AMERICANS AND THE COURT: HOW PUBLIC OUTCRY HAS INFLUENCED THE COURT TO ADDRESS JUDICIAL ETHICS CRISES

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I. INTRODUCTION

In 1803, Chief Justice John Marshall wrote the majority opinion for the single most important case that the Supreme Court has ever heard. In that case, *Marbury v. Madison*,[1] the Chief Justice—in a decision he arguably should have recused from—vanquished political rivals by establishing the principle of judicial review and made it clear that not only is the Court charged with ensuring the promise of equal justice under the law, but that it is the "final arbiter of the law."[2] The buck stops with

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 177-78; *The Court and Constitutional Interpretation*, U.S. SUP. CT., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/DXZ2-DAXB] (last visited Apr. 15, 2024); James Sample, *Supreme Court Recusal from* Marbury *to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 106-07 (2013). John Marshall signed the commission in question in *Marbury v. Madison* when he was the acting Secretary of State and was responsible for its delivery. Sample, *supra*, at 106. Despite his role in creating and delivering the commission, when Marshall was appointed Chief Justice he did not recuse from hearing the case despite this seeming conflict of interest. *Id.* at 106-07.

them. This is the body that precipitated the Civil War with its calamitous decision in *Dred Scott v. Sandford*[3] and the same body that spurred the civil rights movement with its landmark decision in *Brown v. Board of Education*.[4] This is the body that decides questions of life and death, liberty or imprisonment. And not only do we repose in them this power, we also give them the singular privilege of lifetime tenure. Yet, despite this great power and responsibility, the federal judiciary has been very dismissive—both historically and today—when Congress or the public have questioned whether they are exercising their immense judicial powers with the highest ethical and moral standards.

Questions about judicial ethics are not new. The concept of judicial ethics dates back to Roman times where, under the "Roman Code of Justinian, parties could seek recusal of any judge considered to be 'under suspicion.'"[5] This principle of impartiality has been present, in different forms, since then, appearing in the Statute of Edward III in 1346[6] and embraced by America's first Congress when, in 1789, it passed the Judiciary Act of 1789.[7] Passed as one of the first acts of the new United States Congress, the Judiciary Act prescribed the official oath for all federal judges, including Supreme Court Justices, instructing them to "faithfully and impartially" discharge the duties of their office.[8] Since then, the U.S. Congress has passed a smattering of other statutes that regulate judicial conduct, including the 1792 federal disqualification statute (what is now 28 U.S.C. § 455), as well as more modern-day statutes such as the Ethics in Government Act of 1978.[9] However, outside of isolated incidents, most efforts to create some modicum of ethical safeguards on judges and Justices have not come from Congress, but from the judiciary itself in response to public ethics scandals that captured the zeitgeist of the American people.

Although there are bills in Congress, like the Supreme Court Ethics, Recusal, and Transparency ("SCERT") Act of 2023;[10] the Supreme

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3. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

4. 347 U.S. 483 (1954).

5. M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, 131 YALE L.J. F. 190, 191-92 (2021) (further citation omitted).

6. *Id.* at 192.

7. Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (codified as amended at 28 U.S.C. § 453).

8. *Id.*

9. Comment, *Disqualifications for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538, 539-40 (1973) (discussing various statutes); Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2 U.S.C. and 5 U.S.C.).

10. Supreme Court Ethics, Recusal, and Transparency Act of 2023, H.R. 926, 118th Cong. (2023).

Court Ethics Act;[11] and the Judicial Ethics and Anti-Corruption Act of 2023,[12] which would have Congress step in to require the Supreme Court to create a code of conduct, until November 2023, it appeared that the Supreme Court was unwilling or unable to do what its predecessors had done and pursued reform from within. In fact, in 2011, Chief Justice Roberts in his Year-End Report implicitly argued that the Supreme Court doesn't need an ethics code of its own because Justices are "jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process."[13]

Public pressure on the Supreme Court to take meaningful reforms has grown as ethics scandals have multiplied. In response, several members of the current Court, including Justice Barrett, Justice Kagan, and Justice Kavanaugh, have confirmed either that there are discussions about the Supreme Court adopting a code of ethics or that adopting such a code would be a good idea.[14] Others, like Justice Alito, have been entirely dismissive of the idea that Congress can regulate Supreme Court ethics, leading the public to wonder if the Justices of the Supreme Court would ever be able to agree amongst themselves how to reform their image and if those reforms could have a meaningful effect on future conduct.[15]

On November 13, 2023, the Supreme Court announced that it had promulgated a Code of Conduct in order to clear up any "misunderstanding" by the public that was created by a lack of a code and to dispel the notion that "the Justices of [the] Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[16] In the new Code's preamble, the Justices state that the intent of the Code is to "set out succinctly . . . the ethics rules and principles that guide the conduct of the Members of the Court."[17] But the Court is quick to point out that "these rules and principles are not new[.]"[18]

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11. Supreme Court Ethics Act, S. 325, 118th Cong. (2023).

12. Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. (2023).

13. C.J. JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/5V9T-VJVL].

14. *See infra* note 122 and accompanying text.

15. *See* Adam Liptak, *Two Justices Clash on Congress's Power Over Supreme Court Ethics*, N.Y. TIMES (Aug. 26, 2023), https://www.nytimes.com/2023/08/26/us/supreme-court-ethics-alito-kagan.html [https://perma.cc/8GTR-2VYV].

16. *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].

17. *Id.*

18. *Id.*

While the Supreme Court's latest action is a good first step, it is just that—a first step. The Code itself has many shortcomings, loopholes, and ambiguous phrases that may well allow the Justices to behave in much the same way they have been behaving for the last thirty years, thereby inhibiting the Court from fully dealing with the judiciary's ethical rot and regaining the public's confidence. As a result, it seems likely that Chief Justice Roberts will fall into a predictable albeit understudied pattern of Chief Justices who tried and ultimately failed to enact meaningful institutional reforms in response to scandals of the judiciary's own making.

This essay, which builds off of Hofstra University's September 2023 symposium, *Accountability and the Future of the Supreme Court*, traces historical ethics scandals in the United States federal judiciary.[19] In so doing, it argues that historically there has been a predictable pattern of public call and institutional response to notable scandals in the federal judiciary.[20] Several of these scandals, some of which we discuss below, led to efforts by the then-current Chief Justice to reign in judicial misconduct.[21] But each time, these reforms fell woefully short, often adopting a seemingly new rule or approach that would not have prevented the ethical crisis that precipitated the reform in the first place.[22] At a moment when sitting members of the Supreme Court are embroiled in multiple ethical crises, this call-and-response history can help guide the public and Congress as it navigates how to push the Chief Justice and the Supreme Court to adopt more meaningful ethics reform, including pursuing changes to the new Code it just adopted.

19. *See infra* Part II–V.

20. *See infra* Part II–VI.

21. The federal judiciary has had several high-profile ethics scandals, not all of which are discussed in this paper. One scandal that is not discussed in this paper are those related to sexual harassment and misconduct in the judiciary, including allegations that former Ninth Circuit Judge Alex Kozinski made inappropriate sexual comments and showed his former law clerks pornography. The judiciary's attempt to reckon with a history of sexual harassment was an important moment. It is not included in this essay because it did not involve the Supreme Court, although the public outrage stemming from those allegations is another example of how the judiciary can respond to and be influenced by public outrage. *See* Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017, 5:27 PM), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [https://perma.cc/4EPM-NHXF].

22. *See infra* Part II–VI.

II. THE FIRST FEDERAL MISCONDUCT SCANDAL LEADS TO CODES FOR STATE JUDGES, BUT NOT FEDERAL JUDGES

The catalyst for creating the first formal code of conduct for sitting judges in the United States was a baseball game-fixing scandal involving Chicago-based federal judge Kenesaw Mountain Landis. In 1919, eight Chicago White Sox players were accused of throwing the World Series against the Cincinnati Reds in exchange for money from a gambling syndicate.[23] The "Black Sox Scandal" rocked Major League Baseball, which sought to protect the integrity of the game, and led to the dissolution of the National Baseball Commission which dealt with conflicts between baseball teams and leagues. In its place, and as part of an effort to rebuild public relations, the Major League created the position of Commissioner of Baseball and gave the Commissioner nearly unlimited authority to act in the "best interests of baseball."[24] And, as a first step, they appointed Judge Landis as its first Commissioner.[25]

After expressing some initial reluctance, Landis accepted the job as Commissioner of Baseball on the condition that he would also remain a sitting federal judge.[26] Although the public was glad that the Major League was cleaning up baseball, the public outcry that accompanied Landis's decision to remain a sitting federal judge was swift, including an impeachment effort in Congress and a public censure from the American Bar Association ("ABA").[27] In Congress, Representative Benjamin Welty's (D-Ohio) articles of impeachment charged Judge Landis with "neglecting his official duties" and causing damage "to the very soul of this government."[28] Welty championed Landis's impeachment even though the Attorney General, in an advisory opinion requested by Welty, concluded that Landis had not violated any laws, leading Welty to introduce legislation to prevent federal judges from accepting any salary outside of their government compensation.[29] While the impeachment effort

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23. Frederic J. Frommer, *Baseball's First Commissioner Faced Impeachment for Taking the Job*, WASH. POST (Apr. 9, 2022, 7:00 AM), https://www.washingtonpost.com/history/2022/04/09/kenesaw-mountain-landis-baseball-impeachment [https://perma.cc/U38J-9XRE]; *see also* McKeown, *supra* note 5, at 192.

24. Richard Justice, *'Best Interests of Baseball' a Wide-Ranging Power*, MAJOR LEAGUE BASEBALL (Aug. 1, 2013), https://www.mlb.com/news/richard-justice-best-interests-of-baseball-a-wide-ranging-power-of-commissioner/c-55523182 [https://perma.cc/M3A3-8MVU].

25. *See* Frommer, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Landis Impeached by Welty in House*, N.Y. TIMES (Feb. 15, 1921), https://timesmachine.nytimes.com/timesmachine/1921/02/15/109803324.pdf [https://perma.cc/5FXV-JG5T]; *see* Frommer, *supra* note 23.

29. *Landis Impeached by Welty in House*, *supra* note 28.

did not go far, the general opinion was that Judge Landis's conduct—accepting the position while remaining on the bench—"lowered the standard of the bench and legal ethics."[30]

The public rebuke from the ABA was similarly swift. In a censure resolution passed at the ABA's conference in Cincinnati, Judge Landis's dual employment was criticized "as conduct unworthy of the office of judge, derogatory to the dignity of the bench and undermining public confidence in the independence of the judiciary."[31] Despite these very public rebukes, Judge Landis continued to serve in both positions until 1922, when public pressure led him to resign from his position on the federal bench.[32]

Spurred by the public's reaction to the Judge Landis scandal, the ABA formed a commission on judicial ethics. Chaired by then-Chief Justice William Howard Taft, the commission was tasked with drafting a judicial code of conduct.[33] Two years later, in 1924, the Canons of Judicial Ethics were approved by the commission.[34]

The ABA Canons of Judicial Ethics ("the Canons") were an advisory set of guidelines intended to be a "guide and reminder for judges" of their ethical responsibilities.[35] It contained thirty-four advisory canons, all focused on mitigating impropriety or the appearance of impropriety.[36] Included were ethical canons regulating extrajudicial activities such as personal use of one's office and solicitations for charity and business promotion as well as avoiding accepting obligations that are inconsistent with the duties of the office.[37] Canon 30 seemed to address the Landis scandal, stating that a judge should "decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby" when holding judicial office.[38]

Although the Canons marked a watershed moment for the judiciary, they were wildly inadequate.[39] That is because, at their core, the 1924

30. *Id.*

31. *Bar Meeting Votes Censure of Landis*, N.Y. TIMES (Sept. 2, 1921), https://timesmachine.nytimes.com/timesmachine/1921/09/02/107025219.pdf [https://perma.cc/K3CT-5U8Z].

32. Frommer, *supra* note 23.

33. *About the Commission*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background [https://perma.cc/HZX8-PARM] (last visited Apr. 15, 2024).

34. *Id.*

35. CANONS OF JUD. ETHICS, pmbl. (AM. BAR ASS'N 1924).

36. McKeown, *supra* note 5, at 193.

37. CANONS OF JUD. ETHICS, Canons 24-26.

38. *Id.* at Canon 30.

39. *See* McKeown, *supra* note 5, at 195, 198.

Canons were intended largely to serve as a guideline to the states and, according to Chief Justice Taft, to be a "guide and reminder for [the judiciary]."[40] They were advisory, nothing more. In the years that followed, every state in the country adopted some version of the Canons, often incorporating them into their substantive law with the added persuasion of sanctions for violations.[41]

But unlike the states, the federal judiciary didn't adopt the 1924 Canons and, in fact, following the Landis scandal—a scandal involving a sitting federal trial judge—no new formal ethical rules were enforced, advisory or otherwise, on lower federal court judges.[42] Interestingly, however, in a move that evokes the efforts of today's Chief Justice, that same year the Supreme Court adopted "standards of propriety."[43] The standards, which only applied to the Supreme Court, were actually intended to be more specific than the Canons laid out by the ABA.[44] Specifically, the Justices agreed to avoid "any activity that even hints of corruption" and not to "participate in an electoral campaign," "give advice to another branch of government in any matter that is likely to come before the Supreme Court," "speak publicly on any matter that is likely to come before the Supreme Court," or "give advice on executive appointments unless requested to do so."[45]

Inherent in the adoption of the "standards of impropriety" by the Justices was the recognition that if the Justices violated these norms, they would undermine the legitimacy and independence of the Supreme Court. But the standards didn't fix any ethics problems because they lacked an accountability and enforcement mechanism, leaving it up to each individual Justice to police their own conduct. As current-day scandals demonstrate, self-policing does not work.

The Judge Landis scandal, and the 1924 ABA Canons and standards of impropriety that grew out of it, are important for many reasons, not least of which is because it was the judiciary's first time responding to public criticism over judicial misconduct. But crucially, both the Canons and the "standards of impropriety" fell short because they were

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40. CANONS OF JUD. ETHICS, pmbl.; *About the Commission*, *supra* note 33 (discussing Taft's role in creating the Canons).

41. *See* Steven Lubet, *Why Won't John Roberts Accept an Ethics Code for Supreme Court Justices?*, SLATE (Jan. 16, 2019, 9:00 AM), https://slate.com/news-and-politics/2019/01/supreme-court-ethics-code-judges-john-roberts.html [https://perma.cc/WU9K-XN43].

42. The Supreme Court was subject to the federal recusal statute. That statute, however, was passed in 1792 and therefore was not a new formal rule. McKeown, *supra* note 5, at 192.

43. David J. Danelski, *The Propriety of Brandeis's Extrajudicial Conduct*, *in* BRANDEIS AND AMERICA 11, 16 (Nelson L. Dawson ed., 1989).

44. *Id.*

45. *Id.*

advisory—they were nothing more than words on a page to prevent the next scandal. Moreover, despite the scandal originating with the federal trial judge, no new ethics rules were imposed—advisory or mandatory—on federal trial judges moving forward. That failure is in and of itself striking. The fact that they fell short, however, is a key part of the judiciary's story. As future scandals would confirm, the Landis scandal was the beginning of a "call-and-response" narrative between the public and the judiciary, where the Chief Justice, in this case Taft, would try to quell public outrage but would neither fix the original problem nor go far enough to prevent the next ethics crisis.

III. JUSTICE FORTAS SCANDAL LEADS TO ADOPTION BY FEDERAL JUDGES, BUT NOT JUSTICES

Nearly half a century passed before the Canons were applied to federal judges, but the catalyst remained constant: scandal.

The scandal which led to the adoption of a model code of judicial conduct for federal judges surrounded Justice Abe Fortas's 1968 nomination to be Chief Justice of the United States.[46] Justice Fortas's career had an auspicious start, including graduating second in his class at Yale Law School, teaching at his alma mater after graduation, and being appointed to argue the Supreme Court's landmark 1962 case *Gideon v. Wainwright*,[47] which established the Sixth Amendment right to counsel for indigent defendants.[48] In 1965, as his legal star was continuing to rise, Fortas was appointed to be an Associate Justice of the Supreme Court by President Lyndon B. Johnson.[49] Not long after, in 1968, Chief Justice Earl Warren decided to retire, and President Johnson nominated Justice Fortas to be Chief Justice.[50]

Since Justice Fortas was a reliable member of the Court's progressive wing, Republicans in Congress immediately launched an effort to discredit him as a potential chief, partly because he sided with integrationists and criminal defendants, partly because he was close to Johnson, and partly because he was Jewish.[51] Justice Fortas became the first

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46. McKeown, *supra* note 5, at 195-96.

47. 372 U.S. 335 (1963).

48. Ciara Torres-Spelliscy, *The Cautionary Tale of Abe Fortas*, BRENNAN CTR. FOR JUST. (Feb. 6, 2018), https://www.brennancenter.org/our-work/analysis-opinion/cautionary-tale-abe-fortas [https://perma.cc/5JGQ-PG4C].

49. *Id.*

50. *Id.*

51. Dahlia Lithwick, *The Chief Justice of the U.S. Wasn't Always Like John Roberts*, SLATE (Feb. 1, 2023, 5:45 AM), https://slate.com/news-and-politics/2023/02/chief-justice-abe-fortas-story-ethics.html [https://perma.cc/JED4-EFG5].

sitting Associate Justice, nominated to be Chief Justice, to testify at his own confirmation hearing, at which many revelations helped to reinforce some senators' pre-existing views of the Justice.[52] For instance, although it was well-known that Fortas was close to the Johnson administration, during his confirmation hearings Republicans uncovered troubling details of just how close he was, including that, as a sitting Justice, "he regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam."[53] More crucially, these confirmation hearings also revealed—through an anonymous tip—that Justice Fortas's former law partner, Paul Porter, secured Justice Fortas a position teaching summer school at American University.[54] While teaching is not concerning in and of itself, Justice Fortas's $15,000 salary, which was forty percent of the salary he earned as a sitting Justice, was not paid by the university, but rather by clients of Porter's firm—many of whom had cases in front of the Supreme Court.[55]

This revelation plunged Justice Fortas's nomination, leading several senators, led by segregationist Senator Strom Thurmond, to filibuster his appointment—the first against a Supreme Court nomination—ultimately causing Fortas to withdraw his name from consideration for Chief Justice in October 1968 while still remaining on the Court as an Associate Justice.[56] With the defeat of Justice Fortas's nomination for Chief Justice, the vacancy remained open when President Nixon took office.

Once Nixon took office the following year, he immediately sought to remake the Court and move it away from the Warren Court's progressive high-water mark.[57] First, Nixon secured an agreement with Chief Justice Earl Warren to remain on the Court until the end of the Court term—June 1969—giving Nixon six months to nominate a new Chief

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52. *Filibuster Derails Supreme Court Appointment*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/nominations/filibuster-derails-supreme-court-appointment.htm [https://perma.cc/D2FD-GQDC] (last visited Apr. 15, 2024).

53. *Id.*

54. Torres-Spelliscy, *supra* note 48; John W. Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court*, WASH. POST (Nov. 19, 2001), https://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/therehnquistchoice.htm [https://perma.cc/R77G-KGVR].

55. Torres-Spelliscy, *supra* note 48.

56. *Id.*; *see* Dean, *supra* note 54.

57. Lithwick, *supra* note 51. The rules governing outside employment have changed since the Justice Fortas scandal. Title VI of the Ethics Reform Act of 1989 now imposes limits on the amount of outside-earned income that a Justice or other covered official can earn. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 501, 103 Stat. 1716, 1760-61 (codified as amended in scattered sections of 5 U.S.C.). For calendar year 2023, the threshold was $31,815. *See* 5 U.S.C. § 13143 (limiting the outside-earned income that covered employees can be paid annually).

Justice.[58] In an effort to manufacture more vacancies on the Court, Nixon's Department of Justice began looking into Fortas's financial entanglements.[59] Evoking parallels to modern-day ethics scandals, it was discovered that Justice Fortas had received $20,000 from the Wolfson Foundation—the principal of which was indicted for securities fraud—for consulting work.[60] Although very troubling and certainly raising ethics questions, other Justices had similar financial relationships, and there were no ethics rules in place then that prohibited this conduct for Supreme Court Justices.[61] While Justice Fortas ultimately returned the money, the damage to his reputation and appearance of impartiality was done.

The response to Justice Fortas's scandal was swift, deliberate, and bipartisan. In fact, the Justice Fortas scandal provides a blueprint for how the public, the legislature, and, most importantly, the Court can respond when the actions of one Justice threaten to undermine the legitimacy of the Court.

In Congress, when *Life* magazine first uncovered Fortas's scandal, Republicans and Democrats alike responded in a bipartisan manner calling for his resignation.[62] The significance of the bipartisan response seems almost inconceivable when viewed in contrast to today's political climate, especially when one considers that Justice Fortas was a liberal and that President Nixon, a Republican, would be responsible for appointing a successor.[63] Yet, in a stunning act of country over party, Democrats made clear that they were more concerned with the preservation of "the confidence of our citizenry in the federal judiciary" than with political questions.[64] Echoing statements of today, members of Congress began making observations and criticisms of the Court, for example stating that the federal judiciary was facing "a crisis of confidence, a crisis that threatens to gravely impair its strength and its effectiveness."[65] Senator Joseph Tydings of Maryland went so far as to

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58. Dean, *supra* note 54.

59. Lithwick, *supra* note 51.

60. Adam Cohen, *54 Years Ago, a Supreme Court Justice Was Forced to Quit for Behavior Arguably Less Egregious Than Thomas's*, N.Y. TIMES (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/opinion/clarence-thomas-supreme-court-abe-fortas.html [https://perma.cc/Q3U4-AAY5].

61. Lithwick, *supra* note 51.

62. Cohen, *supra* note 60.

63. *See id.*

64. Fred P. Graham, *Tydings Declares Fortas Must Resign Immediately*, N.Y. TIMES (May 13, 1969), https://timesmachine.nytimes.com/timesmachine/1969/05/14/90104810.html [https://perma.cc/QF9Z-8Q6W].

65. Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL'Y REV. 33, 44 (2012) (quoting *Bills Providing for Improvements in the Administra-*

introduce a bill that created a constitutionally questionable non-impeachment mechanism for the removal of a Supreme Court Justice and created a discipline review board modeled after many seen in the states.[66]

The Court's internal response is also instructive. Chief Justice Earl Warren and Fortas's friend, Justice Hugo Black, both allegedly played a part in convincing Fortas to resign—urging him to salvage his reputation; spare his wife, also a prominent lawyer, from further public embarrassment; and avoid a high-profile impeachment effort in Congress.[67] Perhaps referencing these conversations, and maintaining that he had done nothing wrong, Justice Fortas in his resignation letter said stepping down was necessary to spare the Court "the harassment of debate concerning one of its members" and to ensure the Court's welfare and maximum effectiveness.[68] Justice Fortas's resignation is stunning when viewed in light of today's scandals. What Justice Fortas, Chief Justice Warren, and Justice Black all seemed to understand was that it is incumbent upon each and every Justice to ensure the impartiality and integrity of the Court, and that one bad apple, or one unethical Justice, can doom the reputation of the entire Court in the eyes of the public.

Just like the Landis scandal spurred the creation of the 1924 ABA Canons, so too did the Fortas affair spur new frameworks for judicial ethics. Indeed, the threat of legislation from Congress combined with public pressure led then-Chief Justice Warren to ask the Judicial Conference's Committee on Court Administration "what might be done to offset the growing apprehension about the federal judiciary."[69] The Judicial Conference Committee responded by requiring a report of compensation

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tion of the Courts of the United States and for Other Purposes Before the Subcomm. on Improvements in Jud. Machinery of the S. Comm. on the Judiciary, 91st Cong. 3 (1969) (statement of Joseph D. Tydings, Chairman, S. Subcomm. on Improvements in Jud. Machinery of the Comm. on the Judiciary)).

66. *Id.* at 45-46.

67. Lithwick, *supra* note 51 (discussing Warren's role); *see* Philip Allen Lacovara, *Clarence Thomas Should Follow the Abe Fortas Precedent and Resign Gracefully*, HILL (Apr. 16, 2023, 9:30 AM), https://thehill.com/opinion/judiciary/3953176-clarence-thomas-should-follow-the-abe-fortas-precedent-and-resign-gracefully [https://perma.cc/4JTR-DBG5].

68. Letter from Abe Fortas, J., U.S. Sup. Ct., to Earl Warren, C.J., U.S. Sup. Ct. (May 14, 1969), *in The Texts of Letters and Statements Involving the Resignation of Justice Fortas: Fortas Letter to Warren*, N.Y. TIMES (May 16, 1969), https://timesmachine.nytimes.com/timesmachine/1969/05/16/90105794.html?pageNumber=20 [https://perma.cc/W3AF-EJMF].

69. JOINT COMM. ON THE CODE OF JUD. CONDUCT OF THE JUD. CONF. OF THE U.S., A REVIEW OF THE ACTIVITIES OF JUDICIAL CONFERENCE COMMITTEES CONCERNED WITH ETHICAL STANDARDS IN THE FEDERAL JUDICIARY, 1969-1976, at 248 (1977).

for nonjudicial services, an attempt to respond to the Justice Fortas affair directly.[70]

Once the Judicial Conference reconvened in September 1969, they also agreed to work with the ABA—which was responding to criticism that the original 1924 Canons were no more than "moral posturing" that was "more hortatory than helpful in providing firm guidance for the solution of difficult questions"—to develop new ethics rules for judges.[71] The cooperation of the Judicial Conference with the ABA's drafting process was brought about at the behest of California Supreme Court Justice Roger Traynor, who convinced newly appointed Chief Justice Warren Burger that it was in the best interest of the federal judiciary if "both the federal and state judiciaries [could] eventually abide by the same set of basic canons."[72] So, the federal judiciary worked with the ABA's Committee on the Code of Judicial Conduct to lead the first major overhaul of the Canons of Judicial Ethics.[73] Led by Justice Traynor, the Committee worked for three years to update the ABA's Canons.[74] The Judicial Conference's Joint Committee on the Code of Judicial Conduct reviewed the final draft and ultimately adopted the ABA's model code with slight modifications in April 1973, resulting in the first ever Code of Judicial Conduct for United States Judges.[75]

The 1973 Code of Judicial Conduct for United States Judges had five canons that required federal judges to (1) "uphold the integrity and independence of the judiciary"; (2) "avoid impropriety and the appearance of impropriety in all activities"; (3) "perform the duties of the office fairly, impartially and diligently"; (4) "engage [only] in extrajudicial activities that are consistent with the obligations of judicial office"; and (5) "refrain from political activity."[76] Crucially, although the canons were adopted by the Judicial Conference and made applicable to federal judges, they were only suggestive. The canons said what the judges "should" do—they never said they must. The federal Code of Conduct for United States Judges to this day generally retains the permissive,

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70. McKeown, *supra* note 5, at 196.

71. DENNIS ALAN RENDLEMAN & MARY T. MCDERMOTT, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT, at xi (3d ed. 2016) (quoting Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 391 (1972)); Remus, *supra* note 65, at 46.

72. Remus, *supra* note 65, at 46-47 (quoting ADMIN. OFF. OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50-51 (1969)); *see also* 28 U.S.C. § 331 (2012) (requiring that the Chief Justice serve as the presiding officer of the Judicial Conference of the United States).

73. McKeown, *supra* note 5, at 193.

74. *Id.* at 196-97.

75. *See* Remus, *supra* note 65, at 47-48.

76. CODE OF CONDUCT FOR U.S. JUDGES, Canons 1-4 (JUD. CONF. OF THE U.S. 1973).

rather than mandatory, approach to the language, with the exception of the issue of disqualification—found in Canon 3C—where the mandatory "shall" language is used.[77]

The Judicial Conference's decision in 1973 to adopt a federal code of ethics demonstrates the effect the public scandals had on the Court. Chief Justice Burger, whom Nixon appointed to replace Warren, signaled to the public that the judiciary was capable of addressing judicial misconduct on its own and without congressional intervention. Interestingly, Chief Justice Burger's work with the ABA and Judicial Conference seemed to both draw lessons from Chief Justice Taft's response to the Landis scandal and foreshadowed the approach that Chief Justice Roberts is taking today.

Ironically though, while the motivation for adopting the Code of Judicial Conduct for United States Judges was in direct response to Supreme Court Justice Fortas's ethics scandals, the Judicial Conference did not, and has not, applied the code to the Supreme Court. Just as the 1924 Canons were a response to but didn't address the Landis scandal, so too the 1973 code was a response to but didn't address the Fortas scandal. By not applying the code to the Supreme Court, and not making it mandatory and enforceable upon any judges or Justices, there is simply nothing that the ABA or Judicial Conference did in the wake of the Fortas scandal that would make it illegal for a future Justice to do the same thing. The courts responded to the scandal and the public pressure that followed, just not in a way to prevent it from happening again.

IV. 2011 SCANDALS LEAD TO SMALL RESPONSE FROM THE COURT ITSELF

Nearly half a century after the Fortas scandal, Chief Justice Roberts entered the judicial ethics fray for the first time when he used his 2011 Year-End Report to respond to brewing criticisms that sitting members of the Supreme Court violated the Court's recusal customs during a high-profile political case.

In November 2011, the Supreme Court agreed to hear oral arguments in *National Federation of Independent Business v. Sebelius*,[78] a case challenging the constitutionality of President Obama's landmark legislative achievement, the Affordable Care Act ("ACA").[79] From the

77. McKeown, *supra* note 5, at 196 (observing that the 1990 revisions added "shall" language to the mandatory standards for state judges); *see* CODE OF CONDUCT FOR U.S. JUDGES, Canon 3(C)(1).

78. 567 U.S. 519 (2012).

79. Adam Liptak, *Justices to Hear Health Care Case as Race Heats Up*, N.Y. TIMES (Nov. 14, 2011), https://www.nytimes.com/2011/11/15/us/supreme-court-to-hear-case-challenging-health-

moment the ACA was passed, there were fierce political battles over the legislation, including several unsuccessful attempts by Republicans to repeal it. Crucially, twenty-six states, private groups, and individual plaintiffs filed several legal challenges to the legislation—challenges that were well-known to be destined for the Supreme Court.[80] It was against this fierce partisan backdrop that Justices Kagan and Thomas failed to recuse themselves from the decision in November 2011 to hear *Sebelius* despite seeming conflicts of interest. Justice Kagan failed to recuse despite previously defending the ACA as Solicitor General during the Obama Administration, and Justice Thomas failed to recuse despite his wife's vocal public position against the law, as well as the fact that she had received over $700,000 for her work in opposition of the Act.[81] Although both Justice Kagan and Justice Thomas also went on not to recuse when the Court heard oral argument in *Sebelius* in March 2012, public pressure on them to recuse began long before *Sebelius* even ended up on the Court's docket.[82]

The issue surrounding recusal happened in the context of growing calls for ethics reform at the Supreme Court. Throughout 2011, there were calls from watchdog organizations, Congress, and legal scholars for the Court to protect the institution's integrity after reports that Justice Thomas was accepting favors from Harlan Crow, as well as calls for his and Justice Kagan's recusal in the anticipated health care case.[83] At the beginning of 2011, the advocacy group Common Cause requested that the Department of Justice investigate Justices Thomas and Scalia's decision not to recuse the prior year in the landmark campaign finance case that unleashed dark money into our electoral system, *Citizens United v.*

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law.html [https://perma.cc/65MZ-Q682]; *see Calls for Recusal Intensify in Health Care Case*, ABC NEWS (Nov. 20, 2011), https://abcnews.go.com/Politics/calls-recusal-intensify-health-care-case/story?id=14995371 [https://perma.cc/4CES-QLCX].

80. *See Calls for Recusal Intensify in Health Care Case*, *supra* note 79.

81. *See* Carmen Abella, *"Bias Is Easy to Attribute to Others and Difficult to Discern in One-self": The Problem of Recusal at the Supreme Court*, 33 GEO. J. LEGAL ETHICS 339, 339-40 & n.7 (2020).

82. *See Calls for Recusal Intensify in Health Care Case*, *supra* note 79; *see also* Letter from Christopher S. Murphy, U.S. Sen., et al., to Lamar Smith, Chairman, H. Judiciary Comm., & John Conyers, Jr., Ranking Member, H. Judiciary Comm. (Sept. 9, 2011), https://www.documentcloud.org/documents/243226-house-democrats-letter-of-supreme-court-ethics.html [https://perma.cc/95P8-RYRZ].

83. *See* Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES (June 18, 2011), https://www.nytimes.com/2011/06/19/us/politics/19thomas.html [https://perma.cc/6JLH-K23K]; *Calls for Recusal Intensify in Health Care Case*, *supra* note 79; Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, NPR (Aug. 17, 2011, 12:01 AM), https://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices [https://perma.cc/D6L3-HF54].

FEC,[84] citing their attendance at a political retreat organized by the Koch brothers, who supported groups that stood to benefit from the Court's decision.[85]

Joining the chorus of calls, in March 2011, 138 law professors sent a letter to the House and Senate Judiciary Committees urging Congress to consider legislation that would require the Supreme Court to adhere to the Judicial Conference's Code of Conduct, which had applied to lower court federal judges since the Fortas scandal.[86] The 138 professors emphasized that "[t]he purpose of [their] letter [was] to issue a nonpartisan call for the implementation of mandatory and enforceable rules to protect the integrity of the Supreme Court."[87] Later that same month, Congress responded to the controversies by introducing a bill that would require the Supreme Court to follow the same ethics code as lower court judges.[88] The sponsor of the bill, Representative Chris Murphy (D-Conn.), cited concerns over the Justices' impartiality in the health care case, which was anticipated to be heard by the Court, as well as Justice Thomas's wife's ties to groups opposed to the health care bill as factors in his decision to introduce the bill.[89]

Public outcry continued throughout 2011 and into 2012, with the Supreme Court denying without comment a motion filed by the advocacy group Freedom Watch, arguing that Justice Kagan should not participate in the case.[90] Op-eds from both the right and left called upon Justice Kagan to recuse, pointing to the fact that she was on an email exchange during her time as Solicitor General that discussed the litigation strategy

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84. 558 U.S. 310 (2010).

85. McIntire, *supra* note 83.

86. Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of* NFIB v. Sebelius, 47 VAL. U. L. REV. 883, 887 (2013).

87. *Id.* (quoting Letter from Mark N. Aronson, Professor of L., Univ. of Cal. Hastings Coll. of L., et al., to Patrick Leahy, Chairman, S. Judiciary Comm. (Mar. 17, 2011), https://web.archive.org/web/20170214102915/http://www.afj.org/wp-content/uploads/2013/09/judicial_ethics_sign_on_letter.pdf [https://perma.cc/U6GD-2ZA3].

88. Eric Lichtblau, *Democrats Seek to Impose Tougher Supreme Court Ethics*, N.Y. TIMES (Sept. 8, 2011, 6:43 PM), https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2011/09/08/democrats-seek-to-impose-tougher-supreme-court-ethics [https://perma.cc/76DM-WHZ5]; *see* Dierdre Shesgreen, *Murphy Proposing Bill on Supreme Court Ethics*, CT MIRROR (Feb. 22, 2011, 12:00 AM), https://ctmirror.org/2011/02/22/murphy-proposing-bill-supreme-court-ethics [https://perma.cc/A68R-8HW8].

89. Shesgreen, *supra* note 88.

90. Bill Mears, *High Court Turns Aside Recusal Request on Health Care Challenge*, CNN (Jan. 23, 2012, 5:57 PM), https://www.cnn.com/2012/01/23/politics/scotus-health-care-recusal/index.html [https://perma.cc/B8UN-BJG4].

for the health care law.[91] Another advocacy group, Judicial Watch, similarly raised alarm after Justice Kagan's refusal to recuse, while the liberal group, People for the American Way, posted a letter on its website claiming that Justice Thomas should similarly recuse because his wife derived income from leading groups working to repeal the law.[92]

Only a few weeks after Justices Kagan and Thomas's initial refusal to recuse from *Sebelius* during the certiorari stage, Chief Justice Roberts responded to the public outcry and congressional legislation to require the Court to follow the Code of Conduct for United States Judges in his 2011 Year-End Report on the Federal Judiciary, which sought to "provide some clarification on how the Justices address ethical issues and dispel some common misconceptions."[93] The report noted that the Judicial Conference's Code of Conduct "by its express terms" applies only to lower court judges but made clear that members of the Supreme Court "do in fact consult the Code of Conduct in assessing their ethical obligations."[94]

The Chief Justice then went on to put Congress on notice that the Court "has never addressed" Congress's constitutional authority to prescribe ethics rules for the Supreme Court.[95] Nonetheless, the Chief Justice decided to put his thumb on the scale. He argued that "Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts."[96] Because Congress created the Judicial Conference to oversee those courts it had the power to establish, the Judicial Conference, according to the Chief Justice, could not regulate the Supreme Court, over which it has no power.[97] The Chief Justice then argued that the Supreme Court doesn't need an ethics code and seemed to suggest that Congress doesn't have the constitutional authority to impose one.

Several legal scholars, including Professors Richard Painter, Stephen Gillers, and Steven Lubet, have taken issue with the Chief Justice's analysis as overlooking pertinent legal or practical considerations and

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91. *See, e.g.*, Eric Segall, *A Liberal's Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011, 4:07 PM), https://slate.com/news-and-politics/2011/12/obamacare-and-the-supreme-court-should-elena-kagan-recuse-herself.html [https://perma.cc/596B-CK4R].

92. Ariane de Vogue, *Groups Suggest Elena Kagan, Clarence Thomas Should Be Recused from Health Law Challenge*, ABC NEWS (Nov. 16, 2011), https://abcnews.go.com/blogs/politics/2011/11/groups-suggest-elena-kagan-clarence-thomas-should-be-recused-from-health-law-decision [https://perma.cc/SU83-4X6Q].

93. ROBERTS, *supra* note 13, at 3.

94. *Id.* at 3-4.

95. *Id.* at 6.

96. *Id.* at 4.

97. *Id.*

ignoring the fact that every state supreme court has adopted a version of the code that fits the particular state judiciary it governs.[98] It is also in direct tension with the court as contemplated by the Constitution: one that is a co-equal branch of government designed to check the other two elected branches. The fact that the Supreme Court has unique sensibilities to take into account should inform the type of code the Court adopts, not whether it adopts one at all.

The irony of the Chief Justice's 2011 report is that he likely thought he was effectively responding to the recusal crises that had plagued the Court in the past year. Like his predecessors Chief Justices Taft, Warren, and Burger, Chief Justice Roberts saw a brewing crisis that threatened the legitimacy of the judiciary and recognized that a response was necessary in order for the public to continue to perceive the high court as legitimate. But Chief Justice Roberts's fatal flaw in 2011 was the same as Chief Justice Taft and Chief Justice Warren's fatal flaws in the 1920s and 1968, respectively; his response was wildly insufficient. While, from his position, a public report focused on judicial ethics might seem like a watershed moment, without there being any new rules, standards, or enforcement mechanisms to prevent future crises, his words were just that—words. He, like his predecessors, failed to adequately respond to public outrage and failed to adopt a new framework that would prevent the precipitating recusal scandal in the first place.

V. 2011 TO NOW: MODERN-DAY SCANDALS AND HOW TO RESPOND EFFECTIVELY

At the end of 2023, the Chief Justice and the Court attempted to respond to immense public criticism by promulgating a new Code of Conduct for the Supreme Court.[99] Unfortunately, the Chief Justice and his colleagues have fallen into the same trap as their predecessors by failing to enact meaningful change that meets the moment and would prevent the precipitating crises.

In the past fifteen years, Supreme Court Justices have come under fire for a variety of unethical behaviors, much of which would undoubtedly be violations of the Code of Conduct for United States Judges if they were subject to it and some of which may be violations of laws that do apply to the Supreme Court, like the Ethics in Government Act,

98. Lubet & Diegel, *supra* note 86, at 886-87; *see* Letter from Legal Ethics Scholars to John G. Roberts, Jr., C.J., U.S. Sup. Ct. (Feb. 3, 2022), https://www.law.nyu.edu/sites/default/files/Scholars%27%20letter%20to%20CJ%20Roberts%202.3.22.pdf [https://perma.cc/RU9K-PLTQ].

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

which requires financial disclosures.[100] These unethical behaviors run the gamut from giving undisclosed speeches to litigants who appear before the Court to failing to recuse themselves from cases where a Justice has a personal or financial conflict of interest to participating—whether willfully or unknowingly—in schemes like Operation Higher Court, where the religious right wined and dined Supreme Court Justices in an effort to curry favor and influence Justices and, in at least one instance, learned the outcome of a high-profile case before the Court released its decision.[101] As a result of these scandals and more, the public's confidence in the Court is at the lowest point since Gallup began polling the question.[102]

Recent scandals that have plagued Justice Thomas are particularly troubling. As early as 2011, good government groups uncovered evidence that Justice Thomas had failed to disclose, as required by law, nearly $700,000 of payments from the Heritage Foundation to his wife when he checked "none" where "spousal noninvestment income" was required to be disclosed on his financial disclosure forms.[103] Justice Thomas similarly failed to report his wife's income from Liberty Central, a conservative consulting firm she founded.[104] These failures to disclose are in and of themselves troubling because they fail to give the public an accurate picture of the outside forces that may influence a Justice's deliberations. But more recent reporting has made clear that these omissions are just the tip of the iceberg.

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100. For example, 5 U.S.C. § 13106 requires federal officials, including Supreme Court Justices, to file annual financial disclosure forms that detail outside income and spouses' sources of income, among other things. 5 U.S.C. § 13106. Sanctions for violation include civil and criminal penalties. *Id.* Moreover, 5 U.S.C. § 7353 bars Supreme Court Justices and lower court judges from soliciting or accepting gifts from anyone seeking official action from, or doing business before, their court, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's official duties. *Id.* § 7353. The penalty for violating mainly consists of administrative and disciplinary action. *Id.* Finally, 28 U.S.C. § 455, known as the "disqualification statute," requires all federal judges, including Supreme Court Justices, to recuse themselves from any judicial proceedings in which their impartiality might reasonably be questioned. 28 U.S.C. § 455(a).

101. Peter S. Canellos & Josh Gerstein, *'Operation Higher Court': Inside the Religious Right's Efforts to Wine and Dine Supreme Court Justices*, POLITICO (July 8, 2022, 3:15 PM), https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739 [https://perma.cc/MH4T-295Y].

102. Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, A New Low*, GALLUP (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx [https://perma.cc/3CTL-JR7A].

103. Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, L.A. TIMES (Jan. 22, 2011, 12:00 AM), https://www.latimes.com/politics/la-xpm-2011-jan-22-la-na-thomas-disclosure-20110122-story.html [https://perma.cc/HMC4-F5WK].

104. *Id.*

Reporting by *ProPublica* in 2023 further revealed that for more than two decades, Justice Thomas failed to disclose a large volume of gifts, transactions, and other benefits he received over the course of his over twenty-year financial relationship with Harlan Crow, a billionaire political activist who has had business before the Court.[105] The facts are truly shocking. Justice Thomas accepted and did not disclose, as likely required by law, tuition payments for his grandnephew's private school.[106] For almost a decade, Justice Thomas accepted and did not disclose, as required by law, as many as thirty-eight destination vacations, including trips aboard Mr. Crow's "superyacht"; twenty-six private flights, plus an additional eight by helicopter; "a dozen VIP passes to professional and college sporting events[;] two stays at luxury resorts in Florida and Jamaica; and one standing invitation to an uber-exclusive golf club overlooking the Atlantic coast."[107] Justice Thomas purchased a luxury RV, the cost of which was underwritten by another billionaire, Anthony Welters, for $267,230, failing to repay a significant portion—or possibly all—of the principal, with the outstanding debt forgiven nine years after the purchase. Justice Thomas failed to disclose both the loan and debt forgiveness.[108] And, in what might be the most jaw-dropping revelation, Justice Thomas failed to disclose, as required by law, the sale of three Savannah, Georgia, properties to Mr. Crow, one of which was

105. *See* Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM) [hereinafter Kaplan et al., *Clarence Thomas and the Billionaire*], https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/VDS3-JZ4X]; 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/87MK-9SK4]; Joshua Kaplan et al., *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023, 6:00 AM) [hereinafter Kaplan et al., *Private School*], https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/7K3R-UWYR]; Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, 5:45 AM) [hereinafter Murphy & Mierjeski, *Clarence Thomas' 38 Vacations*], https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court [https://perma.cc/3Q7G-94HQ].

106. Kaplan et al., *Private School*, *supra* note 105; *see* @MarkPaoletta, TWITTER (May 4, 2023, 7:31 AM), https://twitter.com/MarkPaoletta/status/1654086444594483200 [https://perma.cc/8CX5-BW5N].

107. Kaplan et al., *Clarence Thomas and the Billionaire*, *supra* note 105; Murphy & Mierjeski, *Clarence Thomas' 38 Vacations*, *supra* note 105.

108. *See* Jo Becker & Julie Tate, *Clarence Thomas's $267,230 R.V. and the Friend Who Financed It*, N.Y. TIMES (Aug. 5, 2023), https://www.nytimes.com/2023/08/05/us/clarence-thomas-rv-anthony-welters.html [https://perma.cc/39FN-LAJZ]; Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html [https://perma.cc/3WCJ-G8PQ].

Justice Thomas's boyhood home, as well as the fact that his mother continues to reside at one of the properties that Mr. Crow now owns rent-free.[109] Justice Thomas over the years has also drawn significant scrutiny for his wife's overt political activism and its relation to his position, including his refusal to recuse in cases where his wife might have had an interest in the outcome of the case.[110]

Through these entanglements Justice Thomas seems to have repeatedly violated the Ethics in Government Act, which requires annual reporting of gifts to covered officials as well as their spouse or dependent child, and the Judicial Conference Regulations on Gifts, which implements federal statutes that prohibit the giving, solicitation, or acceptance of certain gifts by officers and employees of the judicial branch.[111] But, perhaps most importantly, Justice Thomas, through his failure to disclose, created the impression that access to and influence over Supreme Court Justices is for sale.[112]

VI. PUBLIC RESPONSE TO THE MOST RECENT SCANDALS

When compared to the Landis and Fortas scandals, Justice Thomas's misconduct is far more expansive. As a result, his repeated ethical scandals have been met with intense criticism from the public and

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109. Elliott et al., *supra* note 105; Ariane de Vogue, *Clarence Thomas to Amend Financial Disclosure Forms to Reflect Sale to GOP Megadonor*, CNN (Apr. 17, 2023, 8:02 PM), https://www.cnn.com/2023/04/17/politics/clarence-thomas-amend-disclosure-gop-megadonor/index.html [https://perma.cc/UUT7-BWJJ].

110. Emma Brown et al., *Judicial Activist Directed Fees to Clarence Thomas's Wife, Urged 'No Mention of Ginni,'* WASH. POST (May 4, 2023, 7:15 PM), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway [https://perma.cc/F9VA-ETW3].

111. Jeremy Fogel & Noah Bookbinder, *Building Public Confidence: How the Supreme Court Can Demonstrate Its Commitment to the Highest Ethical Standards*, CREW (Aug. 9, 2023), https://www.citizensforethics.org/reports-investigations/crew-reports/building-public-confidence-how-the-supreme-court-can-demonstrate-its-commitment-to-the-highest-ethical-standards [https://perma.cc/BA5K-F357] ("Sanctions for violation of the [Ethics in Government] Act include civil and criminal penalties, although a Supreme Court Justice has never been charged with violating the Act and proceedings involving lower court judges are exceedingly rare."); *see* 5 U.S.C. §§ 13101, 13103; 2 ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY pt. C, ch. 6 (2021).

112. *See* Letter from Citizens for Responsibility and Ethics in Government in Washington to John G. Roberts, Jr., C.J., U.S. Sup. Ct. & Merrick B. Garland, Att'y Gen., U.S. Dep't of Just. (Apr. 14, 2023) [hereinafter CREW Letter (Apr. 14, 2023)], https://www.citizensforethics.org/wp-content/uploads/2023/04/Justice-Clarence-Thomas-DOJ-Complaint-April-14-2023-5.pdf [https://perma.cc/R9HY-8F67]; Letter from Citizens for Responsibility and Ethics in Government in Washington to John G. Roberts, Jr., C.J., U.S. Sup. Ct. & Merrick B. Garland, Att'y Gen., U.S. Dep't of Just. (May 5, 2023) [hereinafter CREW Letter (May 5, 2023)], https://www.citizensforethics.org/wp-content/uploads/2023/05/Justice-Clarence-Thomas-Amendment-to-Legal-Complaint-May-5-2023.pdf [https://perma.cc/472M-QHSN].

legislative branch, with petitions calling for his removal getting over one million signatures, and watchdog groups filing complaints with the Department of Justice and the Judicial Conference requesting investigations of Justice Thomas's conduct.[113]

In Congress, members of both the House and Senate joined the chorus calling for investigations into Justice Thomas's actions, with some calling for his resignation and/or impeachment.[114] Several bills were introduced in the 118th Congress to impose a binding code of conduct on the Court (or require the Supreme Court to impose one of its own), including the SCERT Act; the Supreme Court Ethics Act; and the Judicial Ethics and Anti-Corruption Act.[115] But despite SCERT being voted out of committee, these legislative vehicles have failed to gain sustained traction, leading one to wonder if the sheer volume of Justice Thomas's ethical misconduct has inhibited the public from focusing its ire and honing in on the need for passing specific legislation.

Both the Senate Judiciary Committee and Senate Finance Committee launched high-profile investigations into Justice Thomas's conduct, with the Finance Committee looking into the terms of the aforementioned private loan made to Justice Thomas in 1999 to purchase a luxury RV.[116] The Senate Judiciary Committee, meanwhile, undertook a broader investigation into Justice Thomas's undisclosed gifts and travel in an

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113. *Impeach Justice Clarence Thomas*, MOVEON, https://sign.moveon.org/petitions/clarence-thomas-must-go [https://perma.cc/K3YV-6XNY] (last visited Apr. 15, 2024); *see* Olafimihan Oshin, *Petition Calling for Clarence Thomas Removal from Supreme Court Gets 1M Signatures*, HILL (July 6, 2022, 4:51 PM), https://thehill.com/homenews/state-watch/3548012-petition-calling-for-clarence-thomas-removal-from-supreme-court-gets-1m-signatures [https://perma.cc/QJE6-9N5J]; Email from Walter M. Shaub, Jr. & Sarah Tuberville to Brian M. Boynton, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just. (Apr. 16, 2023), https://www.pogo.org/policy-letters/pogo-calls-for-doj-to-investigate-clarence-thomas-seek-civil-penalties [https://perma.cc/C8GB-T69J]; Letter from Campaign Legal Center to Hon. Roslynn R. Mauskopf, Jud. Conf. Sec'y, Admin. Off. of the U.S. Courts (Apr. 11, 2023), https://campaignlegal.org/sites/default/files/2023-04/Judicial%20Conference%20Letter-FINAL.pdf [https://perma.cc/5QLG-T6CU]; CREW Letter (Apr. 14, 2023), *supra* note 112; CREW Letter (May 5, 2023), *supra* note 112.

114. *See* Zach Schonfeld, *Democrats Express Outrage Over Clarence Thomas Luxury Travel Report*, HILL (Apr. 6, 2023, 12:08 PM), https://thehill.com/regulation/court-battles/3937511-democrats-express-outrage-over-clarence-thomas-luxury-travel-report [https://perma.cc/4454-ZS3N]; Martin Pengelly, *AOC Leads Call for Federal Ethics Investigation into Clarence Thomas*, GUARDIAN (Aug. 12, 2023), https://www.theguardian.com/us-news/2023/aug/12/aoc-democrats-federal-investigation-clarence-thomas [https://perma.cc/9PRU-LH27].

115. *See* Supreme Court Ethics, Recusal, and Transparency Act of 2023, H.R. 926, 118th Cong. (2023); Supreme Court Ethics Act, S. 325, 118th Cong. (2023); Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. (2023).

116. Robert Barnes & Ann Marimow, *Clarence Thomas's RV Loan Was Forgiven, Senate Committee Report Says*, WASH. POST (Oct. 23, 2023, 6:28 PM), https://www.washingtonpost.com/politics/2023/10/25/clarence-thomas-rv-loan-forgive [https://perma.cc/G9QV-NHHW].

effort to prevent future misconduct.[117] As a part of that effort, the Committee announced that it was planning to subpoena Justice Thomas's benefactor, Harlan Crow, among other conservative judicial activists, including Leonard Leo.[118] But, before announcing that intention, the Committee first invited Chief Justice Roberts to testify.[119] In his response declining to testify, the Chief Justice cited the lack of precedent for such testimony, as well as separation of powers issues and judicial independence.[120] But he nonetheless attached to the letter a document, signed by all nine Justices, that caught Congress and the public by surprise. Entitled "Statement on Ethics Principles and Practices," the document purported to summarize the ethics rules, statutes, and other guiding documents and principles seemingly followed by the Court.[121] Crucially, nothing in this document created—or hinted at creating—a mechanism to enforce even these tepid ethics rules at the high court.

VII. WHERE TO GO FROM HERE

Proving that the Court is not blind to the growing crescendo of public criticism, beginning in 2023, Justices Kagan, Kavanaugh, and Barrett all publicly confirmed either that there were discussions about the Supreme Court adopting a code of ethics to govern the Justices' behavior or that adopting such a code would be a good idea.[122]

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117. Michael Macagnone, *Crow Sidesteps Panel's Question About Gifts to Clarence Thomas*, ROLL CALL (May 23, 2023, 3:14 PM), https://rollcall.com/2023/05/23/crow-sidesteps-panels-questions-about-gifts-to-clarence-thomas [https://perma.cc/J9PF-EH4Y].

118. John Kruzel & Andrew Chung, *US Senate Democrats Scrub Vote on Supreme Court Ethics Subpoenas*, REUTERS (Nov. 9, 2023, 1:36 PM), https://www.reuters.com/world/us/us-senate-democrats-vote-supreme-court-ethics-probe-subpoenas-2023-11-09 [https://perma.cc/76SM-4U2U]; 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/HQ89-6DNX].

119. *See* Letter from Richard Durbin, Chair, U.S. S. Comm. on the Judiciary, to John G. Roberts, Jr., C.J., U.S. Sup. Ct. (Apr. 20, 2023), https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf [https://perma.cc/2HY4-LWHT].

120. Letter from John G. Roberts, Jr., 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/P3LT-DA7Q].

121. *Id.*

122. *See* Claire Rush, *Justice Kagan Supports Ethics Code but Says Supreme Court Divided on How to Proceed*, ASSOCIATED PRESS, https://apnews.com/article/elena-kagan-supreme-court-oregon-ethics-4b70b05db01eabfee58fd245d75b8cbb [https://perma.cc/BA26-SV32] (Aug. 3, 2023); Julie Carr Smyth, *Supreme Court Justice Kavanaugh Predicts 'Concrete Steps Soon' to Address Ethics Concerns*, ASSOCIATED PRESS, https://apnews.com/article/supreme-court-justice-kavanaugh-ethics-thomas-76c1e5474093d17127707535ccdea852 [https://perma.cc/VR72-A9G6] (Sept. 7,

Around the same time, beginning as early as February 2023, Chief Justice Roberts began to signal to the public that the Court was discussing adopting a code of conduct.[123] Indeed, reports indicate that these discussions have been happening for at least four years.[124] In fact, in 2019, Justice Kagan testified before the House Appropriations Subcommittee on Financial Services and General Government that the "Chief Justice [was] studying whether the Supreme Court should have its own ethics code."[125] Moreover, during her testimony, Justice Kagan acknowledged that the Court was aware of the public's perception that it does not play by the same rules as everyone else.[126]

On November 13, 2023, the Supreme Court finally released a Code of Conduct to "set out succinctly and gather in one place the ethics rules and principles that guide the conduct" of the Justices.[127] The historic nature of this Code should not be understated, particularly its acknowledgment that it was done to "dispel [the] misunderstanding" in recent years that "the Justices . . . unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[128] The Court's explicit acknowledgment that it hears the cries of the public is crucial, because without it the Court likely would not have released the Code.

Borrowed in large part from the language used in the Code of Conduct for United States Judges, the new Code is a good first step, but it is just that: a first step. That is because the new Code is riddled with the lower court code's permissive ("should") rather than mandatory ("shall") language.[129] This permissive language, while troubling, is workable at

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2023, 4:23 PM); Lawrence Hurley, *Justice Amy Coney Barrett Says Ethics Rules for the Supreme Court Would Be a 'Good Idea*,*'* NBC NEWS (Oct. 16, 2023, 6:16 PM), https://www.nbcnews.com/politics/supreme-court/amy-coney-barrett-says-supreme-court-ethics-rules-good-idea-rcna120718 [https://perma.cc/2ZNW-22YA].

123. Ariane de Vogue, *Chief Justice John Roberts Seeks to Assure the Public About the Supreme Court's Ethics*, CNN (May 23, 2023, 11:29 PM), https://www.cnn.com/2023/05/23/politics/john-roberts-supreme-court-ethics/index.html [https://perma.cc/PMF2-UKKV].

124. Alison Durkee, *Supreme Court Justices Reportedly Can't Figure Out How to Adopt Ethics Code Amid Controversies*, FORBES (Feb. 9, 2023, 4:46 PM), https://www.forbes.com/sites/alisondurkee/2023/02/09/supreme-court-justices-reportedly-cant-figure-out-how-to-adopt-ethics-code-amid-controversies [https://perma.cc/DM3W-ENTE].

125. Robert Barnes, *Supreme Court Justices Tell Congress They Are Not Considering Televising Hearings*, WASH. POST (Mar. 7, 2019, 6:39 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html [https://perma.cc/U9QK-GZE4].

126. *Id.*

127. *Statement of the Court Regarding the Code of Conduct*, *supra* note 16.

128. *Id.*

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

the lower court level because there are mechanisms within the Administrative Office of the U.S. Courts and U.S. Judicial Conference to file complaints against judges who violate the code of conduct.[130] At the Supreme Court level, however, there is no enforcement framework.[131] Because there is no place that the public can go to file misconduct complaints, the Supreme Court's "should" language is highly problematic. Given that permissive language, perhaps it is unsurprising that the Court uses the preamble to the Code as an opportunity to go out of its way to make clear that these rules "are not new."[132]

But the Code's lack of an enforcement mechanism isn't the only concern.[133] The new Code is so full of loopholes that it seems to still permit some of the scandalous actions that Justice Thomas did in the first instance that led to the Code's adoption. For example, because the Code does not mandate compliance with the Judicial Conference Regulations on Gifts nor create an enforcement mechanism for such compliance like those applicable to lower court federal judges, Justice Thomas may still be able to have billionaires and political activists subsidize his lifestyle, including taking future vacations on Harlan Crow's "superyacht."[134]

What these loopholes show is that, as consequential as the Code is, the Chief Justice's new Code falls short—just like the reform efforts led by Chief Justices Warren, Taft, and Burger did—because it doesn't create a singular new enforceable rule for the Justices to follow that would have prevented the Justice Thomas scandals in the first place. Furthermore, given that it is signed by the nine current Justices, it is unclear whether this Code only applies to them or will apply to future Justices as well. In truth, what the Court and Chief Justice Roberts have done is begun a conversation. The Court is telling us that it hears the public outcry, acknowledges its potential for institutional damage, and is attempting to solve it. In that vein, what the Code should really be seen as is a signal from the Court that the door to conversation between the Court and the public is open. In fact, in the commentary to the Code, the Court acknowledges that it has a ways to go and gives Congress and the public

130. Virginia Canter & Gabe Lezra, *The Supreme Court's Toothless Code of Conduct Is an Important Step, but Leaves Much to Be Desired*, CREW (Nov. 17, 2023), https://www.citizensforethics.org/news/analysis/the-supreme-courts-toothless-code-of-conduct-is-an-important-step-but-leaves-much-to-be-desired [https://perma.cc/G9F3-NZ35].

131. *Id.*

132. *Statement of the Court Regarding the Code of Conduct*, *supra* note 16.

133. The Supreme Court's new Code of Conduct has a number of concerns, many of which (including issues related to recusal) are not discussed in this paper. For a discussion about the Code's shortfalls, please refer to CREW's analysis of the code. Canter & Lezra, *supra* note 130.

134. *See supra* note 107 and accompanying text.

an opening for further advocacy by stating that "[t]he Court will assess whether it needs additional resources in its Clerk's Office or Office of Legal Counsel to perform initial and ongoing review of recusal and other ethics issues."[135] Taking the Justices at their word, the public needs to continue to talk with the Court so that it doesn't squander the moment like it did in the wake of the Landis and Fortas scandals.

VIII. CONCLUSION

Ethics scandals by sitting judges and Justices are not new, nor is intense public backlash to their behavior. In fact, we've seen over the past 100 years a predictable call and response between judicial misconduct and public pressure, where a member of the judiciary engages in unethical behavior and the public demands change. But each of those times, the changes have fallen shockingly short. With the Judge Landis scandal, the ABA created a model code, but the federal judiciary failed to adopt it.[136] The response to the Justice Fortas scandal similarly failed to meet the moment, because although it led to the Code of Conduct for United States Judges, that code was never extended to the Supreme Court, even though that's where the scandal originated.[137] So too Chief Justice Roberts's 2011 Year-End Report was a watershed moment that continued the conversation over judicial ethics between the Court and the public, but it failed to include a singular new enforceable rule of conduct for the Justices.[138]

Looking at this history, and understanding the role of public pressure, how it has succeeded, and where it has fallen short, can help guide us through today's crises. If the Roberts Court wants to be synonymous with a more ethical and transparent judiciary, it needs to leave the Taft, Warren, and Burger playbook of half measures behind. Instead, it needs to adopt binding rules backed up by enforcement mechanisms that would prevent Thomas's misconduct, Fortas's misconduct, and the misconduct of others to follow. Because when the powerful are not held to the highest ethical standards their positions demand, and consequently do not behave ethically, the public will eventually and inevitably question the legitimacy of their power. The Roberts Court took a step forward in avoiding that eventuality, but now more must be done.

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135. COMMENTARY ON CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. 14 (U.S. SUP. CT. 2023).

136. McKeown, *supra* note 5, at 192-93.

137. *Id.* at 195-97.

138. *See supra* Part IV.