Edmond & Lily Safra Center for Ethics
Carr Center for Human Rights Policy

SUPREME COURT ETHICS:

IS THE COURT REALLY THE

LEAST DANGEROUS BRANCH

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February 22, 2024

I thank the Safra Center for Ethics and the Carr Center for Human Rights Policy for the opportunity to speak to you, as an individual and not a representative of the judiciary, on "Supreme Court Ethics: Is the Court Really 'The Least Dangerous Branch,'" as Alexander Hamilton famously wrote in advocating for adoption of the Constitution in 1788.

In 1969, Supreme Court Justice Abe Fortas resigned in response to bipartisan outrage in the Congress because he had accepted, and subsequently returned, a $20,000 consulting fee from a foundation headed by a man being investigated by the Department of Justice and eventually convicted of securities fraud.[1]

In 1973, the Judicial Conference of the United States, which is chaired by the Chief Justice of the Supreme Court, issued a Code of Conduct for all federal judges except for Supreme Court Justices.

In November 2023, following mounting demands for Supreme Court ethics reform, the Court adopted, for the first time, a Code of Conduct stating the "ethics rules and principles that guide" it.[2] Critical comments concerning the Code largely focused on its failure to provide a mechanism to enforce it or sanctions for Justices who violate it.[3] As I said in testimony in the Senate last May, enforcement of any voluntary code is a major issue.

However, that is not in my view the greatest defect in the Supreme Court Code. That defect is its subtle but significant departure from the ethics statutes enacted to ensure the impartiality of the federal judiciary. Those laws govern both federal judges and Justices. However, the Code includes provisions that either conflict with or exempt the Justices from these statutory obligations. In other words, through its adoption of the Code, the Supreme Court has essentially asserted the power, if not the right, to disobey laws enacted by Congress and the President. Thus, the Code undermines the system of checks and balances that safeguard our constitutional democracy, threatens the impartiality of the Supreme Court, and jeopardizes crucial public confidence in the federal judiciary.

The issues I am discussing today can be best understood in the context of the constitutional architecture of the federal government. As many but perhaps not all of you know, the United States Constitution is fundamentally based on Lord Acton's observation that "power tends to corrupt and absolute power corrupts absolutely."[4] To reduce this risk, the powers of the federal government are divided between three branches: the Legislature – the Congress; The Executive – the President; and the Judiciary – the courts. The three branches of government are not separate silos. The Supreme Court itself has "squarely rejected the argument that the Constitution contemplates a complete

division of authority between the three branches."[5] Rather, they are intended to provide essential checks and balances to each other. For example, generally no law can be enacted without the approval of both Congress and the President.

As I said earlier, in 1788, Alexander Hamilton wrote that the judiciary would always be the least dangerous branch because the President had military power and the courts would have to rely on the Executive to enforce their judgments. In addition, Congress would be more powerful than the courts because it controlled spending and, Hamilton wrote, "prescribes the rules by which the duties and rights of <u>every</u> citizen are to be regulated."[6]

Hamilton argued that, although the Constitution does not expressly provide it, the courts must necessarily have the power to declare that statutes enacted by Congress and the President are invalid in order to assure that elected officials do not exercise powers not given to them by the people in the Constitution.[7] To perform this important role without fear of retribution for their inevitable unpopular decisions, federal judges would have life tenure and not be subject to election. In this way, the Constitution created an independent judiciary. However, the independence of the judiciary is not an end in itself.

Every United States Justice and judge takes an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and <u>impartially</u>

discharge and perform all the duties" of his or her office.[8] As this oath reflects, it is the most fundamental duty of every Justice and judge to decide cases impartially, without fear or favor.

As I learned in Slovakia years ago, an independent judiciary is not necessarily an impartial judiciary. It could be a dishonest, unaccountable judiciary. Therefore, there must be means of determining whether a Justice or judge is capable of deciding a particular case impartially and whether reasonable, well-informed people can be confident that he or she is doing so. There must also be means of holding Justices and judges accountable if they violate laws intended to assure that they decide cases honestly and impartially.

There are several statutes that have been enacted to do this. As is well known, accepting or soliciting a bribe is a federal crime.[9]. Perhaps less known is the statute that prohibits Justices and judges from soliciting or accepting anything of value from a person whose interests may be substantially affected by the performance of his or her official duties.[10]

However, there are two other statutes that are central to what I am discussing today. They are laws intended to assure that Justices and judges decide cases impartially without injuring their independence in doing so.

One statute, 28 U.S.C. §455, provides that a Justice or judge must disqualify himself or herself if he or she is biased or prejudiced, or if a reasonable person might question his or her impartiality in a particular case even if the Justice or judge is not actually biased or prejudiced.[11]

In part to assure that litigants and the public have the information necessary to be confident that a Justice or judge is capable of performing impartially in a particular case, the 1978 Ethics in Government Act requires that all federal officials, including Justices and judges, make certain financial disclosures annually. Willfully making a false statement in a Financial Disclosure Report, or willfully failing to report required information, is a crime punishable by up to five years in prison.[12]

As I indicated earlier, in 1973 the Judicial Conference promulgated a Code of Conduct for United States Judges.[13] A federal judge can be sanctioned by the judiciary for violating the Code.[14] However, as I also said earlier, Supreme Court Justices are not subject to that Code and until November 2023 were not subject to any Code at all.

The Code of Conduct for United States Judges but not Justices states that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the judiciary."[15] As required by the related statute, §455(a), that Code states that "[a] judge shall disqualify himself or

herself in a proceeding in which the judge's impartiality might reasonably be questioned."[16] Also as required by §455(b), the Code states that a judge shall disqualify himself if he knows that his spouse has "an interest that could be substantially affected by the outcome of the proceeding."[17]

In 2011 and 2012, 6 complaints were made to the Judicial Conference and the Supreme Court that Justice Clarence Thomas had for multiple years failed to report, as required by the Ethics in Government Act, that his wife Ginni Thomas had been employed by the Heritage Foundation, a conservative think tank, and was paid a total of almost $700,000.[18] As I testified in the Senate last year, the Ethics in Government Act required the Judicial Conference to decide if there was reasonable cause to believe that the Justice, who had reported his wife's employment for many years, had willfully falsely stated that she had "none" in the years she worked for and was paid by the Heritage Foundation. If reasonable cause to believe the false statements were made willfully was found to exist, the law required that the Conference refer the Justice to the Attorney General for possible investigation and prosecution. However, Justice Thomas was allowed to file amended Reports and the matter was closed without the 24 members of the Judicial Conference, including me, being informed of the complaints concerning his possible criminal conduct.[19]

The revelations concerning Justice Thomas prompted members of the Senate Judiciary Committee, among others, to urge the Supreme Court to subject itself to the Code of Conduct applicable to all other federal judges in order to increase public trust and confidence in the Court.[20]

In his 2011 Year-End Report on the Federal Judiciary, Chief Justice John Roberts wrote that a Code of Conduct for Supreme Court Justices was not necessary or appropriate, in part because the Justices, like other federal judges, file the statutorily required Financial Disclosure Report annually.[21] He also noted that Justices are subject to §455, the statute requiring a Justice or judge's recusal – meaning disqualification -- in certain circumstances. However, he wrote, the principles of recusal "can differ due to the unique circumstances of the Supreme Court."[22] The Chief Justice concluded that his colleagues were "jurists of exceptional integrity" and, therefore, a Code of Conduct for them was not needed.[23]

Issues concerning the integrity of Justices and the need for a Supreme Court Code of Conduct reemerged with intensity last year. The Ethics in Government Act requires the annual reporting of gifts received by a Justice and his or her spouse, except for gifts received as "personal hospitality. The statute defines personal hospitality as "hospitality extended for a nonbusiness purpose by an individual . . . at the personal residence of that individual"

or property or a facility owned by him his family.[24] The paradigm of personal hospitality is dinner at the home of friends or a weekend at their beach house. The statutory definition of personal hospitality does not include travel paid for by someone else. That travel and the individual or organization that paid for it must, like gifts, be reported annually.[25]

Among other things, in 2023, ProPublica, a non-profit media organization, reported that Justice Thomas had failed to report many gifts from billionaires, including 38 vacations, 26 private flights, and stays at luxury resorts in Florida and Jamaica.[26] ProPublica also wrote that Harlan Crow, a wealthy real estate developer, and contributor to conservative causes and Republicans[27] had paid for some of Justice Thomas' vacations, including on a yacht in Indonesia,[28] and purchased from the Justice his mother's home.[29] The New York Times reported that Anthony Welters forgave a substantial amount of a loan Justice Thomas had used to buy a quarter million dollar motor coach.[30] None of these matters were reported on the Justice's Financial Disclosure Reports as gifts or otherwise as required by the Ethics in Government Act.

In addition, ProPublica reported last year that in 2008 Justice Samuel Alito went for free on a fishing trip to Alaska arranged by Leonard Leo, the head of the conservative Federalist Society and other advocacy organizations.[31] Justice Alito flew for free on the private jet of a hedge-fund billionaire whose

businesses repeatedly had matters in the Supreme Court. The Justice stayed for free for three days at a commercial fishing lodge that charged more than $1000 a day, and was owned by a wealthy donor to conservative causes. Justice Alito did not report these payments as gifts or travel expenses on his Financial Disclosure Report as the law required.

Justices Thomas and Alito are not the only Justices whose conduct raised ethical issues. Justices Sonia Sotomayor and Neil Gorsuch each received advances and royalties from Random House for books they published. Yet neither recused themselves from deciding whether the Supreme Court should hear cases in which Random House was a party.[32] We know this because the payments from Random House were disclosed in their Financial Disclosure Reports.[33] Similarly, former Justice Ruth Bader Ginsburg reported being provided transportation, food, and lodging in 2018, by an Israeli billionaire whose companies previously had business before the Supreme Court.[34]

The revelations concerning Justice Thomas particularly prompted the Chair of the Senate Judiciary Committee and others to call on Chief Justice Roberts to investigate the alleged misconduct and to subject the Supreme Court to an ethical code. The Chair indicated that he would seek to have Congress create a code for the Court by statute if the Supreme Court did not act itself.[35] The Chief Justice declined an invitation to testify on the matter.[36]

However, as I said, in November 2023 the Supreme Court adopted a Code of Conduct.[37]

The Code states that "[a] Justice should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[38] The law, of course, includes §455, the statute that requires that a Justice not participate in a case in certain circumstances. However, the Supreme Court's Code does not reaffirm that statutory mandate. Rather, it undermines it.

The statute unambiguously states that:

> Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

It also states that "[h]e shall disqualify himself" in five specific circumstances. As the Supreme Court has unremarkably written, the word "shall" in a statute "normally creates an obligation impervious to judicial discretion."[39] Therefore, "shall" means "must."

The Code, however, states that a Justice "should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned . . .."[40] It also uses the term "should" concerning the counterparts of circumstances in which the statute requires recusal, including for example, when the Justice's "spouse . . . has an interest in the subject matter

in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." Again unremarkably, courts have interpreted the word "should" to mean that something is discretionary, not mandatory.[41] Therefore, the Code gives a Justice the discretion to participate in deciding a case when the law enacted by Congress and the President requires his or her disqualification.

In addition, the Code provides exceptions to the statutory standards for disqualification with the potential to undermine the purpose of the Code. For example, it states that "[t]he rule of necessity may override the rule of disqualification."[42] This rule, created by the Supreme Court, authorizes a justice to exercise his or her discretion to participate in a case in which the statute requires his or her disqualification. The rationale for this departure from the law is that every Justice is "indispensable."[43] However, the Supreme Court at times must and does function with only eight justices. Sometimes a Justice recuses herself as Justice Ketanji Brown Jackson did in a case argued in January.[44] Sometimes there is a vacancy, as there was for the 18 months after Justice Antonin Scalia died in 2016.[45]

The Supreme Court has the right to propose that Congress and the President amend §455 to create an exception for it. The Court would also have the power – although not necessarily the right – to find the statute unconstitutional if the issue were presented

in a case before it. However, the Code authorizes Justices to simply ignore the statute without doing either.

The Code also creates another significant exception to the statutory requirements of §455 by providing that "[n]either the filing of a brief amicus curiae nor the participation of counsel for amicus curiae requires a Justice's disqualification."[46] An "amicus" is an individual or entity that is not a party to a case, but is allowed to make an argument in support of a party. The Commentary to the Code states that "[t]he courts of appeals follow a similar approach to ameliorating any risk that an amicus filing could precipitate a recusal."[47] It cites Federal Rules of Appellate Procedure 29(a)(2) as authority for this proposition. Actually, however, the Courts of Appeals approach is diametrically opposite from the Supreme Court's. Rule 29 does not permit a judge to sit in a case where §455 requires disqualification based on the participation of an amicus. Rather, the Rule requires that the amicus not be allowed to participate in the case so that the judge can do so lawfully.

Moreover, the Commentary states that "[i]ndividual Justices, rather than the Court, decide issues of recusal."[48] The Code does not require a Justice to disclose possible grounds for recusal to other Justices, the litigants, or the public. Rather, exceptions to the §455 statutory duty to recuse based on "necessity" or the

amicus exception created by the Supreme Court are authorized to be made secretly by a single Justice.

Therefore, the Code permits what The Washington Post reported occurred in 2012.[49] Reportedly, Leonard Leo instructed a Republican pollster, Kellyanne Conway, to bill a non-profit group he advised, the Judicial Education Project, $25,000 for purported polling and consulting because he wanted to give Justice Thomas' wife Ginni "another" $25,000. He emphasized that the paperwork should have "[n]o mention of Ginni, of course." Conway sent the requested bill to Leo and evidently gave that $25,000 supplement to Justice Thomas' wife. The same year, the Judicial Education Project filed an amicus brief in a landmark Supreme Court voting rights case, Shelby Cnty., Ala. v. Holder.[50] Justice Thomas participated and was part of the 5-4 majority that invalidated a provision of the law intended to protect minority voters, as Leo's organization had advocated.[51]

If Mrs. Thomas did little or no work for the Judicial Education Project, any payments to her should have been disclosed as a gift on Justice Thomas' 2012 Financial Disclosure Report, which was due to be filed in May 2013, before the Shelby County case was decided in June 2013. If the payments had been disclosed by Justice Thomas in 2012 or in his Financial Disclosure Report for that year, the Department of Justice could have decided whether

to investigate the payments to Mrs. Thomas as a possible bribe. However, if it were then in effect, the Supreme Court's current Code would have permitted Justice Thomas to decide, without informing his colleagues or the litigants, that his participation in that case was necessary, even if a fully informed reasonable person might have questioned his impartiality and, therefore, his recusal was required by the statute, §455.

The fact that the Supreme Court Code of Conduct implicitly reflects the view that the Justices are not required to obey the laws concerning ethics enacted by Congress and the President is consistent with the position recently expressed by Justice Alito. In a July 2023 lengthy interview by David Rivkin, an attorney in a case then before the Supreme Court, Justice Alito stated explicitly that the Justices do not have to obey laws enacted by Congress because, and I quote, "No provision in the Constitution gives them the authority to regulate the Supreme Court - period."[52]

This statement is revolutionary. The Supreme Court unequivocally stated almost 150 years ago that "No man in this country is so high that he is above the law."[53] In an actual case, an ethics statute could be held to be an unconstitutional incursion on the independence of the judiciary but, according to Supreme Court jurisprudence, only if the statute unduly prevents the courts from accomplishing their constitutionally assigned functions.[54]

As I said earlier, the core constitutional function of the courts is to decide cases impartially. The Ethics in Government Act and the related recusal statute are intended to promote rather than impede the proper performance of that core function.

It is anomalous for Justice Alito to assert that Congress and the President do not have the power to enact legislation concerning judicial ethics because no provision of the Constitution provides that power. As I said earlier, no provision of the Constitution gives the Supreme Court the power to hold statutes unconstitutional. Justice Alito's view would mean that judges could not be prosecuted and punished for accepting bribes. The judiciary would not be subject to any check or balance. If the Supreme Court adopts Justice Alito's position and holds the statutes concerning judicial ethics unconstitutional in an actual case, it will have made the least dangerous branch the most dangerous branch.

As Harvard Law School Professor Emeritus Alan Dershowitz has succinctly stated:

> Our system of governance is based on the separation of powers and checks and balances. The judiciary is an independent branch but it – like the other branches – is subject to checks. Unlike the legislative and executive branches, the judicial branch is not subject to the ultimate check in any democracy, namely periodic elections. This makes it even more important that justices be subject to the legislative check of compelled ethical rules

> and the executive check of prosecution for violation of these rules.[55]

However, Justice Alito's view is already being cited to frustrate the Senate's ability to investigate some of the incidents I have mentioned, and get information concerning whether new judicial ethics laws should be enacted. The Senate Judiciary Committee authorized subpoenas for Leonard Leo and Harlan Crow.[56] Leo has resisted providing the requested documents and information. His attorney, David Rivkin, who interviewed Justice Alito, has asserted that Congress has no power to investigate because any ethics legislation Congress might enact would be, as Justice Alito said, unconstitutional.[57] Harlan Crow has taken the same position.[58]

Therefore, the Supreme Court may have to soon decide the merits of Justice Alito's contention. This would raise the question of whether his July 2023 statement that Congress has no power to legislate concerning the Supreme Court was inconsistent with the Supreme Court Code's current prohibition on commenting on the merits of an impending case.[59] It would also raise the question of whether Justice Alito must recuse himself in any such case for having prejudged it.

In an opinion piece Justice Alito published in June 2023, he stated that his failure to disclose in his 2008 Financial Disclosure Report who paid for his flight and accommodations on

the free Alaska fishing trip was consistent with the standard practice of the Justices.[60] There is reason to believe that is true. However, I hope you will tell me whether recent revelations about any such practice injures your confidence in the integrity and impartiality of Supreme Court Justices and, indeed, all federal judges.

This is a crucial question. As Hamilton wrote, judges do not have an army to enforce what may be unpopular or controversial orders. Rather, we really rely on the confidence of the American people that those decisions have been made impartially and their insistence that they be obeyed. As Chief Justice Roberts wrote in 2022, "public trust is essential, not incidental, to our function."

It took a long time for that trust to develop and it may not be enduring. In 1803, in the seminal case of Marbury v. Madison, Chief Justice John Marshall declared that the courts had the power to order President Thomas Jefferson to deliver a judicial commission signed by his predecessor President John Adams. He also held that the courts could invalidate as unconstitutional the law authorizing the trial he had conducted as a Supreme Court Justice. Marshall did not order Jefferson to deliver the commission because he knew that Jefferson would refuse to comply, and that the American people would support their newly elected President rather than an unelected Justice.[61]

In 1861, President Abraham Lincoln ignored with impunity the first Supreme Court order to a President – a direction to release a prisoner during the Civil War.[62]

However, in 1974 the Supreme Court ordered President Richard Nixon to obey a grand jury subpoena for tapes he secretly made of conversations in the Oval Office that incriminated him and his close colleagues concerning many crimes in what came to be known as "Watergate."[63] President Nixon knew that by then the American people had great confidence in the Supreme Court, would be outraged by defiance of its order, and he would be impeached and removed from office if he did not comply. Therefore, he turned over the tapes and resigned.

Confidence in the Supreme Court is now waning. In 2023, Pew and Gallup polls showed that public confidence in the Supreme Court was at a historic low. [64, 65]

This diminished confidence is undoubtedly attributable in part to some of the Supreme Court's controversial decisions. For example, in 2010, the Court decided 5-4 in Citizens United[66] that corporations, labor unions, and megadonors could make unlimited contributions to what became Political Action Committees that support candidates for office.

This year, the Supreme Court may make another controversial decision. It will decide whether to reverse the 40-year-old Chevron doctrine that requires courts to defer to an agency's reasonable

interpretation of an ambiguous statute. The demise of the Chevron doctrine could, among other things, result in the invalidation of environmental regulations and thus financially benefit real estate developers and others.

As these examples indicate, it is extremely important that reasonable people be assured that controversial decisions are being made impartially, and are not improperly influenced by, among other things, wealthy people who have partisan political or personal agendas, and who secretly provide lavish gifts to some of the Justices.

There are now efforts to enact legislation intended to promote public confidence in the judiciary. For example, the Senate Judiciary Committee has sent to the full Senate a Supreme Court Ethics, Recusal, and Transparency Act sponsored by Senator Sheldon Whitehouse.[67] If adopted, the Act would require the Supreme Court to increase transparency by adopting rules governing the disclosure of gifts, travel, and income received by Justices and their families that are as rigorous as those that apply to members of Congress; establish rules requiring each party or amicus to disclose anything of value provided to a Justice; and require Justices to explain their recusal decisions to the public.[68] In the current intensely partisan political environment, the prospects for any new legislation are poor.

For principled and pragmatic reasons, I agree with the Supreme Court Code that states that judges "must bear the primary responsibility for requiring [appropriate] judicial behavior."[69] That Code properly provides that in performing the duties of his or her office, "[a] Justice should not be swayed by partisan interests, public clamor, or fear of criticism."[70] However, Justices and judges should not be indifferent to informed, legitimate, serious concerns about their integrity and impartiality. It is important that we judges and Justices at all times choose to act, and are seen to act, in a manner that demonstrates to the American People that we are faithfully and impartially administering justice equally to the poor and to the rich.

As it is primarily the responsibility of judges to foster appropriate judicial behavior and thus encourage public confidence in the courts, I again thank the Edmond and Lily Safra Center for Ethics and the Carr Center for Human Rights Policy for giving me the opportunity to speak with you today. I look forward to hearing your thoughts and to responding to any questions that as a judge I can appropriately answer.

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Times (Apr. 11, 2023),
https://www.nytimes.com/2023/04/11/opinion/clarence-thomas-supreme-court-abe-fortas.html.

[2] SCOTUS, STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT (November 13, 2023) https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[3] Adam Liptak, *Supreme Court's New Ethics Code is Toothless, Experts Say*, N.Y. TIMES (Nov. 13, 2013), https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html.

[4] Sydney E. Ahlstrom, *Lord Acton's Famous Remark*, N.Y. TIMES (Mar. 13, 1974), https://www.nytimes.com/1974/03/13/archives/lord-actons-famous-remark.html.

[5] Nixon v. Admin'r of Gen. Serv., 433 U.S. 425, 443(1977).

[6] THE FEDERALIST NO. 78 (Alexander Hamilton).

[7] THE FEDERALIST NO. 78 (Alexander Hamilton).

[8] 28 U.S.C. §453.

[9] 18 U.S.C. §201(b)(2).

[10] 5 U.S.C. §7353.

[11] 28 U.S.C. §§455(a) and (b).

[12] 18 U.S.C. §1001(a).

[13] Judicial Conference of the United States, *Code of Conduct for United States Judges*, GUIDE TO JUDICIARY POLICY (Mar. 12, 2019) https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf (hereinafter the "Judicial Code").

[14] Article VI §20(b)(1)(D). Judicial Conference of the United States, *Rules for Judicial-Conduct and Judicial Disabilities Proceedings*, GUIDE TO JUDICIARY POLICY (Mar. 12, 2019) https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf

[15] The Judicial Code, Canon 2A.

[16] The Judicial Code, Canon 3(C)(1).

[17] The Judicial Code, Canon 3(C)(1)(d)(iii).

[18] Danny Hakim & Jo Becker, *The Long Crusade of Clarence and Ginni Thomas*, THE NEW YORK TIMES (last updated Sep. 1, 2022); Senior Judge Mark L. Wolf, *Written Testimony for the May 17, 2023, Hearing of the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights Hearing on Review of Judicial Ethics Processes at the Judicial Conference of the United States* (May 15, 2023) https://www.whitehouse.senate.gov/imo/media/doc/Testimony%20of%20Hon.%20Mark%20L.%20Wolf%20with%20Exhibits%201-3%20(5.15.23).pdf.

[19] Senior Judge Mark L. Wolf, *Written Testimony for the May 17, 2023, Hearing of the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights Hearing on Review of Judicial Ethics Processes at the Judicial Conference of the United States* (May 15, 2023) https://www.whitehouse.senate.gov/imo/media/doc/Testimony%20of%20Hon.%20Mark%20L.%20Wolf%20with%20Exhibits%201-3%20(5.15.23).pdf.

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[21] Chief Justice John Roberts, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (Released Dec. 31, 2011) https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[22] Chief Justice John Roberts, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (Released Dec. 31, 2011) https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[23] Chief Justice John Roberts, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (Released Dec. 31, 2011) https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[24] 5 U.S.C. §§13104(a)(2)(A) and (e)(1)(C).

[25] See 5 U.S.C. §13104(a)(2)(B).

[26] 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), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court.

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[32] See Devan Cole, 2 Supreme Court justices did not recuse themselves in cases involving their book publisher, CNN (last updated May 5, 2023), https://www.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html.

[33] See Debra Cassens Weiss, Sotomayor and Gorsuch didn't recuse in cert denials involving their publisher, ABA J. (May 8, 2023), https://www.abajournal.com/news/article/sotomayor-and-gorsuch-didnt-recuse-in-cert-denials-involving-their-publisher.

[34] See Karl Evers-Hillstrom, Supreme Court justices continue to rack up trips on private interest dime, Open Secrets (June 13, 2019),

https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips/.

[35] See Letter from Committee on the Judiciary, United States Senate, to Chief Justice John G. Roberts, Jr., Supreme Court of the United States (Apr. 10, 2023), https://www.durbin.senate.gov/imo/media/doc/Letter%20from%20Chair%20Durbin%20to%20Chief%20Justice%20Roberts%20-%204.10.23.pdf.

[36] See Letter from Chief Justice John G. Roberts, Jr., Supreme Court of the United States, to Committee on the Judiciary, United States Senate (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf.

[37] See The Code.

[38] The Code, Canon 2.A.

[39] Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 119 S.Ct. 956, 962 (1998).

[40] The Code, Canon 2.B(2).

[41] See United States v. Rogers, 14 Fed. App'x 303, 305 (6th Cir. 2001) (stating that "the word 'should,' in most contexts, is precatory, not mandatory . . . The existence of such precatory language implies that the [] court's power . . . is discretionary, not [] mandatory"); see also Hamlet v. United States, 63 F.3d 1097, 1104 (Fed. Cir. 1995) (finding that the word "should" in the Federal Personnel Manual made a matter "precatory and not mandatory").

[42] The Code, Canon 3.B(3).

[43] Commentary to the Code, at 10. As authority for the proposition that the rule of necessity overrides the §455(a) statutory requirement of disqualification, the Commentary, at 11, cites United States v. Will, 449 U.S. 200, 217 (1980). In Will, 13 federal judges brought suit challenging the constitutionality of a statute that reduced the compensation allegedly due to them and every other judge and justice. Id. at 209. The Supreme Court held that "the public interest in a competent and independent judiciary" would be injured if every judge and Justice were disqualified based on their financial interest in the outcome of the case. Id. at 217. The court did not decide the question of whether the common law rule of necessity would override "[t]he declared purpose of

§455 [] to guarantee litigants a fair forum in which they can pursue their claims," id. at 217, if a single Justice was required to recuse as sometimes happens. See, e.g., Loper Bright Enterprises, et al. v. Raimondo, Sec. of Comm., et al., No. 22-451 (argued Jan. 17, 2024) (recusal of Justice Jackson); RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090 (2016) (decided by eight Justices due to recusal of Justice Sotomayor); Puerto Rico v. Franklin California Tax-Free Tr., 136 S. Ct. 1938 (2016) (decided by eight Justices due to recusal of Justice Alito).

[44] Loper Bright Enterprises, et al. v. Raimondo, Sec. of Comm., et al., No. 22-451 (argued Jan. 17, 2024) (recusal of Justice Jackson).

[45] See Erwin Chemerinsky, Supreme Court vacancy could define its term: Erwin Chemerinsky, Los Angeles Daily News (last updated Aug. 28, 2017), https://www.dailynews.com/2016/09/28/supreme-court-vacancy-could-define-its-term-erwin-chemerinsky/.

[46] The Code, Canon 3.B.(4).

[47] Commentary to the Code, at 11.

[48] Code Commentary, at 11, citing Cheney v. United States Dist. Court for D.C., 540 U.S. 1217 (2004)). In Cheney, the Sierra Club filed a motion for the recusal of Justice Scalia based on a duck-hunting trip that he took with then-Vice President Richard B. Cheney, who was a party to the case. See Sierra Club Motion to Recuse, Cheney v. United States Dist. Court for the Dist. of Columbia, No. 03-475, 2004 WL 397220 (Feb. 23, 2004). The Supreme Court referred the motion to Justice Scalia, who denied it, stating that there was "no basis for recusal." Cheney v. United States Dist. Court for the Dist. of Columbia, 124 S. Ct. 1391, 1403 (2004) (Scalia, J., mem.).

[49] See Emma Brown et al., Judicial Activist directed fees to Clarence Thomas' wife, urged 'no mention of Ginni.' The Washington Post (May 4, 2023), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway/.

[50] See Brief for the Judicial Education Project as Amicus Curiae Supporting Petitioner, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[51] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

[52] David B. Rivkin Jr. & James Taranto, The Supreme Court's Plain-Spoken Defender, THE WALL ST. J. (July 29, 2023).

[53] United States v. Lee, 106 U.S. 196, (1882).

[54] Nixon v. Adm'r of Gen. Servs., 97 S. Ct. 2777, 2790 (1977).

[55] Alan Dershowitz, Alito is Wrong: Congress Can Impose Ethics Rules on the Supreme Court, NEWSWEEK (Aug. 2, 2023), https://www.newsweek.com/alito-wrong-congress-can-impose-ethics-rules-supreme-court-opinion-1817029.

[56] See Andry Kroll, Senate Judiciary Committee Has Yet to Subpoena Harlan Crow or Leonard Leo, PROPUBLICA (Fe. 16, 2024), https://www.propublica.org/article/why-hasnt-senate-judiciary-subpoenaed-harlan-crow-leonard-leo-scotus (discussing subpoenas).

[57] Letter from Leonard Leo to Richard Durbin, U.S. Senate Majority Whip, U.S. Senate, and Sheldon Whitehouse, Chair of Senate Judiciary Subcommittee, U.S. Senate (July 25, 2023), https://www.whitehouse.senate.gov/imo/media/doc/2023-09-04_complaint_from_senwhitehouseenclosure.pdf

[58] Letter from Harlan Crow to Richard Durbin, U.S. Senate Majority Whip, U.S. Senate, and Sheldon Whitehouse, Chair of Senate Judiciary Subcommittee, U.S. Senate (May 22, 2023), https://www.documentcloud.org/documents/23822173-harlan-crow-attorney-letter-to-senate-judiciary-committee.

[59] The Code, Canon 3.A. ("A Justice should not knowingly make public comment on the merits of a matter pending or impending in any court").

[60] Samuel Alito, ProPublica Misleads Its Readers, THE WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda.

[61] Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60 (1803).

[62] See Scott Bomboy, Lincoln and Taney's Great Writ Showdown, CONSTITUTION CENTER (May 28, 2022), https://constitutioncenter.org/blog/lincoln-and-taneys-great-writ-showdown.

[63] United States v. Nixon, 418 U.S. 683 (1974).

[64] PEW RESEARCH CENTER, Favorable views of Supreme Court at lowest point in more than three decades of public opinion polling (July 20, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/sr_2023-07-21_scotus_1/.

[65] Megan Brenan, Views of Supreme Court Remain Near Record Lows, GALLUP (Sep. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx#:~:text=Line%20graph.-,Americans'%20trust%20in%20the%20judicial%20branch%20of%20the%20federal%20government,year's%2047%25%20record%20low%20reading.

[66]

[67] See Supreme Court Ethics, Recusal, and Transparency act of 2023, S.359, 118th Congress (2023), https://www.congress.gov/bill/118th-congress/senate-bill/359.

[68] See Supreme Court Ethics, Recusal, and Transparency act of 2023, S.359, 118th Congress (2023), https://www.congress.gov/bill/118th-congress/senate-bill/359.

[69] Commentary to the Code, at 13 (alteration in original).

[70] The Code, Canon 3.A.