branch.” JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES*, 2 (Oxford University Press, 2009). *See also* RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 20 (6<sup>th</sup> ed. 2009) (“The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system.”).

The first Congress quickly fulfilled its constitutional obligation to establish the federal judiciary by enacting the Judiciary Act of 1789, which controlled significant aspects of judicial administration, including judicial ethics. That law has special constitutional significance because it was enacted by a Congress composed of the Framers' contemporaries, including a number of the Framers themselves. Accordingly, that the Judiciary Act of 1789 is “widely viewed as an indicator of the original understanding of Article III.” *See* RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 21 (6<sup>th</sup> ed. 2009).

The Judiciary Act of 1789 not only created the lower federal courts, it also controlled the operations of the U.S. Supreme Court. That law set the size of the Supreme Court at six justices, established a quorum requirement of four, and provided that the Supreme Court would meet at the “seat of government” twice a year. The First Congress also authorized funds to support the federal judiciary and granted the Supreme Court authority to hire personnel, including a clerk of the Court, to assist in its administration. Finally, that same legislation mandated that the justices do double duty as circuit court justices. In addition to meeting in the nation's capital as the Supreme Court, each justice was required to travel the country to hear cases in his dual capacity as circuit court judge—a dual role that the justices served for more than a century. *See generally* *An Act to Establish the*

Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1804) (rejecting a constitutional challenge to the law requiring the justices to sit as circuit justices).

Consistent with its constitutionally-assigned obligation to establish the federal judiciary, the First Congress enacted laws regulating the ethical conduct of all federal judges, including the Supreme Court justices. The words of the oath of office taken by every Article III judge to ascend to the bench was set by Congress through federal law. Before taking their seat, every judge and justice was required by a federal statute to “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.” See 28 U.S.C. § 453 (2012). Congress chose these words in an effort to compel judges to behave ethically and administer the law impartially while on the bench—the same goals that underlie the current recusal statute and the *Code of Conduct for United States Judges*.

Congress’s long tradition of regulating the ethics of all Article III judges, including the Supreme Court justices, continues to this day. The recusal statute, 28 U.S.C. § 455, has applied to both Supreme Court justices as well as lower federal court judges for nearly 75 years. The Ethics Reform Act of 1989 places strict limits on outside earned income and gifts for all federal officials, including federal judges. The Ethics in Government Act of 1978 requires high-level federal officials in all three branches of the federal government to file annual reports disclosing financial information, including their outside income, the employment of their spouses and dependent children, investments, gifts, and household liabilities. All federal judges, including Supreme Court justices, file these annual reports, and the Judicial Conference of the United States is empowered by that Act to refer to the Attorney General any judge or justice who fails to file that report. See 5 U.S.C. app. 4, 104(b). The Supreme Court justices regularly abide by all of these laws.

Despite this long history of regulating judicial ethics for *all* federal judges, some have argued that Congress lacks authority to mandate ethical standards for Supreme Court justices. They contend that Congress is empowered to regulate the ethical conduct of the judges on lower courts as part of its constitutional authority to “ordain and establish” the lower federal courts, but lacks that same authority over the U.S. Supreme Court because that Court is constitutionally mandated.

Although that distinction is important when it comes to Congress’s power to establish (or abolish) the lower courts, it is irrelevant when it comes to Congress’s role in regulating the ethical conduct of the federal judiciary. To the contrary, the Constitution *requires* Congress to enact laws that establish the U.S. Supreme Court

as an institution and ensure that it operates effectively. The Court could not exist without legislation from Congress establishing it in the first instance, and thus the Constitution mandates that Congress do so. Federal laws that fund the Supreme Court, set its size at nine members, establish the quorum requirement, and permit the hiring of law clerks, librarians, access to legal databases all support the sound operation of the Court to protect the quality of judicial decision-making. Ethics legislation serves the same vital purpose. *See FALLON, JR., ET AL., supra*, at 21.

To be clear, Congress has no power to control federal judges' decisions or penalize Article III judges for judicial outcomes it dislikes. The Constitution intends the judiciary to be a co-equal branch of government, and provides Article III judges with life tenure and protection against diminution of their salary to ensure that judicial decision-making is insulated from political influence. *See THE FEDERAL NO. 79*, at 109 (Alexander Hamilton) (Alexander Bourne ed., 1901). Regulating judges' and justices' ethical conduct does not undermine the federal courts' decisional independence, however. To the contrary, such legislation bolsters the power and prestige of the third branch of government, enabling it to fulfill its role under the U.S. Constitution as a check on the political branches.

#### **IV. Conclusion**

The judiciary's reputation is essential to its legitimacy, and will bolster the public's willingness to obey judicial decisions. The public's perception of the judiciary's independence and integrity is the primary source of its legitimacy, and ultimately its power. Congressional regulation of the ethical conduct of federal judges, including the Supreme Court justices, will serve to strengthen the judicial branch. If the Supreme Court will not take action, Congress must do so to protect the Court from itself.