THE SUPREME COURT AND THE LIMITS OF HUMAN IMPARTIALITY

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> Show me a man who thinks he's objective, and I'll show you a man who's deceiving himself.
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> –Henry Luce[1]

I. INTRODUCTION[2]

There is a systemic failure in Supreme Court judicial ethics which, without remedy, will continue to corrode the public's trust and the Court's legitimacy.[3]

The acute problems are not limited to jurists of any particular ideological stripe. Indeed, the illustrative instances of concern detailed in Part V of this Article range from Justices Alito and Thomas to Justices Kagan and Sotomayor. All of whom are iconic jurists. In our polarized

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1. Staff Reports, *Editorial: 'Show Me a Man Who Thinks He's Objective*,*'* ALBERT LEA TRIB. (June 1, 2009, 10:25 AM), https://www.albertleatribune.com/2009/06/editorial-show-me-a-man-who-thinks-hes-objective [https://perma.cc/4QPK-H4W2].

2. This Article developed out of written and spoken testimony about Supreme Court ethics provided by the author to the Senate Judiciary Subcommittee on Federal Courts. *See Ensuring an Impartial Judiciary: Supreme Court Ethics, Recusal, and Transparency Act of 2023: Hearing on S.359 Before the S. Comm. on the Judiciary*, 118th Cong. (2023) (statement of James J. Sample, Professor of Law, Maurice A. Deane School of Law at Hofstra University) [hereinafter Sample, *Senate Judiciary Committee Testimony*], https://www.judiciary.senate.gov/imo/media/doc/2023-06-14%20PM%20-%20Testimony%20-%20Sample.pdf [https://perma.cc/AP7J-HBU2]. This hearing came in the wake of an investigative report by *ProPublica*, which raised concerns about Justice Thomas potentially failing to meet financial disclosure requirements due to his receipt of trips and other valuable items from Republican billionaire donor Harlan Crow. The *ProPublica* report triggered a widespread discussion of Supreme Court ethics across the nation.

3. *See* Raymond J. Lohier Jr. et al., *Losing Faith: Why Public Distrust in the Judiciary Matters—and What Judges Can Do About It*, 106 JUDICATURE 70, 71-72 (2022).

era, the tendency is to see nearly every issue through a partisan lens. Viewing robust judicial ethics in this manner is reductionary at best.

The problem, perhaps with isolated exception, is generally not the people. Though brilliant, Supreme Court Justices *are* human.[4] They make mistakes. The problem is the ad hoc, uneven system. The repeated failures of Justices nominated by Democratic and Republican Presidents alike to recuse themselves in cases—where if they were lower court judges they would have to recuse—means that recusal can no longer be analyzed as a series of idiosyncratic one-offs. While surely each instance is unique, collectively there is a troubling and conscious choice *not* to solve the problem. Fair, impartial courts with rigorous processes and enforcement mechanisms benefit *all* Americans, regardless of partisan differences.

While reasonable minds can disagree on the close calls in individual cases, it is unreasonable to conclude that the Supreme Court's systemic, repeated failure—and even its steadfast refusal—to police itself in the area of judicial ethics is anything other than a serious concern. The Supreme Court is not by itself in terms of Justices getting put into questionable scenarios, but as Senior District Judge Michael Ponsor stated, "You don't just stay inside the lines; you stay well inside the lines. This is not a matter of politics or judicial philosophy. It is ethics in the trenches."[5]

Years of institutional boilerplate lip service, against a background of increasingly egregious, even brazen disregard for basic norms of judicial ethics, conflicts with the Court's obligation to maintain the appearance of impartiality. That is significant. Not only does the appearance of partiality affect the litigants, it is detrimental to the rule of law and public confidence in the Court.[6] As the Supreme Court itself has explained,

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4. "The judge's way of looking at the world can influence her interpretation of material facts and operative law: facts, with reference to life experiences that facilitate her understanding of the parties and circumstances that bring them to court, and law, with reference to life experiences that inform her judicial philosophy." Charles Gardner Geyh, *Judicial Ethics and Identity*, 36 GEO. J. LEGAL ETHICS 233, 261 (2023). To assert that Justices must disavow their particular beliefs and identities is not only unrealistic and unfair, but also entirely impossible. The question then becomes one of crafting an institution with proper checks and balances to prevent these inherent biases from prevailing on the bench.

5. Michael Ponsor, *A Federal Judge Asks: Does the Supreme Court Realize How Bad It Smells?*, N.Y. TIMES (July 14, 2023), https://www.nytimes.com/2023/07/14/opinion/supreme-court-ethics.html [https://perma.cc/CD3Z-YAKS].

6. *Cf.* Greg Stohr, *Supreme Court's Approval Rating Slides as Clarence Thomas Faces Ethics Controversies*, BLOOMBERG (May 24, 2023, 1:00 AM), https://www.bloomberg.com/news/articles/2023-05-24/supreme-court-approval-slides-as-clarence-thomas-s-ethics-issues-mount [https://perma.cc/6UAJ-DTHX]; *see* Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP NEWS (Aug. 2, 2023),

"justice must satisfy the appearance of justice."[7] The Eighth Circuit described it this way: "[I]t is essential to protect the judiciary's reputation for fairness in the eyes of all citizens. This reputational interest is not a fanciful one; rather, public confidence in the judiciary is integral to preserving our justice system."[8]

II. JUDICIAL AND LEGISLATIVE COMMENTARY ON A CODE OF CONDUCT

Prior to the Court, at least nominally, adopting a voluntary Code of Conduct late in 2023,[9] expressions of support for a code long had a bipartisan quality. Although there might have been disagreements on how to get there or even what is included in the code, it was obvious that something needed to be done. While support for a code could be found on both sides of the aisle, the same was true for those opposed to one, including historically vocal opposition from certain Supreme Court Justices themselves.[10]

Republican Senator Lindsey Graham, the top-ranking Republican on the Senate Judiciary Committee, believed that the Court needed to raise its standards: "I think it would be helpful for the [C]ourt to up its game. I don't want Congress to start micromanaging the [C]ourt but I think confidence-building would be had if they were more clear on some of this stuff."[11] The Court implementing and enforcing its own code did simplify the entire process while perhaps being the most supportable position from a bipartisan perspective. However, not including an enforcement mechanism defeats one of the main purposes of a self-imposed code—avoiding a potential clash with Congress and those who believe the Court is above checks and balances.

In 2021, Justice Barrett stated to a crowd of over 100 people that the Justices were not "a bunch of partisan hacks," in a speech attempting to quell rising fears that the highest court in the land is politically

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https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/JMN7-RKRH]. The latest poll shows the Court holding around a forty-percent approval rating after its last term. *Id.* On average, the Court's approval rating has hovered around fifty-one percent for the past twenty-three years. *Id.*

7. Offutt v. United States, 348 U.S. 11, 14 (1954).

8. Wersal v. Sexton, 674 F.3d 1010, 1022 (8th Cir. 2012) (citing Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.")).

9. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).

10. *See, e.g.*, *infra* Part II.

11. Alexander Bolton, *GOP Senators Want Roberts to Take Action on Supreme Court*, HILL (June 26, 2023, 6:00 AM), https://thehill.com/homenews/senate/4065348-gop-senators-want-roberts-to-take-action-on-supreme-court [https://perma.cc/K4RJ-SE23].

driven.[12] Barrett argued that "[j]udicial philosophies are not the same as political parties."[13] Ironically, the speech she gave took place at a celebration of the thirtieth anniversary of the opening of the McConnell Center[14] at the University of Louisville, where she was introduced by the then-Senate Majority Leader Mitch McConnell. McConnell was Senate Majority Leader at Justice Barrett's confirmation hearing.

Interestingly, at a University of Minnesota Law School event on October 16, 2023, Justice Barrett voiced her support for a code of conduct, stating that it would be a "good idea" for the Court to have an ethics code and that "[t]here is no lack of consensus among the [J]ustices . . . . There's unanimity among all nine [J]ustices that we should and do hold ourselves to the highest ethical standards possible."[15] Justice Barrett's comments mirror those made by her colleagues Justices Kagan and Kavanaugh, and Chief Justice Roberts.[16]

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12. Mary Ramsey, *Justice Amy Coney Barrett Argues US Supreme Court Isn't 'a Bunch of Partisan Hacks*,*'* COURIER J. (Sept. 13, 2021, 6:18 AM) https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002 [https://perma.cc/EPV5-QU4F].

13. *Id.*

14. *Id.* The McConnell Center is an endowed education facility created in 1991 by Senator McConnell in partnership with the University of Louisville. The facility "seeks to identify, recruit and nurture Kentucky's next generation of great leaders" by "prepar[ing] top undergraduate students to become future leaders; (2) offer[ing] civic education programs for teachers, students and the public; and (3) conduct[ing] strategic leadership development for the US Army." *Mission*, MCCONNELL CTR., https://louisville.edu/mcconnellcenter/about/mission [https://perma.cc/8ADP-HQVK] (last visited Apr. 15, 2024).

15. Jordan Rubin, *Amy Coney Barrett's Support for Ethics Code Highlights Its Absence*, MSNBC (Oct. 17, 2023, 11:53 AM), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/amy-coney-barrett-supreme-court-ethics-code-rcna120768 [https://perma.cc/KU98-5AAU].

16. At an appearance at Notre Dame Law School, Justice Kagan also remarked that signing onto a binding code of ethics "would help convince the public that 'we were adhering to the highest standards of conduct.'" Lawrence Hurley, *Justice Elena Kagan Says Supreme Court Ethics Code Would Be 'a Good Thing*,*'* NBC NEWS (Sept. 22, 2023, 4:51 PM), https://www.nbcnews.com/politics/supreme-court/justice-kagan-says-supreme-court-ethics-code-good-thing-rcna116945 [https://perma.cc/DSB4-DJXZ]. Justice Kavanaugh remarked at a judicial conference that he hopes there will be "concrete steps soon" to address recent concerns. *Id.*; Associated Press, *Supreme Court Justice Kavanaugh Predicts 'Concrete Steps Soon' to Address Ethics Concerns*, NBC NEWS (Sept. 7, 2023, 3:54 PM), https://www.nbcnews.com/politics/supreme-court/brett-kavanaugh-predicts-concrete-steps-supreme-court-ethics-rcna103946 [https://perma.cc/79W2-GUJG]. In 2023, following the *Dobbs* leak, Chief Justice Roberts remarked, "I want to assure people I am committed to making certain that we as a court adhere to the highest standards of conduct. We are continuing to look at things we can do to give practical effect to that commitment." Lawrence Hurley, *Chief Justice Roberts Says Building a Fence Around Supreme Court Was the 'Hardest Decision' of His Tenure*, NBC NEWS (May 24, 2023, 7:49 AM), https://www.nbcnews.com/politics/supreme-court/roberts-calls-building-fence-supreme-court-hardest-decision-tenure-rcna85956 [https://perma.cc/SA6T-H7Z7].

The Library of Congress released documents, on May 2, 2023, belonging to Justice John Paul Stevens, which detail interactions between Justice Stevens, Chief Justice Rehnquist, and Justice Scalia.[17] These documents, in which Justice Stevens expresses concern over potential recusal issues in upcoming cases before the Court, not only offer an internal point of view regarding ethical concerns and longstanding recusal related tensions, but also demonstrate that, over twenty years later, with rampant ethical concerns still permeating the Court at even higher rates, the institution remains incapable of meaningful action.

Some of the papers include a heavily marked-up response to Justice Rehnquist's decision not to recuse in the 2001 case *United States v. Microsoft Corp.*,[18] demonstrating just how concerned Stevens was with Rehnquist's ultimate decision. Stevens underlined and circled aspects of Rehnquist's response, writing "WRONG;" "MATTERS ARE INTERTWINED;" "WILL DEFINITELY AFFECT AND MAY CONTROL;" and "APPEARANCE."[19]

One modest change emerged during the Court's most recent term, as two Justices—Kagan and Jackson—began documenting and publishing the reasoning behind their recusals on several routine orders, but several Justices, including Kavanaugh, Alito, and Sotomayor, continue to routinely fail to acknowledge their recusals, offering virtually no transparency into the nation's highest court.

In 2019, Justice Kagan testified before a House subcommittee, during an appearance regarding the Court's budget, that the Court was "seriously" considering adopting its own code of conduct.[20] *The Wall Street Journal* reported in July of 2023 that Chief Justice Roberts had tried for several years to get his colleagues to discuss the issue, but attempts had since slowed. These efforts had stalled after four years of waiting, reportedly due in part to the Justices' inability to come to an agreement as

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17. Tobi Raji et al., *Documents Reveal Justices' Long-Running Tensions Over Ethics*, WASH. POST (June 26, 2023, 6:03 AM), https://www.washingtonpost.com/politics/2023/06/26/documents-reveal-justices-long-running-tensions-over-ethics [https://perma.cc/V4VB-NRZB].

18. 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001). The Justice Department and twenty state attorneys general filed an antitrust lawsuit against Microsoft, claiming the company had a monopoly over the personal computer business. When the case reached the Supreme Court, Rehnquist faced calls for recusal. His son, James C. Rehnquist, was a partner at a law firm and was working on private antitrust cases for Microsoft. *Id.* at 47; Raji et al., *supra* note 17.

19. Raji et al., *supra* note 17.

20. Robert Barnes & Ann E. Marimow, *Supreme Court Justices Discussed, but Did Not Agree on, Code of Conduct*, WASH. POST (Feb. 9, 2023, 3:19 PM), https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code [https://perma.cc/S58W-PY4Q].

to the contents of a code of conduct.[21] In the wake of the most recent scandals permeating the Court, Justice Kagan called for a formal code of ethics for the Court at a judicial conference, seemingly in response to Justice Alito's response to congressional attempts to pass a binding code of ethics.[22] Kagan said: "[I]t just can't be that the [C]ourt is the only institution that somehow is not subject to checks and balances from anybody else. We're not imperial. . . . Can Congress do various things to regulate the Supreme Court? I think the answer is: yes."[23] Interestingly, Kagan seemed to believe that a code imposed by another branch was the better solution, rather than an internal adoption[24]—perhaps in response to recent scandals from members of the Supreme Court reinvigorating public calls for the Court to adopt its own code of conduct.

III. SUPREME COURT CODE OF CONDUCT

On November 13, 2023, the Court issued the very first Supreme Court Code of Conduct.[25] The adoption of this Code is the first time in history that the Supreme Court has published and implemented a written code of conduct. In fact, "[u]ntil November 2023, there was no single body of ethical canons with which the nation's highest court was required to comply"—the sole judicial body in this country with such a lack of ethical guidelines.[26]

This Code, adopted by all nine of the sitting Justices, is a reaction to what the Court described as "the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[27] The Court claims that the new Code merely codifies the "equivalent of common law ethics rules, that is, a body of rules derived from a variety of sources, including statutory provisions, the code that applies to other members of the federal judiciary, ethics advisory opinions issued by the Judicial Conference

21. *See id.*

22. Tori Otten, *Elena Kagan Hits Back at Samuel Alito, Endorses Supreme Court Ethics Reform*, NEW REPUBLIC (Aug. 4, 2023, 1:26 PM), https://newrepublic.com/post/174851/elena-kagan-hits-back-samuel-alito-endorses-supreme-courrt-ethics-reform [https://perma.cc/L5W3-EJAB].

23. *Id.*

24. *See id.*

25. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).

26. JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11078, THE SUPREME COURT ADOPTS A CODE OF CONDUCT 1-2 (2023).

27. *Statement of the Court Regarding the Code of Conduct*, U.S. SUP. CT. (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/4G5H-5863].

Committee on Codes of Conduct, and historic practice."[28] Actions, of course, speak louder than words, and the recent ethical lapses, as discussed in this Article, demonstrate that the Justices view those "common law ethics rules" as merely impractical ideals, rather than rules that they must adhere to.[29]

The new Code of Conduct sets forth five ethical canons and accompanying commentary adopted by the Supreme Court, which will guide the Justices in executing their judicial duties. The five canons are:

> 1. "A Justice Should Uphold the Integrity and Independence of the Judiciary."
> 2. "A Justice Should Avoid Impropriety and the Appearance of Impropriety in All Activities."
> 3. "A Justice Should Perform the Duties of Office Fairly, Impartially, and Diligently."
> 4. "A Justice May Engage in Extrajudicial Activities that Are Consistent with the Obligations of the Judicial Office."
> 5. "A Justice Should Refrain from Political Activity."[30]

The Congressional Research Service provided a brief summary:

> Canons 1 and 2 are broadly worded and are accompanied by brief notes explaining that each Justice should "maintain and observe high standards of conduct" [Canon 1] and "should not allow family, social, political, financial, or other relationships to influence official conduct or judgment." [Canon 2B.] Canon 3[B(2)] governs disqualification, laying out circumstances in which Justices should recuse themselves from participating in cases because their impartiality might reasonably be questioned. Canon 4 allows Justices to speak, write, and teach about the law and engage in other extrajudicial activities, subject to certain limitations. Canon 5 provides that Justices should not engage in political activities, such as holding a leadership role in a political organization, endorsing candidates for political office, political fundraising, making campaign contributions, and running for elected office.[31]

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28. *Id.*

29. For an in-depth discussion on rules and standards for the federal judiciary and the Supreme Court, see James Sample, *Supreme Court Recusal from* Marbury *to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 102 (2013).

30. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 1-5 (U.S. SUP. CT. 2023).

31. LAMPE, *supra* note 26, at 2 (quoting CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 1, 2B (U.S. SUP. CT. 2023)).

The Justices' Code of Conduct and the Code of Conduct for United States Judges ("Federal Judicial Code") are nearly identical, both in structure and substance, with different explanatory notes, which alter the practical application of the Justices' Code.[32] The Court states in its commentary that much of the Federal Judicial Code commentary is "inapplicable" to the Supreme Court, and the new commentary is "tailored to the Supreme Court's placement at the head of a branch of our tripartite governmental structure."[33]

Perhaps most noteworthy and controversial are the new Code's disqualification provisions, which begin with the language, "A Justice is presumed impartial,"[34] which, while entirely consistent with prior Supreme Court precedent, has "no logical place" in a Code of Conduct designed to guide the Justices and, in fact, serves as a reminder to both Justices and the public that the Supreme Court and its Justices are inherently special and ethical—simply because of the position they hold.[35] This narrative cannot continue if the Court hopes to preserve its own legitimacy. If the American public is to give back its trust to the Court, the Justices themselves must be the ones proving they deserve it.

The new Code then qualifies the statutory (28 U.S.C. § 455) duty to disqualify when a Justice's impartiality might "reasonably be questioned" by adding language interpreting this to mean that "an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties."[36] However, every Circuit has clarified via commentary that the "reasonable person" is not a judge or Justice but instead an outside observer, who may be less inclined to credit the judge's impartiality.[37] It remains to be seen if this same interpretation, entirely consistent with precedent, will be applied to the Supreme Court Code of Conduct; however, it is noteworthy that this particular element was omitted, likely intentionally.

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32. Charles Geyh, *The New SCOTUS Code of Conduct*, SCOTUSBLOG (Nov. 24, 2023, 10:59 AM) [hereinafter Geyh, *The New SCOTUS Code of Conduct*], https://www.scotusblog.com/2023/11/the-new-scotus-code-of-conduct [https://perma.cc/7H6G-ZTM5].

33. COMMENTARY ON CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. 10 (U.S. SUP. CT. 2023).

34. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3B(1) (U.S. SUP. CT. 2023).

35. Geyh, *The New SCOTUS Code of Conduct*, s*upra* note 32.

36. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3B(2) (U.S. SUP. CT. 2023).

37. CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 20-23 (Kris Markarian ed., 3d ed. 2020) [hereinafter GEYH, JUDICIAL DISQUALIFICATION].

The Code also provides that the "rule of necessity may override the rule of disqualification."[38] Consistent with the precedent set forth by many of the Justices prior to the Code, as well as the commentary in the statement from the Court, this strongly implies that the rule of necessity has some relation to the need to minimize tie votes on the Court—reinforcing the Justices' duty to sit, discussed in depth further in this Article.[39] The rule of necessity also implies, more directly, that "whe[n] all [of the Justices] are disqualified, none are disqualified[,]" meaning that the need for review trumps disqualification.[40] This is particularly relevant because there is no replacement for the Supreme Court or a Supreme Court Justice—and the new Code fails to provide a suitable replacement, or clarify the lack thereof.[41]

On its face, the Code represents a massive departure from the "trust us" rationale the Justices have long peddled in regard to Supreme Court ethics[42] but, upon review, lacks one critical element: any form of an enforcement provision. The Federal Judicial Code also lacks an enforcement provision; however, alleged violations of the Federal Judicial Code can be a basis for a misconduct complaint under the Judicial Conduct and Disability Act.[43] The Act does not apply to Supreme Court Justices, and thus, the Justices' Code of Conduct cannot serve as a similar avenue for reporting Supreme Court judicial misconduct.[44] This lack of enforcement, however, presents a unique opportunity for Congress to step in and create an external enforcement mechanism for the newly imposed Code of Conduct.

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38. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(3) (U.S. SUP. CT. 2023).

39. *See infra* Part V.A.7.

40. GEYH, JUDICIAL DISQUALIFICATION, *supra* note 37, at 16.

41. *See id.* at 15-16.

42. In support of this longstanding narrative, in his 2011 Year-End Report on the Federal Judiciary, Chief Justice Roberts asserted that the Supreme Court is so fundamentally different from the lower federal courts that a code of conduct need not apply. C.J. JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/53XH-9HDC]. Roberts argued that the Supreme Court did not need its own code of conduct because "[e]very Justice seeks to follow high ethical standards[.]" *Id.* at 4-5.

43. JUD. CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, at 14 (2006), https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf [https://perma.cc/VBY3-S6ZY]; LAMPE, *supra* note 26, at 1.

44. LAMPE, *supra* note 26, at 1.

IV. INSTITUTIONAL SYSTEMIC CHALLENGES

It is imperative to recognize the Supreme Court *as an institution* and separate that institution from the individuals on the bench. We cannot, and should not, attribute all the issues presented hereinafter to the individuals, but instead recognize that many of the concerns detailed are instead a function of the institution and system itself.

There are (with fluctuations due to vacancies) approximately 1,390 judges and Justices in the federal court system.[45] Only nine of those individuals had absolutely no binding ethics code to adhere to until this past year. To assert that the current situation is the failing of those nine individuals is a superficial and reductive view of a problem that extends far beyond an individual or ideological methodology. There are, of course, isolated exceptions of particularly appalling behavior, as detailed further in Part V of this Article, but they absolutely must be discussed in the greater context of the system as a whole. Isolating the issues is a disservice to the current conversation.

A main point of contention as to some of the perceived faults in the Supreme Court as an institution can be found in the lack of transparency. Whether looking at the procedure of how the Court grants writs of certiorari or the increasing use of a "shadow docket" to decide important decisions, the separation of the public from the Court's procedures has only worked to undermine the institution's credibility.[46] The secrecy that the Supreme Court shrouds itself in further fuels critics of the institution, who point to policies such as the refusal of cameras in the courtroom and a lack of procedure for Justices to publish their personal papers as more reasons why the legitimacy of the Court has waned.[47]

When looking at the Supreme Court's process for granting writs of certiorari, the lack of a concrete standard as to how Justices should grant writs lends directly to the lack of transparency.[48] Only four Justices are needed to grant cert, and Justices are not required to explain the reasoning as to their vote.[49] The Supreme Court received 4,159 cert petitions during the 2022 term, and of those, the Court heard arguments for

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45. Ponsor, *supra* note 5. The federal judiciary comprises roughly 540 magistrate judges, 670 district judges, 180 appeals court judges, and nine Supreme Court Justices. *Id.*

46. *See* Alexis Denny, Comment, *Clarity in Light: Rejecting the Opacity of the Supreme Court's Shadow Docket*, 90 UMKC L. REV. 675, 675-76 (2022).

47. *See* Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 790, 832-33 (2016).

48. *Id.* at 824-32. *Contra* Nancy S. Marder, *The Supreme Court's Transparency: Myth or Reality?*, 32 GA. ST. U. L. REV. 849, 870-74 (2016).

49. Marder, *supra* note 48, at 872.

sixty-eight cases.[50] However, no official record of the votes to grant or deny certiorari are ever published, and no official reason has ever been elicited from the Court as to why this record is shielded from the American people.[51]

Although some supporters of the Court's current form point to the administrative burdens on providing such records and reasonings to the public,[52] the lack of transparency or standardized guiding principles to the current certiorari procedure further shrouds the Court's decision-making process in mystery.[53] In denying access to this information, the public is denied both the ability to trace Justices' certiorari votes and another tool to better hold the Justices accountable for their decisions.[54] Simply relying on tradition as reason for this denial becomes a harder justification to make when viewing this process in combination with the Court's other opaque procedures, especially in the wake of controversial, precedent-overturning rulings.[55]

Within the realm of transparency concerns are financial disclosures (and lack thereof) by Justices and their spouses. While the most egregious individual violations are expanded on in Part V of this Article, it is important to acknowledge that this issue is not limited to a single Justice or political ideology, but instead lies within another "gray area" that the institution itself should—and must—address. While Justice Thomas has established himself as the touchstone for unreported income, this is a trend that extends to conservative and liberal Justices alike.[56]

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50. C.J. JOHN ROBERTS, 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [https://perma.cc/L8BT-TY2C].

51. Segall, *supra* note 47, at 828.

52. *E.g.*, Marder, *supra* note 48, at 871-72.

53. Segall, *supra* note 47, at 825-30.

54. *See* Denny, *supra* note 46, at 696.

55. *E.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

56. Justice Barrett's husband became managing partner of the recently opened Washington, D.C. branch of his firm, SouthBank Legal. Information about spousal employment is required on financial disclosure forms for the Justices; however, the name of the firm appeared redacted on his wife's 2021 financial statements, despite the firm's website prominently displaying Barrett's profile. Hailey Fuchs et al., *Justices Shield Spouses' Work from Potential Conflict of Interest Disclosures*, POLITICO (Sept. 29, 2022, 3:09 PM), https://www.politico.com/news/2022/09/29/justices-spouses-conflict-of-interest-disclosures-00059549 [https://perma.cc/7L6A-2SNE]. Chief Justice Roberts's wife is a "legal head-hunter" for a firm. *Id.* A former managing partner at her previous firm said it hired her, in part, because the firm "hop[ed] it would benefit from her being the [C]hief [J]ustice's wife." *Id.* Although Roberts listed his wife's company on his 2021 ethics form, he did not disclose which lawyers and law firms hired her as a recruiter. *Id.* Justice Jackson noted in a disclosure form filed in 2022, while she was a lower court judge, "that she had previously left out 'self-employed consulting income that my spouse periodically receives from consulting on medical malpractice

Another procedure that has recently been called into question is the use of the Supreme Court's shadow docket. As coined in 2015 by William Baude, the term "shadow docket" refers to the "range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity."[57] This truncated docket circumvents the typical briefs and oral arguments presented within decisions from the Supreme Court's "merits docket."[58] Equally absent from "shadow docket decisions" are the lengthy opinions that lay out the Court's legal reasoning.[59]

Although courts at all levels have "order[] lists,"[60] they are typically used to quickly rule on "mundane and uncontroversial questions addressing procedural issues."[61] However, recently the Supreme Court has begun using this shortened process to decide important substantive constitutional issues.[62] In the four years that President Donald Trump was in office, his administration "requested relief from the Supreme Court via its shadow docket forty-one times—a full five times as often as the Bush and Obama administrations combined."[63]

While the Court has established four factors to guide the determination as to whether a case belongs on the "shadow docket,"[64] the Court has not applied these factors with any consistency.[65] The third factor in particular has been subject to varying interpretations,[66] making the swift decision-making process even more unpredictable, resulting in rulings

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cases.' Like in the cases of Thomas, Barrett and Roberts, the names of his clients were not included in the filing." *Id.*

57. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

58. Denny, *supra* note 46, at 675.

59. *See id.* at 675-77.

60. *Id.* at 676.

61. *Id.*; *e.g.*, Wheaton Coll. v. Burwell, 573 U.S. 958, 958 (2014).

62. *E.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); *see* Denny, *supra* note 46, at 688 ("[The *South Bay United*] decision effectively set the rule that religious gatherings were above any attempts of the local and state government to control the spread of COVID-19, and that individuals could gather indoors in large, though limited, numbers for an extended period of time to worship, despite continued prohibitions against identical behavior for non-religious gatherings . . . ."); Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 12, 19 (2022).

63. Denny, *supra* note 46, at 685 (emphasis removed).

64. The four factors, based on an in-chambers opinion in *Rostker* and fully discussed in *Nken*, are: (1) a "reasonable probability" that four Justices will grant the case review; (2) a "fair prospect" that the Court will find the lower decision erroneous; (3) that "irreparable harm" will result if the relief sought is not granted; and (4) in close call situations, consideration of harm to the applicant, the respondent, and the public at large may be necessary to "balance the equities[.]" Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980); Nken v. Holder, 556 U.S. 418, 425-26 (2009).

65. *See, e.g.*, Denny, *supra* note 46, at 680-84.

66. *Id.* at 680-81.

that come with little to no explanation and sometimes unsigned by all members of the Court.[67]

These opaque procedures create a system where individual Justices are allowed and arguably encouraged to avoid accountability for increasingly questionable decisions.[68] The shortcomings behind the Court's veiled decision-making procedures is exemplified by the issues perpetuated by the lack of a binding code of ethics.[69] The most significant of these issues continues to be the current recusal practices used by the Supreme Court; in particular recent controversies have reinvigorated public criticism of the Court's self-determinative recusal procedures.

V. SELECT EXAMPLES ILLUSTRATIVE OF CURRENT INDIVIDUAL CONCERNS

Ethical concerns regarding conflicts of interest date at least as far back as *Marbury v. Madison*,[70] in which Justice Marshall wrote the majority opinion in a decision where both he and his brother stood to gain or lose tremendously from the outcome.[71] Two hundred and twenty plus years removed from *Marbury*, the root problem remains the same: the Justices themselves have the final word in evaluating their own cases, without any oversight or consequence.[72]

The following section details recent recusal scandals that have permeated the media, reducing the public's trust in the judiciary. This is not to say that the wrong recusal or disclosure decision was reached in every instance included below, but rather, merely to highlight the fundamental flaws of the current process. The examples below show that concerns are genuine, and not limited to Justices of any one ideological bent. Indeed, fairness, impartiality, the appearance of impartiality, and confidence in the courts are fundamental, nonpartisan due process interests.

The fact that there is more substance and actual legal analysis in *ProPublica*'s reporting than in Justice Alito's self-serving op-ed highlights the fundamental flaw of Justices deciding their own cases. It is telling as to the Court's degraded norms that Abe Fortas was at least

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67. *Id.* at 680, 694.

68. *See id.* at 696-97.

69. *See* Barnes & Marimow, *supra* note 20.

70. 5 U.S. (1 Cranch) 137 (1803). For a more in-depth analysis of historical Supreme Court cases that raised recusal questions, see generally Sample, *supra* note 29.

71. Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, FED. LAW., Feb. 2001, at 45, 45.

72. Glenn Fine, *The Supreme Court Needs Real Oversight*, ATLANTIC (Dec. 5, 2022), https://www.theatlantic.com/ideas/archive/2022/12/supreme-court-ginni-thomas-january-6-ethics-oversight/672357 [https://perma.cc/EH29-7GHE].

capable of the shame that resulted in his resignation—during the Nixon presidency—when confronted with his ethical lapse. Justice Thomas and Justice Alito, on the other hand, keep doubling and tripling down with farcical defenses.

It remains to be seen whether the new Code of Conduct will diminish the frequency in which Justices find themselves entangled in public controversies, depending on how seriously the Court takes its new Code. The Statement Regarding the Code of Conduct,[73] along with the complete and utter lack of any meaningful enforcement mechanism, offer plenty of avenues for the Justices to continue their longstanding tradition and narrative of ethical lapses.

A. The Current Supreme Court

With the rampant uptick in concerns, what were once considered catastrophic, career-ending scandals have been reported on a seemingly weekly basis in recent months. From the acceptance of lavish, undisclosed vacations to non-recusals when individuals with close personal and professional relationships appear before the Court, ethical violations and lack of transparency are not unique to a single Justice or single ideology, but rather a product of the haphazardly applied, to-each-their-own approach the lack of standards offers and the new Code seemingly perpetuates.

The concerns detailed are, of course, not an exhaustive list, and are realistically (albeit pessimistically) only the tip of the iceberg as far as ethical concerns go. The well-documented and public violations presented below pose the inevitable question: what else is happening behind closed doors, unbeknownst to the American public?

1. Justice Gorsuch

Justice Gorsuch, along with two other investors operating as "Walden Group LLC," sold a forty-acre tract of land in Colorado to the chief executive of a law firm that has had at least twenty-two cases before the Court since the transaction.[74] In the twelve cases in which Justice Gorsuch's opinion is recorded, he sided with the firm's clients eight times and against the firm four times.[75] The property, first listed in 2015, sold

73. *Statement of the Court Regarding the Code of Conduct*, *supra* note 27.

74. Amy B. Wang, *Gorsuch Property Sale Renews Calls for Supreme Court Ethics Reform*, WASH. POST (Apr. 25, 2023, 7:51 PM), https://www.washingtonpost.com/politics/2023/04/25/neil-gorsuch-property-sale-law-firm-ethics [https://perma.cc/9TRB-GURL].

75. *Id.*

in 2017—just nine days after Justice Gorsuch was confirmed to the Court. Justice Gorsuch did list income from Walden Group LLC on his financial disclosure forms the following year, but did not acknowledge the land sale, and in the column where he could list the identity of the buyer of a private transaction, he left the box blank.[76] While the chief executive at the firm denies ever having met or interacted with the Justice, because the decision is left up to Justice Gorsuch alone and—more to the point—is entirely unreviewable, his subjective determination is not only final, but effectively infallible. We can do better.

Although not a clear violation of Canon three under the newly imposed Code of Conduct, Justice Gorsuch's participation in these cases while remaining silent on his financial relationship with the parties' legal representation leaves the possibility of such a violation an open question.[77] The continued emergence of issues involving Justices' transparency of financial disclosures and impartiality lends itself to the need for external enforcement mechanisms. These individual examples display the problem with allowing the Justices to be the infallible arbiters of their own impartiality.

2. Justice Kagan

Justice Kagan faced several conflicts between her earlier work as Solicitor General and her work on the Court. At her confirmation hearing, Kagan stated that as a general rule, if she had personally reviewed a draft pleading or participated in discussions to formulate the government's litigation position, she would recuse in a related case, even if she had not been the formal decision maker.[78] In direct questions regarding the Affordable Care Act, Justice Kagan assured that she did not express an opinion on the merits of the bill at any time as Solicitor General, though she did work in the Solicitor General's office while the bill was

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76. Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579 [https://perma.cc/6Q55-JLRN]; NEIL M. GORSUCH, FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2017, at 7 (2018), https://fixthecourt.com/wp-content/uploads/2018/06/Gorsuch-NM-J3.-SUP_R_17.pdf [https://perma.cc/22RK-7UNX].

77. *See* LAMPE, *supra* note 26, at 2.

78. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64-65 (2010) [hereinafter *Kagan Confirmation Hearing*] (statements of Sen. Patrick J. Leahy and Solic. Gen. Elena Kagan); *see also* The Washington Post, *Elena Kagan's Old Job as Solicitor General Is Having an Effect on Her New One*, CLEVELAND.COM (Oct. 4, 2010, 3:38 AM), https://www.cleveland.com/nation/2010/10/elena_kagans_old_job_as_solici.html [https://perma.cc/R68M-QL9P].

in Congress, a situation that would ordinarily warrant recusal.[79] Justice Kagan's answers reflect the portion of section 455 requiring disqualification "[w]here [the Justice] has served in governmental employment and in such capacity participated as counsel [or] adviser . . . concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy[.]"[80]

The most jarring aspects of Justice Kagan's lack of recusal in the Affordable Care Act litigation are illustrated by a series of emails exchanged between her and her colleagues in the Solicitor General's office and with her former colleague from Harvard Law School, Laurence Tribe.[81] While the White House's official posture and Justice Kagan's direct, unequivocal oral response during her Senate confirmation hearing reflect a Solicitor General who was entirely walled off from any participation on the litigation strategy in defense of the Affordable Care Act, the emails reveal a more nuanced reality.[82]

Justice Kagan's email sequence—much like Justice Gorsuch's property sale—provides yet another instance where, had the judge involved served on a lower court, rather than the Supreme Court, the recusal outcome might have been different. Even if the end result had been the same, the process would serve as a source of some legitimacy.[83]

More recently, Justice Kagan faced calls to recuse herself from the affirmative action cases, as she was dean of Harvard Law School thirteen years prior.[84] Kagan did not offer comments as to her decision not to step aside, but her colleague Justice Jackson, a member of the Board of Overseers at Harvard University, did recuse.[85]

Justice Kagan's decision not to recuse from both the Affordable Care Act and affirmative action cases highlights the issue with the newly imposed Code of Conduct. Even though Justice Kagan's involvement particularly in the Affordable Care Act case would appear partial in

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79. *Kagan Confirmation Hearing*, *supra* note 78, at 301.

80. 28 U.S.C. § 455(b)(3).

81. Sample, *supra* note 29, at 145-48.

82. For a more in-depth breakdown on Justice Kagan's email sequence, see *id.* at 145-50.

83. *See* Jonathan H. Adler, *Mukasey on the ObamaCare "Recusal Nonsense*,*"* VOLOKH CONSPIRACY (Dec. 5, 2011, 8:51 AM), https://volokh.com/2011/12/05/mukasey-on-the-obamacare-recusal-nonsense [https://perma.cc/6W6G-Q8G2].

84. Lawrence Hurley, *Justice Thomas Defenders Make the Case for Supreme Court Ethics Reform*, ABC NEWS (May 5, 2023, 7:52 AM), https://www.nbcnews.com/politics/supreme-court/justice-thomas-defenders-make-case-supreme-court-ethics-reform-rcna82846 [https://perma.cc/RLZ5-6VYS].

85. *Id.*; *see also* Nate Raymond, *U.S. Supreme Court Pick Jackson to Recuse from Harvard Race Case*, REUTERS (Mar. 23, 2022, 4:21 PM), https://www.reuters.com/legal/government/us-supreme-court-pick-jackson-recuse-harvard-race-case-2022-03-23 [https://perma.cc/A4DN-HA3N].

violation of Canon three in the new Code of Conduct, recusal would still be at Justice Kagan's discretion, with no form of external review.[86] Ultimately, without an enforcement mechanism, the new Code of Conduct would not guarantee a different result given a clear violation than if the Supreme Court continued without any code of conduct.

3. Justice Alito

In 2020, amid the COVID-19 pandemic, Justice Alito appeared at an event hosted by the Federalist Society to deliver politically charged remarks, sharing his views on a number of then-current issues.[87]

"The pandemic has resulted in previously unimaginable restrictions on individual liberty . . . . Whatever one may think about the COVID restrictions, we surely don't want them to become a recurring feature after the pandemic has passed," said Justice Alito.[88] The Justice then moved on to direct and pointed criticism of Democrats' responses to several other "hot-button" issues, including same-sex marriage, abortion, and contraception, and targeted attacks on five sitting U.S. Democratic Senators.[89]

In June of 2023, *ProPublica* reported extravagant gifts accepted by Justice Alito from multiple major conservative donors, including Paul Singer, a hedge fund billionaire who has repeatedly asked the Court to rule on his business dealings.[90] Alito had reportedly accepted a (unreported) trip on a private plane owned by Singer to a private fishing lodge in Alaska, paid for by another individual.[91] *ProPublica* estimated the plane ride would have cost around $100,000 had it come out of Justice Alito's own pocket.[92]

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86. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3 (U.S. SUP. CT. 2023).

87. Steve Benen, *Alito Drops Pretense of Impartiality, Delivers Political Remarks*, MSNBC: MADDOWBLOG (Nov. 13, 2020, 10:42 AM), https://www.msnbc.com/rachel-maddow-show/maddowblog/alito-drops-pretense-impartiality-delivers-political-remarks-n1247700 [https://perma.cc/584F-YP3E].

88. *Id.*

89. *Id.* (citing *Slate*'s Mark Joseph Stern). The five Senators Alito commented on by name are: Senator Richard Blumenthal, Senator Dick Durbin, Senator Kirsten Gillibrand, Senator Sheldon Whitehouse, and Senator Mazie Hirono. *Id.*

90. Justin Elliott et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/4FKJ-TZAN].

91. *Id.*

92. *Id.*

In an unprecedented move, the Justice preemptively responded to the story by issuing his own statement, declining to respond directly to questions sent to his staff by *ProPublica*[93] and arguing the seat would have remained empty had he not accepted, and that he need not report the free travel on his disclosure forms under the current rules because "[p]ersonal hospitality need not be reported."[94] Justice Alito also downplayed his relationship with Singer, writing that he had "spoken to [Singer] on no more than a handful of occasions, all of which (with the exception of small talk during a fishing trip [fifteen] years ago) consisted of brief and casual comments at events attended by large groups."[95]

Alito further argued that the flight on the private jet constituted "hospitality extended for a non-business purpose by one, not a corporation or organization . . . on property or facilities owned by [a] person[.]"[96] He wrote:

> The term "facilities" was not defined, but both in ordinary and legal usage, the term encompasses means of transportation. See, e.g., Random House Webster's Unabridged Dictionary of the English Language 690 (2001) (defining a "facility" as "something designed, built, installed, etc., to serve a specific function affording a convenience or service: transportation facilities" and "something that permits the easier performance of an action"). Legal usage is similar. Black's Law Dictionary has explained that the term "facilities" may mean "everything necessary for the convenience of passengers." Federal statutory law is similar. See, e.g., 18 U.S.C § 1958(b) ("'facility of interstate commerce' includes means of transportation"); 18 U.S.C § 2251(a) (referring to an item that has been "transported using any means or facility of interstate commerce"); Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, Federal Jury Practice and Instructions § 54.04 (February 2023) ("the term 'uses any facility in interstate commerce' means employing or utilizing any method of . . . transportation between one state and another").[97]

This analysis—arguably some of the only real legal analysis in the piece—is a stark contrast to the textualist identity Justice Alito has

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93. *Id.*; Samuel A. Alito Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://perma.cc/85UH-69W6].

94. Alito, *supra* note 93 (alteration in original).

95. *Id.*

96. *Id.*

97. *Id.*

maintained throughout his career.[98] The ordinary reader would not find the aircraft Alito traveled on to be deemed "facilities." Furthermore, under the *noscitur a sociis* canon, a word is "known by the company it keeps."[99] In the rule cited by Alito, "facilities" appears with the term "on property or facilities," and the ordinary reading in this context would thus be "on *real* property owned by a person, not on a plane, boat, or car."[100]

However, as Justice Stevens said best over three decades ago, "The relevant inquiry . . . is not whether the judge was actually biased but whether he or she *appeared* biased."[101] The factual allegations and fears Alito attempts to quell in his response fail to acknowledge that fundamental basis of section 455.[102] *Might* a reasonable person infer bias after Singer's investment group appeared in Court petitions in each of the six years following the trip?[103]

Justice Alito's politically charged remarks and acceptance of gifts from multiple conservative donors would appear to be violations of Canons two and four under the Supreme Court's new Code of Conduct.[104]

4. Justice Sotomayor

Justice Sotomayor, like most Justices, regularly accepts speaking engagements at numerous public institutions across the country. In the abstract, this is a critical element of the Justices' public work. However, Justice Sotomayor has benefited immensely from these engagements, and particularly events to promote her books, which have earned her at least $3.7 million since she joined the bench in 2009.[105] Recent reporting

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98. *See* John O. McGinnis, *The Contextual Textualism of Justice Alito*, 46 HARV. J.L. & PUB. POL'Y 671, 673-74 (2023).

99. Rick Hasen, *Justice Alito's Bad Textualism Extends to His Mangling of Words to Justify Not Reporting a Seat on a Private Jet Paid for by a Billionaire Litigant*, ELECTION L. BLOG (June 21, 2023, 7:54 PM), https://electionlawblog.org/?p=136996 [https://perma.cc/W2WX-DTR9].

100. *Id.* (emphasis added).

101. Gabe Roth, *The One Ethics Rule the Supreme Court Needs Before Its Next Term*, BLOOMBERG (July 3, 2023, 10:02 AM), https://www.bloomberg.com/opinion/articles/2023-07-03/supreme-court-needs-new-ethics-rules-before-its-next-term [https://perma.cc/GFM7-Z4JD] (emphasis added).

102. *See* 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

103. Roth, *supra* note 101.

104. *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 2, 4(D)(3) (U.S. SUP. CT. 2023).

105. Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, ASSOCIATED PRESS (July 11, 2023, 5:14 AM),

revealed that Justice Sotomayor's taxpayer-funded staff repeatedly "prodded" public institutions that have hosted the Justice for speaking engagements to purchase her memoir or children's books.[106] According to a statement released by the Court, "[w]hen (Sotomayor) is invited to participate in a book program, Chambers staff recommends the number of books (for an organization to order) based on the size of the audience so as not to disappoint attendees who may anticipate books being available at an event[.]"[107]

Had this situation arisen outside of the Supreme Court, this use of governmental staff would have been strictly prohibited by the applicable code of conduct. Ethics rules prohibit officials in the executive and legislative branches from using government resources, including staff, for personal financial gain.[108] Lower federal court judges are prohibited from "lend[ing] the prestige of the judicial office to advance" their "private interests."[109] The Supreme Court issued a statement explaining that the Court "works with the [J]ustices and their staff to ensure they are 'complying with judicial ethics guidance'" for such engagements.[110]

Justice Sotomayor also failed to recuse herself from any of the several matters involving her publisher, Penguin Random House ("PRH"), that have come before the Court—despite having earned $3.7 million from her various book sales during her time on the bench.[111] Sotomayor is not the only Justice to publish with PRH. As of 2021, Justice Gorsuch earned a reported $555,000 from PRH sales, Justice Breyer earned a reported $337,000 in sales, and Justice Barrett was to receive a reported $2 million.[112] In the two Court petitions between 2009 and 2021 where PRH appeared as a party, Justice Breyer was the only Justice to recuse, likely because his wife owned shares in Pearson, a publishing company founded by her family and which held a large stake in PRH until 2020.[113] PRH waived the right to respond in both petitions.[114]

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https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/45RM-BLDM].

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; *see also Better Than Some of the Alternatives: In Defense of Making Bank on Books*, FIX CT. (Apr. 22, 2021), https://fixthecourt.com/2021/04/better-alternatives-defense-making-bank-books [https://perma.cc/U8AL-5CJB].

112. *Better Than Some of the Alternatives: In Defense of Making Bank on Books*, *supra* note 111.

113. *Id.*

Under the newly imposed Code of Conduct, Justice Sotomayor's extrajudicial activities, in combination with her decision not to recuse from PRH-involved petitions, can be viewed as violations of Canons two, three, and four.[115] Although, again without the necessary methods of enforcing these Canons, these potential violations go unprevented.

5. Justice Kavanaugh

In a photo tweeted by Brian Brown, the head of the anti-LGBTQ National Organization for Marriage, Justices Kavanaugh and Alito are seen meeting with Brown just weeks after the group filed amicus briefs in three cases[116] which were arguably the most consequential cases to ever come before the Supreme Court on LGBTQ rights, and some of the biggest cases before the Court during that term.[117]

Take Back the Court called for Justices Kavanaugh and Alito to recuse themselves from the cases, writing:

> Posing for photographs with the president of an advocacy organization that has filed briefs in matters pending before the [C]ourt makes a mockery of Chief Justice Roberts' assertion that a judge's role is to impartially call balls and strikes. If you refuse to recuse yourselves, this incident will further illustrate the urgent need for structural reform

114. *See* Waiver of Right of Respondents to Respond, Nicassio v. Viacom Int'l, Inc., No. 19-560 (U.S. Nov. 12, 2019); Waiver of Right of Respondents to Respond, Greenspan v. Random House, Inc., No. 12-965 (U.S. Feb. 8, 2013).

115. *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 2, 3, 4 (U.S. SUP. CT. 2023).

116. @BrianSBrown, TWITTER (Oct. 29, 2019, 12:12 PM), https://twitter.com/briansbrown/status/1189213352167428096?s=20 [https://perma.cc/2Q82-R2ZD]; *What Were They Thinking? Justices Again Fail a Basic Ethics Test*, FIX CT. (Oct. 31, 2019), https://fixthecourt.com/2019/10/thinking-justices-fail-basic-ethics-test [https://perma.cc/4J5E-FBWP]. The National Organization for Marriage ("NOM") filed amicus briefs in Bostock v. Clayton Cnty., 590 U.S. 644 (2020); Altitude Express, Inc. v. Zarda, 590 U.S. 644 (2020); and R.G. & G.R. Harris Funeral Homes v. EEOC, 590 U.S. 644 (2020). The Court agreed to hear the cases, which were consolidated, to answer whether Title VII of the Civil Rights Act prohibits employment discrimination against gay, lesbian, and transgender people. In the briefs, NOM described the terminated LGBTQ employees' claims as "a radical expansion of basic civil rights laws." *What Were They Thinking? Justices Again Fail a Basic Ethics Test*, *supra*.

117. Masha Gessen, *The Homophobic Activists Who Won an Audience with Two Supreme Court Justices*, NEW YORKER (Nov. 8, 2019), https://www.newyorker.com/news/our-columnists/the-homophobic-activist-who-won-an-audience-with-two-supreme-court-justices [https://perma.cc/P4M6-LGV5].

> of the Supreme Court in order to restore a Court that understands its role is to protect individual rights and our democracy.[118]

Justice Kavanaugh's relationship with a party directly involved in a recently filed amicus brief, although not conclusive, gives the appearance of impartiality which would likely be violative of Canons two and three of the new Code of Conduct for Justices of the Supreme Court.[119] However, according to the new Code of Conduct, Justice Kavanaugh's lone discretion about this relationship is conclusive enough to warrant dismissal of calls for recusal.

6. Justice Thomas

Justice Thomas has, for over two decades, repeatedly accepted luxury trips and gifts from Republican donor Harlan Crow.[120] In addition to accepting at least thirty-eight vacations, including trips on private jets and superyachts, Justice Thomas has repeatedly failed to disclose these gifts on his financial statements.[121] This is certainly questionable behavior, but also perhaps a violation of the Ethics in Government Act of 1978.[122] While that law excludes from its purview "personal hospitality," such as food, lodging, or entertainment, the personal hospitality exception does not include private jet transportation for social events and vacations.[123] Additionally, Crow made tuition payments for Justice Thomas's grandnephew's private education at Hidden Lake Academy. Justice Thomas had taken legal custody of his grandnephew and was "raising him as a son."[124] Tuition at the school ran over $6,000 per month,[125] and

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118. Letter from Aaron Belkin, Dir., Take Back the Court, to Brett Kavanaugh, J., U.S. Sup. Ct., & Samuel Alito, J., U.S. Sup. Ct. (Nov. 6, 2019), https://www.takebackthecourt.today/kavanaugh-alito-recusal-letter [https://perma.cc/ZKN8-325P].

119. *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 2(B), 3(B)(2)(c) (U.S. SUP. CT. 2023).

120. Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/AFC3-JSYJ].

121. Tierney Sneed, *What Judicial Ethics Rules Say About Clarence Thomas' Lifestyle Bankrolled by His Friends*, CNN, https://www.cnn.com/2023/08/13/politics/clarence-thomas-billionaires-ethics-rules/index.html [https://perma.cc/JM47-CFGP] (Aug. 13, 2023, 11:35 AM).

122. *Id.*

123. 5 U.S.C.A. § 13104(a)(2)(A) (West) ("[A]ny food, lodging, or entertainment received as personal hospitality of an individual need not be reported . . . ."); *id.* § 13104(a)(2)(B) (requiring the disclosure of reimbursements accompanied by a description of the "travel itinerary, dates, and nature of expenses provided").

124. John Fritze, *GOP Donor Harlan Crow Paid Private Tuition for Relative of Justice Clarence Thomas*, USA TODAY (May 4, 2023, 2:46 PM), https://www.usatoday.com/story/news/politics/2023/05/04/clarence-thomas-relative-received-tuition-from-gop-donor-harlan-crow/70182450007 [https://perma.cc/BG9J-RZGU] (quoting Justice

none of the payments were ever reflected in Justice Thomas's annual financial disclosures.[126] One of Crow's companies also purchased properties in Savannah, Georgia for $133,363 from three co-owners including Justice Thomas and his mother, who remained in her home while the Crow company put tens of thousands of dollars into renovations of the home, including a carport, repaired roof, and a new fence and gates.[127]

This mirrors a similar scenario from 2011 in which Justice Thomas failed to disclose over $680,000 his wife, Ginni Thomas, received over the course of five years from the Heritage Foundation[128]—a widely known conservative think tank. Included in this sum was income earned from an interest group she founded that was funded with half a million dollars from Harlan Crow—the repeated, outlier-level benefactor of Justice Thomas himself.[129]

Justice Thomas claims that he did not disclose the gifts or his wife's income because he assumed they amounted to standard hospitality between longtime friends and that there was a misunderstanding in the filing instructions, respectively.[130] However, the repetition of such oversights, between the same actors, strains credulity. The lack of meaningful repercussions disincentivizes compliance, and the entire saga underscores the need for judicial ethics reforms.

Thomas). But, when pressed as to why Justice Thomas did not disclose the tuition payments, an attorney who had represented his wife, Ginni, claimed that the disclosure rules did not apply to nephews and that the payments were thus not reportable. *Id.*

125. *Id.* It is unclear exactly how much Crow paid for the school in total. A former administrator at the school "told ProPublica that Crow paid the tuition the entire time Thomas' grandnephew was a student there." *Id.*

126. *Id.*

127. Justin Elliott et al., *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/VY8H-375U]. 5 U.S.C.A. § 13104 mandates disclosure by the Justices and other government officials of most real estate transactions over $1,000. *Id.*; 5 U.S.C.A. § 13104(a)(5)(A). The disclosure forms specifically include a space to report the identity of any buyer in a real estate deal, which remains blank on Thomas's form. Elliott et al., *supra*.

128. Elie Mystal, *Clarence Thomas and His Wife's $680,000 of Unreported Income*, ABOVE L. (Jan. 24, 2011, 11:18 AM), https://abovethelaw.com/2011/01/clarence-thomas-and-his-wifes-680000-of-unreported-income [https://perma.cc/GJX2-RWTR]. On his yearly financial disclosure reports, in the section for spousal noninvestment income, Justice Thomas checked a box marked "none[.]" *Id.*

129. Kaplan et al., *supra* note 120.

130. Zoe Tillman, *Justice Thomas Ethics Review Queried by US Court Leader in 2012*, BLOOMBERG L. (May 5, 2023, 7:46 PM), https://news.bloomberglaw.com/us-law-week/justice-thomas-ethics-review-queried-by-us-court-leader-in-2012 [https://perma.cc/4EDC-AKVY]; Nina Totenberg, *Justice Thomas Explains Why He Didn't Report Trips Paid for by Billionaire*, NPR, https://www.npr.org/2023/04/07/1168649656/justice-thomas-trips [https://perma.cc/3DQF-8KD3] (Apr. 7, 2023, 7:38 PM).

Justice Thomas's decision not to recuse from January 6th-related matters deserves separate mention. Justice Thomas's decision to pass judgment on such matters has stemmed from the direct involvement of his wife in perpetuating the "stolen election" conspiracy. Mrs. Thomas not only publicly empathized with January 6th rioters, she urged Arizona legislators and the White House Chief of Staff to help overturn President-elect Biden's victory.[131] In November 2022, Justice Thomas voted to block a subpoena against the Arizona Republican Party chair for phone records that could have implicated Mrs. Thomas.[132] Subsequently, on January 19, 2022, Justice Thomas was again the lone dissenter in *Trump v. Thompson*,[133] in which he argued in favor of Trump's bid to withhold presidential records from the January 6th committee.[134]

Contextually, the text messages Mrs. Thomas sent—and the centrality of the person to whom she sent them during the contentious weeks following the 2020 election—could scarcely be more telling. Writing to the White House Chief of Staff, Mark Meadows, Mrs. Thomas said, "Help This Great President stand firm, Mark!!!...You are the leader, with him, who is standing for America's constitutional governance at the precipice. The majority knows Biden and the Left is attempting the greatest Heist of our History."[135] Similarly, Mrs. Thomas wrote to Mr. Meadows, "Sounds like Sidney [Powell] and her team are getting

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131. Mark Sherman & Jonathan J. Cooper, *Ginni Thomas' Emails Deepen Her Involvement in 2020 Election*, PBS NEWSHOUR (May 20, 2022, 7:22 PM), https://www.pbs.org/newshour/politics/ginni-thomas-emails-deepen-her-involvement-in-2020-election [https://perma.cc/ERZ7-L9JH].

132. Ward v. Thompson, 143 S. Ct. 439, 439 (2022) (mem.). *SCOTUSblog* describes the Arizona matter at issue in *Ward*:

> Thomas' wife, Ginni Thomas, lobbied Arizona lawmakers in November 2020 to set aside the victory by then-President-elect Joe Biden and choose a "clean slate of Electors." According to *The Washington Post*, which first reported on Thomas' efforts, Ginni Thomas sent emails to two members of the Arizona legislature through an online platform "designed to make it easy to send prewritten form emails to multiple elected officials."

Amy Howe, *Court Allows Jan. 6 Committee to Obtain Phone Records of Arizona GOP Chair*, SCOTUSBLOG (Nov. 14, 2022, 12:13 PM), https://www.scotusblog.com/2022/11/court-allows-jan-6-committee-to-obtain-phone-records-of-arizona-gop-chair [https://perma.cc/9FVN-ZRDP].

133. 142 S. Ct. 680 (2022) (mem.).

134. *Id.* at 680.

135. Bob Woodward & Robert Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST (Mar. 24, 2022, 5:15 PM), https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts [https://perma.cc/EN9P-H2VL]; *see* Sample, *Senate Judiciary Committee Testimony*, *supra* note 2, at 12.

inundated with evidence of fraud. Make a plan. Release the Kraken and save us from the left taking America down."[136]

Justice Thomas contends that he had no knowledge of his wife's involvement in the events culminating with the January 6th attacks.[137] Even if one assumes that to be true, *prospectively* this will not remain a credible excuse in future cases regarding January 6th; the fact of Mrs. Thomas's testimony about her involvement before the January 6th committee is common knowledge.[138] More to the point, however, *might it be reasonable* to question Justice Thomas's impartiality in adjudicating January 6th cases? *Might* it be better for him *not* to be the only person determining the answer to the prior question? *Res ipsa loquitur*.

Justice Thomas's ethical concerns certainly do not stop there. In the latest batch of reports, lawyers with high-profile cases in front of the Court sent money to a Thomas aide through Venmo—a smartphone app designed to send payments from one user to another.[139] The seven payments, labeled "CT Christmas Party" and "Thomas Christmas Party," among others, appear to have given the lawyers exclusive access to the Justice's 2019 party.[140] Almost all the attorneys that sent money to Justice Thomas's aide were senior litigators at big law firms.[141]

Justice Thomas's laissez-faire attitude toward his purported ethics scandals and violations of the Ethics in Government Act provide a dubious narrative when contrasted against his recently released opinions. In *Jones v. Hendrix*,[142] Thomas authored an opinion on a request for habeas

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136. Woodward & Costa, *supra* note 135; *see* Sample, *Senate Judiciary Committee Testimony*, *supra* note 2, at 12.

137. Sample, *Senate Judiciary Committee Testimony*, *supra* note 2, at 13.

138. *See Ginni Thomas Tells Jan. 6 Committee She Regrets Texting with Meadows About 2020 Election*, CBS NEWS, https://www.cbsnews.com/sanfrancisco/news/ginni-thomas-tells-jan-6-committee-she-regrets-texting-with-meadows-about-2020-election [https://perma.cc/9XBG-DSB5] (Dec. 30, 2022, 3:01 PM).

139. *See* Stephanie Kirchgaessner, *Lawyers with Supreme Court Business Paid Clarence Thomas Aide via Venmo*, GUARDIAN (July 12, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/jul/12/clarence-thomas-aide-venmo-payments-lawyers-supreme-court [https://perma.cc/5F2J-7RK3]. Among the lawyers who sent a Venmo payment, one was a partner at the firm that successfully argued *Students for Fair Admissions v. Harvard*, the high-profile affirmative action case; another was the former solicitor general of West Virginia who played a key role in *West Virginia v. EPA*; and others were partners at firms that had previously had cases on the Supreme Court's docket. *Id.*; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); West Virginia v. EPA, 597 U.S. 697 (2022).

140. Kirchgaessner, *supra* note 139; Prem Thakker, *Lawyer Who Helped Overturn Affirmative Action Venmoed Clarence Thomas Aide*, NEW REPUBLIC (July 12, 2023, 10:29 AM), https://newrepublic.com/post/174259/top-lawyers-venmoed-clarence-thomas-aide-supreme-court [https://perma.cc/BFY5-9DRK].

141. *See* Kirchgaessner, *supra* note 139; Thakker, *supra* note 140.

142. 599 U.S. 465 (2023).

corpus that provides absolutely no leniency,[143] rendering an extraordinarily strict and conservative reading of 28 U.S.C. § 2255(e).[144] Though the issues in *Jones v. Hendrix* are notably different from Justice Thomas's disclosure and recusal violations,[145] the two situations create an interesting and alarming conversation when discussed in a greater context. The special treatment he seems to believe applies to Supreme Court Justices, simply because of the bench on which they sit, cannot be overlooked.

When looking at the totality of Justice Thomas's actions in recent years, there would likely be multiple violations under the newly imposed Code of Conduct. Whether looking at Justice Thomas's undisclosed financials revealing an extensive relationship with a well-known partisan donor, or at his spouse's direct involvement in January 6th matters with which he refuses to recuse himself from, there appears to be violations of Canons two, three, and four.[146] Accordingly, under this new Code of Conduct, even though these violations create the appearance of partiality, the lack of enforcement mechanisms would not stop such violations from happening.

7. Chief Justice Roberts

In his 2011 Year-End Report, Chief Justice Roberts asserted that the Supreme Court is so fundamentally different from the lower federal courts that a Code of Conduct need not apply.[147] Chief Justice Roberts claims that a Code of Conduct is unnecessary because "[e]very Justice seeks to follow high ethical standards."[148] If this is true, however, one would think the Justices would actually welcome a Code of Conduct to

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143. *See id.* at 471-79. Justice Jackson called out her colleague in her dissent, stating that her conservative colleagues were "forever slamming the courtroom doors to a possibly innocent person . . . ." *Jones*, 599 U.S. at 495 (Jackson, J., dissenting); Jordan Rubin, *Ketanji Brown Jackson Calls Out Majority for Unjustly Ignoring Innocence Claims*, MSNBC (June 23, 2023, 11:42 AM), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/ketanji-brown-jackson-supreme-court-jones-v-hendrix-rcna90639 [https://perma.cc/9XV2-C2D9].

144. 28 U.S.C. § 2255(e); *Jones*, 599 U.S. at 469-70 (holding that the proper interpretation of "inadequate or ineffective" in the context of the section 2255(e) provision means that only prisoners who are unable to bring a habeas challenge in the original court convicted are allowed to bring a second habeas challenge). This essentially denies the initial purpose of section 2255 in permitting a second habeas challenge when the initial habeas process was inadequate or ineffective to test the legality of the detention.

145. *See supra* Part V.A.6.

146. *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 2(B), 3(B)(2)(c), 4(D)(1) (U.S. SUP. CT. 2023).

147. ROBERTS, *supra* note 42, at 3-4.

148. *Id.* at 4-5.

ensure, in a clear and accessible manner, that they are acting ethically, as it would alleviate any issues of close calls or questionable ethical decisions. Chief Justice Roberts reminds us that there is no higher court to review a Justice's recusal decisions as the Supreme Court is the court of last resort, and there is no replacement for a Supreme Court Justice.[149] This "duty to sit" with all nine on the Court does not, however, tell the full story. The current quorum is set at six Justices, allowing the Court to issue an opinion when up to three Justices are absent—something this Court (and almost every Court prior) has done.[150]

In his recent letter to Senator Durbin, the Chief Justice declined the invitation to testify before the Senate Judiciary Committee, stating that "[t]estimony before the Senate Judiciary Committee by the Chief Justice . . . is exceedingly rare[;]" he further implied that doing so would jeopardize judicial independence and the separation of powers.[151] It is impossible to neglect that Chief Justice Roberts qualifies his statement with the words "by the Chief Justice" because, without them, his statement would be incorrect. Sitting Justices have testified at ninety-two congressional hearings since 1960 regarding various matters of judicial administration.[152]

The Chief Justice may have been resistant to a Code of Conduct for the Court because of his own questionable behavior, though not as overt as his colleagues. Chief Justice Roberts's wife "has allegedly been paid more than $10 million by multiple law firms—at least one of which

149. *Id.* at 7-9.

150. SUP. CT. R. 4. It is an open question as to whether Congress and/or the Court could, or should, constitutionally authorize, for example, a randomly drawn circuit court judge to sit on a one-time basis, by designation in place of a recused Supreme Court Justice. If so, the "duty to sit" argument has even less force. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(1) (U.S. SUP. CT. 2023). Certainly, such a practice would be consistent with designation practices in the lower courts and in many state supreme courts. It is also true, however, that the Supreme Court is constitutionally unique in respects that can reasonably be argued to counsel against such a practice.

151. Letter from John G. Roberts, C.J., U.S. Sup. Ct., to Richard J. Durbin, Chair, U.S. S. Comm. on the Judiciary (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf [https://perma.cc/J9R3-VFY5]; *Hearing on Supreme Court Ethics Reform Before the S. Comm. on the Judiciary*, 118th Cong. 4 (2023) (statement of Amanda Frost, John A. Ewald Jr. Research Professor of Law, University of Virginia School of Law) [hereinafter Frost, *Senate Judiciary Committee Testimony*]; Jordan Rubin, *John Roberts Calls Dick Durbin's Bluff, Declines Ethics Testimony Invite*, MSNBC (Apr. 26, 2023, 7:43 AM), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/john-roberts-senate-judiciary-committee-durbin-rcna81471 [https://perma.cc/7YXB-GLE6].

152. Frost, *Senate Judiciary Committee Testimony*, *supra* note 151, at 4.

argued a case before her husband, after it had already paid her hundreds of thousands of dollars."[153]

VI. CONGRESSIONAL ENFORCEMENT MECHANISMS

As this Article details, in recent years the entire federal judiciary, including but certainly not limited to the Supreme Court, has been rocked by revelations of judges and Justices failing to comply with various aspects of 28 U.S.C. § 455 by the non-disclosure of expensive gifts, lack of transparency regarding rationales for recusals or non-recusals, coordinated judicial lobbying by "dark-money" amici curiae, and routine failures to abide by the most basic rules of ethical judicial conduct. The radical circumstance in which one, and only one, court has approached judicial ethics rules on an entirely voluntary, self-determined, aspirational basis is what we are currently experiencing.

It is necessary for Congress, if not the Court itself, to *level up* the processes, rules, and enforcement mechanisms so as to bring the Court in line with the rules for lower courts, in line with the baseline ethics rules for Congress, and in line with the baseline rules for the executive branch. In an ideal world, Chief Justice Roberts would implement some form of enforcement alongside the new Code of Conduct for the Court itself, however, the distinct lack of any mention of enforcement in the new Code is nothing if not intentional.[154] If the American public waited for the Supreme Court to voluntarily adopt or cede ethics enforcement to others, we would have better odds waiting for Godot. Congress can and should pursue meaningful mechanisms to enforce the Code.

Notably, eight of the current nine Justices served on courts in which they were all required to comply with ethics rules previously.[155] It is hardly burdensome to extend the accompanying enforcement provisions upwards, when almost all of the current Justices previously complied with them when serving on lower courts. Is it unfortunate that such legislation is necessary? Yes. Is it especially unfortunate that such a leveling up is needed for the branch of government that, in theory, should be

153. Otten, *supra* note 22.

154. *See generally* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).

155. Justice Kagan served as the Solicitor General directly prior to her appointment and thus was not subject to the same Code of Conduct as the eight other Justices while they serve on lower federal courts. *See Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/TWF6-X3CW] (last visited Apr. 15, 2024).

held to even higher ethical standards than the constituent branches? Absolutely.

A. Enforcement of Basic Ethics

28 U.S.C. § 455 uses the mandatory word "shall," while also providing judges and Justices with standards for fact evaluation.[156] Standards, as opposed to bright-line rules, allow judicial officers "to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard."[157] Characterized optimistically, jurists are regularly forgetting the fact discovery process.[158] Characterized more cynically, they have ample reason for apathy as they know they will not be held accountable.

The new Supreme Court uses hortatory "shoulds" instead of mandatory "shalls," offering a level of discretion to the Justices' decisions, instead of the strict compliance required by section 455.[159] This alteration continues to reinforce the narrative that the Supreme Court and the Justices are so fundamentally different simply because of the bench they sit on that the ethics rules and enforcement they *already* previously complied with no longer need apply.

B. Transparency

The public's trust in the Court is essential. The essentiality of that trust does not square with lavish, undisclosed luxuriating via the largesse of private benefactors, and particularly not when those benefactors not only have direct interests before the Court, but also have derivative interests in connecting their friends to their beneficiaries on the bench.

Federal law already requires certain disclosures and transparency,[160] but vis-à-vis the Justices, those laws lack meaningful enforcement. There are several proposed laws that would require (1) courts to immediately notify parties when it becomes clear that a judge may be conflicted; (2) written explanations for all recusal decisions; and (3) the Federal

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156. 28 U.S.C. § 455(a)–(b).

157. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

158. *See* Kaplan et al., *supra* note 120 (noting that Justice Thomas should have recused himself from a case involving his wife, suggesting his failure to discover the facts that might lead to recusal).

159. *See generally* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023); § 455(a).

160. 5 U.S.C.A. § 13104(a)(1)–(2) (West) (requiring various federal officials to disclose, *inter alia*, non-governmental income, gifts, and reimbursements).

Judicial Center to conduct biennial studies of how well the judiciary is complying with federal recusal laws. Any proposed law should also require the Supreme Court to create a transparent and standard process for receiving ethics or misconduct complaints and establish procedures for resolving such complaints.[161] This should all contribute to the goal of the new Code, per the Court itself, to avoid even "the *appearance* of impropriety."[162]

There is also concern not with only the Justices themselves, but with those trying to influence the Court. The current Code explicitly states that "[n]either the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification."[163] There should absolutely be a requirement for amici curiae and their parties to disclose any gifts, income, or reimbursements they have recently provided to a judge in a case. This would thus reduce the ability of highly organized, dark-money-financed amici to lobby judges in a manner that obscures the identities and interests of those who fund them.[164]

Senator Sheldon Whitehouse has incisively detailed the current common practice:

> [A] network of groups that receive common amicus funding and often have ties to the parties in interest . . . regularly file briefs before the Court with no disclosure of their common funding or connections to the parties. This practice of judicial lobbying through amicus influence poses ethical issues representative of today's political climate, in which dark money abounds, compromising our courts.[165]

In our current, flawed system, Justices are expected to self-evaluate their biases, balance their roles as fair jurists, and do so in a manner that,

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161. As Senator Sheldon Whitehouse noted in his letter to Chief Justice Roberts, the Court currently has no method or procedure for receiving or assessing ethical complaints. Letter from Sheldon Whitehouse, Chairman, S. Judiciary Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts., to the Hon. John G. Roberts, Jr., C.J., U.S. Sup. Ct. 1 (Sept. 4, 2023), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/2023-09-04_complaint_from_senwhitehouseenclosure.pdf [https://perma.cc/4YU8-T5YW].

162. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 2 (U.S. SUP. CT. 2023) (emphasis added); *see* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988); *see also* MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2010).

163. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(4) (U.S. SUP. CT. 2023).

164. *See* Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022, 5:00 AM), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying [https://perma.cc/9KHP-5N6X].

165. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141, 141 (2021).

whatever their own subjective view of their impartiality, also *appears* to others to be objectively reasonable.[166] It should come as no surprise that the results of such a system are uneven and inconsistent, even to the point in which, given analogous circumstances, some Justices recuse while others do not due to the psychological challenges of individual Justices unilaterally judging their own cases. The new Code does virtually nothing to quell these fears, continuing the "trust us" rationale and allowing Justices to determine their own fate in situations with questionable ethical concerns, with no avenue for reporting misconduct or enforcement.

It should be noted that, even with the new Supreme Court Code of Conduct *and* some form of a congressional enforcement mechanism, the proposed system still relies almost entirely on the transparency and self-reporting and regulation of the Justices. This differs from the lower Federal Court Code, which "declares that judges should 'maintain and enforce' high standards of conduct . . . [and] adds that '[a] judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code.'"[167] The lack of any duty to take action in response to known Code violations by other Justices may work to preserve relations between the Justices, but does so at the expense of public confidence that the Justices and the Court will take the Code seriously. Without language like that present in section 455, the new Supreme Court Code relies entirely on self-reporting by the Justices, and enforcement by the Court or Congress does the same. Though perhaps obvious to note, many of the ethical lapses discussed earlier in this Article, including (but certainly not limited to) Justice Thomas's infamous lack of transparency, are revelations

166. Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 708 (2011) (discussing judges' psychological ability to assess their own bias); *see* Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on a Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 668 (2015) (arguing that "the existence of unconscious bias suggests that judges cannot necessarily trust their subjective belief that they are approaching a matter impartially"). "Furthermore, when a judge is faced with a recusal motion that presents information already in the judge's ken, but about which the judge did not recuse *sua sponte*, '[the judge] is being asked to admit that she has already failed in her ethical obligation to recuse herself.'" RUSSELL WHEELER & MALIA REDDICK, JUDICIAL RECUSAL PROCEDURES: A REPORT ON THE IAALS CONVENING 5 (2017), https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf [https://perma.cc/7635-TGZS] (quoting MATTHEW MENENDEZ & DOROTHY SAMUELS, BRENNAN CTR. FOR JUST., JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 4 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf [https://perma.cc/ZTV7-93S7]) (alteration in original).

167. Geyh, *The New SCOTUS Code of Conduct*, *supra* note 32.

discovered by the tireless efforts of investigative journalism, without which the public may have never discovered the issues plaguing the Court.

VII. CONGRESSIONAL ABILITY TO REGULATE AND ENFORCE

Four sources of constitutional interpretation—constitutional text, history, case law, and purpose—all support the constitutional power of Congress to enact some form of enforcement mechanism for the new Code of Conduct.

A. Text

Article III, Section 1 of the Constitution states, "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."[168]

Article I, Section 8 states, in relevant part, "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . *all* . . . Powers vested by this Constitution in the Government of the United States, *or in any Department* or Officer thereof."[169] The Constitution vests judicial power in the judicial branch, a "Department" of the United States.[170] Combined with Article III, the Necessary and Proper Clause establishes Congress's authority to carry the judicial power into execution.

McCulloch v. Maryland[171] recognized the broad scope of the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[172] A congressionally enforced judicial Code of Conduct fits neatly within the *McCulloch* framework. First, establishing an ethical judiciary is a legitimate end.[173]

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168. U.S. CONST. art. III, § 1.

169. *Id.* art. I, § 8, cl. 18 (emphasis added).

170. At the time of the framing, the judicial branch was commonly referred to as a "Department." *See, e.g.*, THE FEDERALIST NO. 78, at 391 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("W[e proceed] now to an examination of the judiciary department of the proposed government."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

171. 17 U.S. (4 Wheat.) 316 (1819).

172. *Id.* at 421.

173. Offutt v. United States, 348 U.S. 11, 14 (1954) (prohibiting judges from deciding contempt charges entangled with their personal feelings because "justice must satisfy the appearance of justice").

Second, as Professor Amanda Frost details extensively in her May 2, 2023 submission to the Senate Judiciary Committee, this end is within the scope of Article III,[174] and "Article III 'leaves Congress in charge of many of the details' necessary to implement federal judicial power[.]"[175] Third, the potential enforcement provisions—establishing ethics and disclosure rules for all judicial officers along with a process to enforce them—are means plainly adapted to the end of implementing an ethical federal judiciary. Finally, none of those provisions are prohibited by the Constitution.[176]

B. History

Historical analysis also supports Congress's authority to make laws that carry the judicial power into execution, including laws that regulate the Supreme Court. The First Congress, whose members included sixteen Framers,[177] enacted the Judiciary Act of 1789, which established the Supreme Court and lower courts by filling in the details left out of Article III.[178] Ever since, Congress has exercised this same authority to control the Supreme Court's size,[179] quorum,[180] location,[181] term,[182] salary,[183] staff,[184] and ethics (e.g., by mandating an oath of office).[185]

174. Frost, *Senate Judiciary Committee Testimony*, *supra* note 151, at 11.

175. *Id.* (quoting JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 2 (2009)).

176. None of the Supreme Court Ethics, Recusal, and Transparency Act provisions limit the tenure of judicial officers, reduce the salary of judicial officers, or expand the judiciary's jurisdiction beyond the limits of Article III, Section 2. U.S. CONST. art. III, §§ 1–2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

177. Senator William Samuel Johnson and Representative Roger Sherman of Connecticut, Senators Richard Bassett and George Read of Delaware, Senator William Few and Representative Abraham Baldwin of Georgia, Representative Daniel Carroll of Maryland, Senator John Langdon and Representative Nicholas Gilman of New Hampshire, Senator William Paterson of New Jersey, Senator Rufus King of New York (represented Massachusetts in the Constitutional Convention), Representative Hugh Williamson of North Carolina, Senator Robert Morris and Representative George Clymer of Pennsylvania, Senator Pierce Butler of South Carolina, and Representative (and later President) James Madison Jr. of Virginia. *The First Federal Congress Members*, FIRST FED. CONG. PROJECT, https://www2.gwu.edu/~ffcp/exhibit/p1/members [https://perma.cc/LPH7-RPX3] (last visited Apr. 15, 2024); *Rufus King: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_KingRufus.htm [https://perma.cc/PTA3-HUGP] (last visited Apr. 15, 2024).

178. Judiciary Act of 1789, ch. 20, §§ 1–3, 1 Stat. 73, 73.

179. *Id.* § 1 (codified as amended at 28 U.S.C. § 1).

180. *Id.*

181. *Id.* (codified as amended at 28 U.S.C. § 2).

182. *Id.*

183. Compensation Act of 1789, ch. 18, § 1, 1 Stat. 72, 72 (codified as amended at 28 U.S.C. § 5). This statute was enacted one day prior to the Judiciary Act of 1789. *See id.*; Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Consider, purely hypothetically and by way of illustration, that Congress could constitutionally expand the Court from nine Justices to nineteen. Comparatively, enforcing Justices' ethical conduct, especially in a manner that defers to the Court's own self-imposed Code of Conduct, is but a modest measure that strengthens the Court.

Similarly, by way of a less dramatic example, there is no constitutional doubt as to the validity of the ethics legislation passed in the twentieth century. In 1948, Congress enacted the first version of 28 U.S.C. § 455, which established a recusal standard that applied to "[a]ny justice or judge."[186] In the Ethics in Government Act of 1978, Congress required various government officers, including the Chief Justice and Associate Justices,[187] to file an annual report[188] disclosing, *inter alia*, their non-governmental income,[189] gifts,[190] and reimbursements.[191] Finally, in the Ethics Reform Act of 1989, Congress prohibited various government officers, including "officer[s] . . . of the . . . judicial branch[]," from accepting gifts by individuals affected by the officer's public functions.[192]

In light of the historical precedent of Supreme Court regulation, Congress possesses the constitutional authority to further enforce the Court's new Code. The new disclosure requirements fall in line with the standards set in 1978,[193] just as the new recusal rules fall in line with the standards set in 1948.[194] Indeed, the accepted use of Congress's greater power to regulate the Supreme Court's size,[195] quorum,[196] and even jurisdiction,[197] imply Congress's lesser power to regulate the process of recusal and enforce missteps.

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184. Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76 (codified as amended at 28 U.S.C. § 671).

185. *Id.* § 8 (current version at 28 U.S.C. § 453).

186. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455).

187. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 308(9), 92 Stat. 1824, 1861 (current version at 5 U.S.C.A. § 13101(10)).

188. *Id.* § 301(c) (current version at 5 U.S.C. § 13103(d)).

189. *Id.* § 302(a)(1)(A)–(B) (current version at 5 U.S.C.A. § 13104(a)(1)(A)–(B)).

190. *Id.* § 302(a)(2)(A)–(B) (current version at 5 U.S.C.A. § 13104(a)(2)(A)).

191. *Id.* § 302(a)(2)(C) (current version at 5 U.S.C.A. § 13104(a)(2)(B)).

192. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 7353(a), 103 Stat. 1716, 1746-47 (current version at 5 U.S.C. § 7353(a)).

193. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 302(a)(1)–(2), 92 Stat. 1824, 1851-52 (current version at 5 U.S.C.A. § 13104(a)(1)–(2)).

194. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455).

195. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (codified as amended at 28 U.S.C. § 1).

196. *Id.* (codified as amended at 28 U.S.C. § 1).

197. U.S. CONST. art. III, § 2 (defining the Supreme Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make"); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 511 (1868).

C. Case Law

Despite the textual and historical support of Congress's authority to regulate the Supreme Court, opponents of legislation contend that separation of powers concerns preclude such measures. Case law, however, reinforces the legitimacy of measures that, without jeopardizing the core functions of co-equal branches, facilitate meaningful checks and balances.

As the Court itself notes, "[W]e have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'"[198] Rather, as the Court held in the Congress-to-Executive Branch context, "[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [separate branch] from accomplishing its constitutionally assigned functions."[199] The Court has developed a three-part test to determine whether a congressional act violates this separation of powers principle.

The first element is whether Congress is attempting "to increase its own powers at the expense of [another] Branch."[200] A congressionally enforced ethics Code does not shift control over recusal decisions to Congress. The control over disqualification remains in the judiciary, simply shifting the decision-making power to Justices who are not involved in the potential conflict. Congress's prospective role would be "limited to receiving reports or other information and oversight . . . functions that [the Court has] recognized generally as being incidental to the legislative function of Congress."[201]

The second element is whether congressional enforcement causes the usurpation of another branch's proper functions.[202] The proper, core function of the judicial branch is deciding cases or controversies and doing so with decisional independence.[203] Congressional enforcement of the Code of Conduct does not usurp judicial functions; it rather furthers the legitimacy, and the appearance of legitimacy, of the Court carrying out those core functions.

The final element is whether an act "impermissibly undermine[s]" or "disrupts" another branch by preventing it "from accomplishing its

198. Morrison v. Olson, 487 U.S. 654, 693-94 (1988) (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

199. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

200. *Morrison*, 487 U.S. at 694.

201. *Id.*

202. *Id.* at 695.

203. *See* U.S. CONST. art. III, § 2.

constitutionally assigned functions[.]"[204] Under the new Code of Conduct, the Justices of the Supreme Court retain the power to determine their own Code of Conduct, simply delegating the enforcement to Congress. Far from imposing highly specific, granular judicial ethics regulations on the Court, congressional enforcement uses the Court's own Code and simply shifts enforcement to an unbiased, equal branch. *Marbury*'s maxim that the Supreme Court has the power to say "what the law is" is well-established.[205] But that does not extend to the Court effectively declaring itself, unlike Congress or the Executive, to be *above* the law, and able to choose, entirely voluntarily, and without review, when it wishes to comply and when it does not.[206]

D. Purpose

In creating the Constitution, the Framers recognized a humbling truth about human nature and, ultimately, about good government:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[207]

In other words, men and women with the best intentions are nonetheless prone to mistake their own interest for justice. True justice arises only when the men and women of the government operate within a system, greater than any one individual, that checks their self-interested biases. This is the rationale behind the judiciary's greatest power of judicial review: because the men and women of Congress are not angels, the men and women of the judiciary have the duty to review the acts of Congress to ensure those acts conform to the Constitution.[208] But this rationale runs in both directions. Even the best humans, be they in Congress or on the Court, are imperfect (and especially so when unilaterally judging their own cases). That is not an indictment, but rather, a reflection of the human condition. The Framers acknowledge as much in their embrace of inter-branch oversight. A congressionally enforced Code of

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204. *Morrison*, 487 U.S. at 695 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986); *Nixon*, 433 U.S. at 443).

205. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

206. *See id.* at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men.").

207. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

208. *Marbury*, 5 U.S. (1 Cranch) at 176-77 (recognizing that the constitutional limits on congressional power mandate judicial review that enables the government to control itself).

Conduct reflects the checks and balances, rules, and systematized procedures of good governance.