

Statement of Kedric Payne

**Vice President, General Counsel, and Senior Director of Ethics
Campaign Legal Center**

U.S. Senate Committee on the Judiciary

**Hearing on “Supreme Court Ethics Reform”
May 2, 2023**

Thank you for the opportunity to appear before you today to testify about the need to enhance Supreme Court ethics rules to provide more transparency, consistency, and compliance. I am the Vice President, General Counsel, and Senior Director of Ethics at Campaign Legal Center, a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. I have served in all three branches of federal government, and for nearly 20 years, I have specialized in government ethics. Today, my testimony describes how the Supreme Court’s ethics rules lag behind legislative and executive branch ethics rules, and the fundamental provisions that can improve Supreme Court ethics.

On April 25, 2023, Chief Justice Roberts confirmed that Supreme Court ethics rules are weaker than any other branch of government, in his published “Statement on Ethics Principles and Practices.” All nine Justices signed the statement, which “aims to provide new clarity to the bar and to the public on how the Justices address certain recurring issues, and seeks to dispel some common misconceptions.”¹ But instead of dispelling misconceptions, the statement proves that the Court has the least developed ethics rules of any branch of government because it does not have: 1) a formal internal ethics enforcement body to advise Justices about their legal obligations and to investigate alleged misconduct; 2) a binding code of conduct; 3) a requirement for full disclosure of privately sponsored travel; and 4) a formal recusal compliance procedure.

Specifically, the Court’s statement explains that: Justices rely on a “wide variety of authorities” for ethics advice without any specific binding authority; Justices may consult the Code of Conduct for lower courts, but it is mostly “aspirational” and the provisions are “not themselves rules”; financial disclosure violations can only be enforced by a letter of inquiry from a body that “does not supervise the Supreme Court”; Justices can decide for themselves whether “public

¹ Chief Justice John G. Roberts, Jr., *Letter to Senate Judiciary Committee Chair Richard J. Durbin* (Apr. 25, 2023), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>.

disclosure of the basis for recusal would be ill-advised”; and issues “such as travel, accommodations, and disclosure” are subject to “security guidance.”²

As described in detail below, the Supreme Court can increase public trust in the judiciary by establishing specific and relevant ethics practices that have already proven effective in the other two branches of government.

Supreme Court Ethics Rules Lag Behind the Legislative and Executive Branches

Ethics laws are essential to maintaining public trust in government. Although some ethics laws apply to all branches of federal government, Supreme Court Justices have fewer fundamental ethics provisions that specifically govern their conduct than the other branches. Over the past decade, the absence of such provisions has resulted in persistent ethics concerns implicating actual or perceived conflicts of interest involving the Justices. Reform of Supreme Court ethics laws and rules would mitigate the risk of diminishing public trust and confidence in the Court.

I. The Supreme Court Lacks an Internal Ethics Enforcement Body

Both the legislative and executive branches have designated enforcement bodies, with authority to provide ethics advice and investigate allegations of non-compliance with the respective branch’s applicable ethics rules. These ethics enforcement bodies are responsible for training officials on application of the rules, which, in turn, promotes compliance. When there is evidence of misconduct, these bodies can also gather facts and make public determinations of whether the rules were followed, which further facilitates compliance.

No such body exists for the Supreme Court. As a result, lingering allegations of ethical misconduct, whether credible or not, harm individual Justices, the Court as a whole, and public confidence in the institution. Until the Supreme Court creates a formal internal enforcement body that provides consistent ethics advice to Justices and publicly reviews allegations of misconduct while disposing of meritless claims, the Court’s current ethical standards will produce little benefit and any reform will have muted impact.

A. Supreme Court Ethics Enforcement

The consequences of the Supreme Court’s lack of an internal ethics enforcement body are evident in recent unresolved controversies arising from a lack of uniformed ethics advice and inadequate investigations.

² *Id.*

Regarding ethics advice, the Court has no controlling source for guidance and Justices can rely on “a wide variety of authorities to address specific ethical issues [including] judicial opinions, treatises, scholarly articles, disciplinary decisions, and historical practice of the Court and the federal judiciary.”³ For example, allegations recently surfaced that Justice Clarence Thomas omitted gifts of travel in his financial disclosure reports.⁴ In response to the allegations, Justice Thomas admitted that he did not report the information, and stated that he “sought guidance from my colleagues and others in the judiciary, and was advised that this sort of personal hospitality from close personal friends, who did not have business before the Court, was not reportable.”⁵

Such advice from “colleagues and others in the judiciary” is legally incorrect with respect to the disclosure of free air travel, and completely inconsistent with how other Justices and officials across the federal government have complied with the exact same law for decades.⁶ This case demonstrates how the Court’s lack of a designated ethics official responsible for answering questions about disclosure and compliance results in a system of infinite interpretations and, ultimately, non-compliance.

Regarding ethics investigations, the lack of any fact-gathering body in the Court means that allegations of ethics violations are not subject to a formal review process, which can sow distrust in the institution and cause confusion about ethics compliance. For example, when the *Dobbs v. Jackson Women’s Health Organization* decision was leaked in 2022, the Court directed the Marshal of the Supreme Court to investigate the leak, even though such an investigation is not included in the Marshal’s statutory responsibilities.⁷ The Marshal essentially serves as a sergeant at arms, who shall “oversee the Supreme Court Police,” “serve and execute all process and orders issued by the Court,” “pay the expenses of printing briefs,” and

³ *Id.*

⁴ Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA, (updated Apr. 7, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

⁵ Statement from Justice Clarence Thomas, Supreme Court of the United States Public Information Office (Apr. 7, 2023), available at <https://www.documentcloud.org/documents/23745868-clarence-thomas-statement-4-7-23>.

⁶ Gifts of free transportation are required to be reported under the Ethics in Government Act. 5 U.S.C. § 13104(a)(2)(A-B). Although Justice Thomas’ response implies that the Judicial Conference’s changes to disclosure guidance in March 2023 created a new requirement to report private plane travel, this is not a new requirement. Indeed, Justice Thomas himself reported private plane travel from the same source in the past, and it is well established in all three branches that EIGA has required these disclosures for decades. See Letter to Judicial Conference Secretary, Campaign Legal Center, at 2-3 (Apr. 11, 2023) <https://campaignlegal.org/sites/default/files/2023-04/Judicial%20Conference%20Letter-FINAL.pdf>.

⁷ 28 U.S.C. § 672(b-c).

undertake other administrative tasks, none of which include investigations.⁸ As a result, the haphazard assignment to the Marshal to investigate the matter caused public criticism that the findings were fundamentally flawed.⁹

In another case, when a witness publicly alleged that Justice Alito leaked the outcome of a decision to an acquaintance, the Supreme Court’s Legal Office concluded within eight days that “[t]here is nothing to suggest that Justice Alito’s actions violated ethics standards.”¹⁰ The Court’s Legal Office apparently did not gather any facts independently, but relied on public statements in the media to close the matter. Like the Marshal of the Supreme Court, the Court’s Legal Office is not statutorily responsible for conducting such an investigation.¹¹

The Court’s lack of a clear fact-gathering body also means financial disclosure violations by the Justices may go unresolved. The Ethics in Government Act of 1978 (“EIGA”) requires that Justices disclose the ownership, purchase, and sale of investment properties.¹² Despite this requirement, Justice Thomas failed to disclose the sale of properties for \$133,363 (three times the reported value) to the same person who provided him undisclosed vacation travel.¹³ Justice Gorsuch similarly omitted required details relating to the sale of a property he co-owned, a sale on which he made between \$250,001 and \$500,000.¹⁴ In particular, while Justice Gorsuch disclosed the sale of an LLC, he omitted listing the underlying real estate asset and the identity of the buyer: the Chair of a law firm that regularly argues before the Supreme Court.¹⁵

⁸ *Id.*

⁹ Robert Barnes, *Marshal says Supreme Court justices questioned in leak probe, not implicated*, WASH. POST (Jan. 20, 2023), <https://www.washingtonpost.com/politics/2023/01/20/supreme-court-leak-justices-questioned/>; Charlie Savage, *Supreme Court’s Inquiry Into Leak Included Interviews With Justices*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/us/politics/supreme-court-leak-justices.html>; Nina Totenberg, *Supreme Court is unable to ID the leaker in Dobbs decision*, NPR (updated Jan. 19, 2023), <https://www.npr.org/2023/01/19/1150051376/supreme-court-dobbs-leak-marshal>.

¹⁰ Letter from the Legal Office of the Supreme Court of the United States to Hon. Sheldon Whitehouse and Hon. Henry C. Johnson (Nov. 28, 2022), <https://www.documentcloud.org/documents/23320603-scotus-letter-dated-11282022>.

¹¹ J. W. Winkle III, M.B. Swann, *When Justices Need Lawyers: The U.S. Supreme Court’s Legal Office*, 76 *Judicature* 244 (Feb. – Mar. 1993), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/when-justices-need-lawyers-us-supreme-courts-legal-office>.

¹² 5 U.S.C. §13104(a)(3).

¹³ Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn’t Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>.

¹⁴ Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, POLITICO (Apr. 25, 2023), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>; *Financial Disclosure Report for Calendar Year 2017* (May 15, 2018), available at https://fixthecourt.com/wp-content/uploads/2018/06/Gorsuch-NM-J3.-SUP_R_17.pdf (financial disclosure report of Justice Neil Gorsuch).

¹⁵ Financial Disclosure Report of Justice Neil Gorsuch, *supra* note 14.

EIGA gives the Judicial Conference, the policymaking body for federal courts, the authority to enforce financial disclosure reporting requirements.¹⁶ While the Supreme Court has stated that the Judicial Conference, “which binds lower courts, does not supervise the Supreme Court,”¹⁷ that assertion does not impact the Judicial Conference’s clear authority to refer to the U.S. Attorney General a Justice’s intentional failure to file required information.¹⁸ Nonetheless, without an internal body with clear, legally binding jurisdiction over the Supreme Court to review allegations of financial disclosure violations, Justices may continue to ignore ethics laws they are required to follow without consequences.

The minimal ethics enforcement in the Supreme Court contrasts significantly with the legislative and executive branches.

B. Legislative Branch Ethics Enforcement

The Supreme Court lags behind the legislative branch by nearly 60 years in the development of formal internal ethics enforcement processes. Both the House and Senate maintain standing internal ethics committees: the U.S. House Committee on Ethics, established in 1967,¹⁹ and the U.S. Senate Select Committee on Ethics, established in 1964.²⁰ The committees serve three functions. First, the committees provide ethics advice and education to members and staff.²¹ Second, the committees investigate and adjudicate any alleged violations of ethics rules or laws.²² Third, the committees administer their chamber’s financial disclosure program.²³

The House ethics enforcement structure includes an additional office: the U.S. Office of Congressional Ethics (“OCE”). Created in 2008, OCE is an independent, nonpartisan entity whose responsibility is solely to investigate allegations of misconduct by House members and staff.²⁴ After conducting investigations, OCE provides a report to the House Ethics Committee with its

¹⁶ “The provisions of [the financial disclosure requirements of federal personnel] shall be administered by the Judicial Conference in the case of [a judicial officer or judicial employee].” 5 U.S.C. § 13102(a)(3).

¹⁷ Chief Justice Roberts, *Letter to Judiciary Committee Chair Richard J. Durbin*, *supra* note 1.

¹⁸ 5 U.S.C. § 13106(b).

¹⁹ Committee History, U.S. House of Representatives Comm. on Ethics, <https://ethics.house.gov/about/committee-history> (last visited Apr. 28, 2023).

²⁰ History, U.S. Senate Select Comm. on Ethics, <https://www.ethics.senate.gov/public/index.cfm/history> (last visited Apr. 28, 2023).

²¹ About, U.S. House of Representatives Comm. on Ethics, <https://ethics.house.gov/about> (last visited Apr. 28, 2023); About Us, U.S. Senate Select Comm. on Ethics, <https://www.ethics.senate.gov/public/index.cfm/aboutus> (last visited Apr. 28, 2023).

²² *Id.*

²³ *Id.*

²⁴ About, Office of Congressional Ethics, <https://oce.house.gov/about> (last visited Apr. 28, 2023).

recommendations. These reports, which generally become public, include a summary of the allegations, detailed findings of fact, and citations to law.²⁵ OCE does not have any authority to provide final adjudication of investigative matters or impose penalties; those powers rest with the House Ethics Committee.

Before each chamber of Congress established their ethics committees, ethics violations were dealt with on a case-by-case basis; they were investigated either by a special or select committee created for the purpose of investigating a specific allegation, or by bringing an issue directly to the floor.²⁶ This system resulted in a patchwork, inefficient system of enforcement. In 1963, when the Secretary to the Senate Democratic Majority resigned following allegations that he misused his official position for personal gain, the Senate Rules Committee began the process of adopting a proposal to create a permanent ethics committee.²⁷ In the House, questions about misconduct and the lack of reliable and accessible ethics guidance thus led to the creation of the House Ethics Committee.²⁸

The Supreme Court is now facing similar challenges related to the appearance of improper conduct by Justices and criticism for its inability to properly investigate misconduct. In the face of these challenges, Congress developed ways to provide better accountability. If the Supreme Court does not establish a specific enforcement body to provide clarity to Justices on how ethics rules and laws apply and to investigate alleged ethics violations, it will continue to experience violations of ethics laws, rules, and norms that will go unchallenged.

C. Executive Branch Ethics Enforcement

The Supreme Court lags behind the current state of ethics in the executive branch by at least 45 years. Under EIGA, the executive branch takes a multi-layered approach to ethics enforcement. The head of each agency appoints a designated agency ethics official (“DAEO”), whose responsibilities include reviewing employee financial disclosure reports to determine whether they violate ethics laws and rules;²⁹ resolving conflicts of interest that violate such provisions;³⁰ and “[c]arrying out an effective government ethics education program.”³¹ In addition, each agency has an office of Inspector General with the authority to conduct investigations into suspected violations of ethics laws and regulations.³²

²⁵ Process, Office of Congressional Ethics, <https://oce.house.gov/learn/process> (last visited Apr. 28, 2023).

²⁶ History, Senate Select Comm. on Ethics, *supra* note 20; Committee History, House Committee on Ethics, *supra* note 19.

²⁷ History, Senate Select Comm. on Ethics, *supra* note 20.

²⁸ Committee History, House Comm. on Ethics, *supra* note 19.

²⁹ 5 C.F.R. § 2634.605; 5 C.F.R. § 2638.104(c)(8).

³⁰ 5 C.F.R. § 2638.104(c)(6).

³¹ 5 C.F.R. § 2638.104(c)(5).

³² 5 C.F.R. § 2638.106.

The Office of Government Ethics (“OGE”) oversees the executive branch ethics program. OGE’s statutory function is to ensure that the executive branch’s ethics program effectively prevents conflicts of interest and other ethics violations.³³ OGE was created in 1978 as part of the post-Watergate reforms, to restore confidence in government after the abuse of public trust, and out of a need to bring “continuity and uniformity” to ethics regulations in the executive branch.³⁴

The mechanisms the executive branch uses to ensure effective ethics enforcement can be instructive for the Supreme Court. The Court’s current scandals could be addressed adequately by an ethics office tasked with carrying out ethics education programs and conducting investigations.

D. Establishing a Supreme Court Ethics Enforcement Body

To meet the baseline standard set by the legislative and executive branches, the Supreme Court must create an ethics body with the authority to provide ethics advice to Justices and to investigate allegations of misconduct, issuing public reports of its findings. This body can be established internally, like a DAEO, office of Inspector General, or the House and Senate Ethics Committees, or externally, like OCE, OGE, or the Judicial Conference that administers the Court’s financial disclosure program.

For this body to be effective, it does not necessarily need the authority to discipline or penalize Justices for ethics violations. Enforcement mechanisms bolstered by well-resourced investigative bodies such as OCE and Inspectors General promote transparency and accountability through their ability to publish detailed public reports within reasonable timeframes. The role of such a body for the Court would be to provide guidance for those seeking to comply with the Court’s rules; investigate possible violations of the Court’s rules; and bring transparency, uniformity, clarity, and accountability to the Court’s ethics.

The scandals surrounding the Supreme Court in recent months and years have led to a significant decline in public trust in the Court.³⁵ Both the legislative branch and executive branch responded to similar public trust crises by creating ethics enforcement bodies. The Supreme Court should follow their lead, to restore confidence in the institution and increase accountability.

³³ 5 C.F.R. § 2638.101.

³⁴ Our History, U.S. Office of Government Ethics, https://www.oge.gov/web/OGEnsf/about_our_history (last visited Apr. 28, 2023); Walter M. Shaub, Jr., OGE and the Inspector General Community, U.S. Office of Government Ethics (July 17, 2015), <https://www.oge.gov/web/oge.nsf/Resources/OGEnsf+and+the+Inspector+General+Community>.

³⁵ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

II. The Supreme Court Lacks a Code of Conduct

The executive and legislative branches have adopted codes of conduct to prohibit common conflicts of interest and support public trust in government, but the Supreme Court has not. Unless the Supreme Court establishes a code of conduct to formally define and prohibit ethical misconduct, the judicial branch will remain the branch with the least developed ethical standards.

A. Supreme Court Code of Conduct

The Judicial Conference has promulgated the Code of Conduct for United States Judges, which applies to most federal judges, but not Supreme Court Justices. The Judicial Conference acknowledges that complying with the code “helps to maintain public confidence in the impartiality of the judiciary,” while “violation of this [c]ode diminishes public confidence in the judiciary and injures our system of government under law.”³⁶ Nevertheless, this Code of Conduct is considered a set of “aspirational rules” for federal judges, and not a binding code. Chief Justice Roberts has acknowledged that, while the Court “takes guidance from the Code,” it “applies by its terms only to lower court federal judges.”³⁷

This Code of Conduct tells judges to: 1) uphold the integrity and independence of the judiciary; 2) avoid not only impropriety but the appearance thereof; 3) perform the duties of their offices fairly, impartially, and diligently; 4) avoid extrajudicial activities that would be inconsistent with the obligations of judicial office; and 5) refrain from political activity.³⁸ While this code does not contain an enforcement mechanism, a judicial discipline process does exist.³⁹

Importantly, neither the code nor the judicial discipline process governs Supreme Court Justices, and the Supreme Court has not promulgated its own ethics code. Chief Justice Roberts has indicated that Justices consult the Code of Conduct for United States Judges, and other authorities, to “address specific ethical issues,” and most recently shared a “Statement on Ethics Principles and Practices” to which all the current Members of the Supreme Court subscribe.⁴⁰ But there is no specific or formal way the Supreme Court handles ethics issues that arise.⁴¹

³⁶ Code of Conduct for United States Judges, *Guide to Judiciary Policy*, United States Courts, Vol. 2, Pt. A, Ch. 2 at 3 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf.

³⁷ Chief Justice Roberts, *Letter to Judiciary Committee Chair Richard J. Durbin*, *supra* note 1.

³⁸ Code of Conduct for United States Judges, *supra* note 36, at 1.

³⁹ See 28 U.S.C. §§ 351-364.

⁴⁰ Chief Justice Roberts, *Letter to Judiciary Committee Chair Richard J. Durbin*, *supra* note 1.

⁴¹ *Chief Justice's 2011 Year-End Report on the Federal Judiciary*, Supreme Court of the United States at 5 (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

The only ethics laws that apply to the Supreme Court are: the EIGA, which requires Justices to file annual reports on their financial interest;⁴² the Ethics Reform Act of 1989, which restricts outside employment and gifts;⁴³ the 28 U.S.C. § 455 (“§ 455”) recusal rule discussed below; and most recently, the Courthouse Ethics and Transparency Act.⁴⁴ Without a binding code of conduct, Justices do not have any ethical obligations related to the numerous other potential conflicts of interest that are addressed by codes of conduct in the executive and legislative branches.

B. Codes of Conduct in Executive and Legislative Branches

Both the executive and legislative branches have clear standards of conduct that cover specific situations that could lead to ethical issues. These rules provide officials with ethics guidance and address circumstances where the public may reasonably question an official’s actions as benefitting themselves rather than the public. Beyond creating a set of rules for officials to follow, most of these codes of conduct also contain a disclosure component to increase transparency and prevent conflicts of interest.

The executive branch ethics code of conduct, “Standards of Ethical Conduct for Employee of the Executive Branch,” is codified in 5 C.F.R. Part 2635. The extensive provisions cover common ethical issues, including gifts,⁴⁵ conflicting financial interests,⁴⁶ impartiality,⁴⁷ future employment negotiations,⁴⁸ misuse of position,⁴⁹ and outside activities.⁵⁰

Similarly, each chamber of Congress has a code of conduct. Explaining the purpose and importance of the code of conduct, the House Ethics Committee noted “[t]hat ‘public office is a public trust’ has long been a guiding principle for government. To uphold this trust, Congress has bound itself to abide by certain standards of conduct. . . .”⁵¹ The House and Senate codes of conduct provide rules

⁴² Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

⁴³ Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716 (codified as amended at 5 U.S.C. app. § 502(a)).

⁴⁴ Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205.

⁴⁵ 5 C.F.R. §§ 2635.201-2635.304.

⁴⁶ 5 C.F.R. §§ 2635.401-2635.403.

⁴⁷ 5 C.F.R. §§ 2635.501-2635.503.

⁴⁸ 5 C.F.R. §§ 2635.601-2635.607.

⁴⁹ 5 C.F.R. §§ 2635.701-2635.705.

⁵⁰ 5 C.F.R. §§ 2635.801-2635.809.

⁵¹ See U.S. House of Representatives Comm. on Ethics, 117th Cong., *House Ethics Manual 2022 Print Ed.*, 2 (2022), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/2022/House-Ethics-Manual-2022-Print.pdf>.

related to gifts, travel, outside employment, financial disclosure, outside activities, and other topics.⁵²

EIGA and the Ethics Reform Act of 1989 apply to all three branches of government; yet the legislative and executive branches have opted to go above and beyond the ethics requirements of those two laws. The judiciary is the only branch that has not adopted a substantial and enforceable code of conduct to address ethical issues that fall outside those that have been prohibited by law. The conspicuous absence of a code of conduct for the Supreme Court raises questions about whether ethics are prioritized in the judicial branch.

C. Establishing a Supreme Court Code of Conduct

For the Supreme Court to raise its ethical standards closer to the executive and legislative branches, the Justices need a code of conduct. The code of conduct for the Court may not need be as extensive as those of the other branches, which encounter broader conflicts of interest due to the nature of each branch. Nevertheless, more comprehensive ethics rules for the Court are necessary to increase public confidence in the judiciary.

A Supreme Court code of conduct should provide concrete standards for what a Justice can and cannot do. This would help demonstrate to the public that the Supreme Court is willing to hold itself accountable for conflicts of interest and other ethics issues that are not currently codified in law. If the code of conduct includes a compliance procedure, Justices will be held accountable for violations and the dwindling public trust⁵³ in the institution can be restored.

III. Supreme Court Privately Sponsored Travel Lacks Transparency

All three branches of government have rules regarding officials accepting travel from private sources because of the potential for conflicts of interest associated with receipt of expensive and recreational gifts. The executive branch has the most restrictive rules, which limit senior officials from accepting privately sponsored travel in most circumstances.⁵⁴ The legislative branch established extensive disclosure requirements for its members⁵⁵ in response to corruption

⁵² See U.S. House of Representatives Comm. on Ethics, 118th Cong., *Code of Official Conduct* (2023), <https://ethics.house.gov/publications/code-official-conduct#>; U.S. Senate Select Comm. on Ethics, 117th Cong., 1st Sess., *The Senate Code of Official Conduct* (2021), https://www.ethics.senate.gov/public/_cache/files/3507e6ae-2525-40ac-9ec8-7c6dbfe35933/2021---red-book---the-senate-code-of-official-conduct.pdf.

⁵³ See, e.g., *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/>.

⁵⁴ 31 U.S.C. § 1353; 5 C.F.R. § 2635.807(a)(2)(iii); 5 C.F.R. § 2635.204.

⁵⁵ Honest Leadership and Open Government Act of 2007, Pub. L. 110–81, 121 Stat. 735 (2007).

scandals involving privately sponsored travel.⁵⁶ In contrast, Supreme Court Justices routinely attend trips paid for by private entities, but the limited information publicly disclosed about these trips has caused speculation about potential conflicts of interest. Enhanced disclosure requirements for Justices' privately sponsored travel could increase confidence in the integrity of the Court by providing the public with more information about potential conflicts of interest.

A. Disclosure of Privately Sponsored Travel for Justices

Justices can accept gifts of privately sponsored travel under certain circumstances, but it must be disclosed. The Supreme Court voluntarily agreed in 1991 to follow the Judicial Conference's gift regulations.⁵⁷ Under these rules, a judicial officer or employee "is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties."⁵⁸ However, the rules provide a broad exception for travel expenses "to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice."⁵⁹

For travel reimbursements aggregating more than \$415 in value received from a single source, Justices must report the identity of the source and a brief description of the trip, including travel locations, dates, and the nature of the expenses provided.⁶⁰ Justices are required to disclose privately sponsored travel only at the end of the year as part of the gifts and reimbursements section of their

⁵⁶ John Bresnahan, *Travel Scandal Fallout Ensnarers Both Parties*, ROLL CALL (May 4, 2005), <https://rollcall.com/2005/05/04/travel-scandal-fallout-ensnarers-both-parties/>.

⁵⁷ Comm. on Codes of Conduct of the Judicial Conference (adopted Jan. 18, 1991), memorandum of Chief Justice Rehnquist, available at https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991_Resolution.pdf.

⁵⁸ *Guide to Judiciary Policy*, United States Courts, Vol. 2, Pt. C, Ch. 6 §620.35(a), <https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf>.

⁵⁹ *Id.* at §620.35(b)(3).

⁶⁰ 5 U.S.C. § 13104(a)(2); 5 C.F.R. § 2634.304(a); *Guide to Judiciary Policy*, United States Courts, Vol. 2, Pt. D, Ch. 3 §330, <https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf>. Recent revisions to the Federal Judiciary Financial Disclosure Regulations have absolutely no impact on the EIGA requirements for the reporting of private plane and yacht travel by justices. Those revisions provide narrow clarification of the "personal hospitality" exception for the reporting of food, lodging, or entertainment. In particular, the Judicial Conference made the revisions "to provide guidance on 'whether 'personal hospitality' may encompass hospitality extended at a commercial property such as a resort' and whether hospitality for which a 'third party reimburses the hosts for the costs' would fall outside the scope of the reporting exemption." The Honorable Roslynn R. Mauskopf, *Response Letter to Sen. Sheldon Whitehouse* (Mar. 23, 2023), [https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20\(Final\).pdf](https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20(Final).pdf).

financial disclosures.⁶¹ The public is unable to adequately determine whether any permissible exception of the gift regulations applies to a trip or if there are additional potential conflicts of interest associated with privately sponsored travel because of the limited disclosure requirements. Specifically, Justices' disclosures are missing four important features: details on the purpose of the trip; attendees of the trip; the cost of the trip; and immediate reporting of the trip.

The lack of transparency surrounding privately sponsored travel has raised questions about the influence that private parties funding or attending the trips can exert on individual Justices. From 2004 to 2018, Justices reported attending more than 1,300 privately sponsored trips.⁶² Justice Antonin Scalia notably frequently traveled at third parties' expense, taking 258 privately sponsored trips over the course of 11 years;⁶³ but many other Justices traveled at the expense of private parties.

For example, in 2019, Justice Brett Kavanaugh was reimbursed for a two-week teaching trip to the United Kingdom by George Mason University.⁶⁴ In 2018, Justice Ruth Bader Ginsburg took 14 privately sponsored trips,⁶⁵ Justice Alito took 6 trips,⁶⁶ and Justice Sonia Sotomayor took 13 trips.⁶⁷ In 2014, six Justices received paid trips to Europe. That year, Justice Scalia went on 23 privately funded trips, including to Hawaii, Ireland, and Switzerland.⁶⁸ Justice Kennedy took a three-week trip paid for by the Aspen Institute and the University of the Pacific, with destinations of Salzburg, San Francisco, and Aspen.⁶⁹

⁶¹ 5 U.S.C. § 13104(a)(2).

⁶² 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/>.

⁶³ Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html>.

⁶⁴ *Financial Disclosure Report for Calendar Year 2019*, at 2 (May 14, 2020), https://fixthecourt.com/wp-content/uploads/2020/06/Kavanaugh-BM-J3.-SC_SR_19.pdf (financial disclosure report of Justice Brett Kavanaugh).

⁶⁵ *Financial Disclosure Report for Calendar Year 2018*, at 2-3 (May 15, 2019), https://s3.amazonaws.com/pfds.opensecrets.org/N99999924_2018.pdf (financial disclosure report of Justice Ruth Bader Ginsburg).

⁶⁶ *Financial Disclosure Report for Calendar Year 2018*, at 2 (May 23, 2019), https://s3.amazonaws.com/pfds.opensecrets.org/N99999926_2018.pdf (financial disclosure report of Justice Samuel Alito).

⁶⁷ *Financial Disclosure Report for Calendar Year 2018*, at 2-3 (May 10, 2019), https://s3.amazonaws.com/pfds.opensecrets.org/N99999915_2018.pdf (financial disclosure report of Justice Sonia Sotomayor).

⁶⁸ *Financial Disclosure Report for Calendar Year 2014*, at 2-3 (May 15, 2014), <https://embed.documentcloud.org/documents/2157458-scalia-antonin-2014> (financial disclosure report of Justice Antonin Scalia).

⁶⁹ *Financial Disclosure Report for Calendar Year 2014*, at 2-3 (May 11, 2015), <https://embed.documentcloud.org/documents/2157457-kennedy-anthony-2014> (financial disclosure

Because only partial information was disclosed about the trips, the public cannot determine whether they fall under the gift exemption for privately sponsored travel. More importantly, the public is not aware of the cost of the trip and participants, which, if known, could trigger the recusal requirement by bringing into question the impartiality of the Justice. Without more detailed and frequent reporting of privately sponsored travel and a way to investigate failures to comply with those reporting requirements, public confidence in the integrity of the Court may continue to decrease.

B. Disclosure of Privately Sponsored Travel for the Legislative Branch

Congress has robust and detailed reporting requirements for privately sponsored travel, acknowledging that “travel may be among the most attractive and expensive gifts” in the 2008 House Ethics Manual.⁷⁰ The nature of the gift could create the appearance of a lawmaker using public office for private gain, and therefore privately sponsored travel is permitted only if it complies with the disclosure and pre-approval process. The disclosure is filed immediately following the trip and includes details about the sponsor of the trip, scheduled events, attendees, and costs.

Members of the House of Representatives, for example, are required by House Rule 25, clause 5 to disclose the receipt of travel expenses from a private source if that travel is in connection with the lawmaker’s official duties within 15 days after the travel is completed, after which the disclosures are made available for public inspection on the Clerk of the House’s website.⁷¹ This disclosure is in addition to the requirement to disclose gifts of private travel on the representative’s annual financial disclosure form.

Prior to the trip, members must submit details to the U.S. House Committee on Ethics (“House Ethics Committee”) for pre-approval to attend the trip. The extensive disclosures for pre- and post-trip reports include:

report of Justice Anthony Kennedy); Reity O’Brien and Rachel Baye, *Supreme Court justices bolstered by free travel, royalties, rental income*, CTR. FOR PUB. INTEGRITY (July 2, 2015), <https://publicintegrity.org/politics/supreme-court-justices-bolstered-by-free-travel-royalties-rental-income/>.

⁷⁰ U.S. House of Representatives Comm. on Standards of Conduct, 110th Cong., 2d Sess., *House Ethics Manual*, 87 (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

⁷¹ RULES OF THE HOUSE OF REPRESENTATIVES OF THE U.S., 118th Cong., Rule 25, cl. 5(b)(1)(A)(ii), cl. 5(b)(5); see also U.S. House of Representatives, *Gift Travel Filings*, <https://disclosures-clerk.house.gov/PublicDisclosure/GiftTravelFilings> (last visited April 28, 2023).

- *Pre-Travel Disclosure*
 - The member reports 30 days prior to the start of the trip the date and location of the travel; the sponsor paying for the travel; any family accompanying the member; justification for the trip and how it is connected to official duties; and a certification that no registered lobbyists or foreign agents were involved in organizing, requesting, or arranging the trip.⁷²
 - The private sponsor reports 30 days prior to the start of the trip the name of the primary sponsor of the trip; an attestation that the trip is not financed in any part by a registered lobbyist or foreign agent; the true source of the sponsor’s funds and any additional sponsors; the sponsor’s interest in the trip and reason for the trip; all House members invited on the trip; and the anticipated cost of expenses, among other details of the trip.⁷³

- *Post-Travel Disclosure*
 - The member confirms attending the trip and provides the trip itinerary.⁷⁴
 - The private sponsor provides the amount of expenses paid on behalf of, or reimbursed to, each individual traveler, as well as a list of all House members that attended the trip.⁷⁵

Willful or knowing misrepresentations on any of the preceding forms subject the signer to criminal prosecution under 18 U.S.C. §1001.

The Senate has similar travel disclosure requirements under Senate Rule 35.⁷⁶ The Senate requires 30-day advanced approval from the U.S. Senate Select Committee on Ethics (“Senate Ethics Committee”) by submitting a Private Sponsor

⁷² U.S. House of Representatives, Comm. on Ethics, *Traveler Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Travel_Traveler%20Form_Interactive.pdf (last revised March 2021).

⁷³ U.S. House of Representatives, Comm. on Ethics, *Primary Trip Sponsor Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Primary_Trip_Sponsor%20Form_V2_Interactive.pdf (last revised March 2021).

⁷⁴ U.S. House of Representatives, Comm. on Ethics, *Member/Officer Post-Travel Disclosure Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Travel_Member_Officer%20Post-Travel_Disclosure_Form_Interactive.pdf (last revised March 2021).

⁷⁵ U.S. House of Representatives, Comm. on Ethics, *Sponsor Post-Travel Disclosure Form*, https://ethics.house.gov/sites/ethics.house.gov/files/documents/2021_Travel_Sponsor%20Post-Travel_Disclosure%20Form_Interactive%20%28002%29.pdf (last revised March 2021).

⁷⁶ *The Senate Code of Official Conduct*, *supra* note 52, Rule 35; U.S. Senate, Select Comm. on Ethics, 118th Cong., Regulations and Guidelines for Privately Sponsored Travel (2023), https://www.ethics.senate.gov/public/_cache/files/674e33d3-9372-4ee1-9f12-e6939d4e58b7/regulations-and-guidelines-for-privately-sponsored-travel.pdf.

Travel Certification Form⁷⁷ along with the invitation for the travel and the itinerary for the travel. If the travel is approved, a post-travel disclosure package must be submitted within 30 days of completion of the privately sponsored travel. That package includes a Post-Travel Disclosure of Expenses,⁷⁸ the travel invitation, the completed and signed Private Sponsor Travel Certification Form, and any attachments. These documents are made available to the public by the Secretary of the Senate.⁷⁹

According to the 2008 House Ethics Manual, Congress established these enhanced disclosure requirements following ethics scandals involving lawmakers accepting travel from private sources without oversight or transparency.⁸⁰ The legislative branch's experience suggests that the potential of ethics scandals will continue to increase if the judicial branch continues to allow Justices to accept privately sponsored travel without at least increasing disclosure.

C. Increasing Transparency of Privately Sponsored Travel for Justices

To improve public confidence in the Supreme Court and its impartiality, Justices should disclose additional details concerning their acceptance of privately sponsored travel, including: the cost of the travel, attendees, and all scheduled events during the trip. Moreover, the disclosures should become public immediately following the trip instead of annually. The prompt disclosures will provide the public and litigants with adequate notice of any potential conflicts of interest with pending matters before the Court.

Congress' disclosure requirements for privately sponsored travel demonstrate that providing the public with clear information about the nature of a trip can decrease speculation of whether the trip is improper. Current Supreme Court ethics

⁷⁷ U.S. Senate, Select Comm. on Ethics, *Private Sponsor Travel Certification Form*, <https://www.ethics.senate.gov/public/cache/files/e3282b35-ddee-43e5-9c59-10920eedae26/pstcf.pdf>.

⁷⁸ U.S. Senate, Select Comm. on Ethics, *Senators and Officers Post-Travel Disclosure of Travel Expenses*, https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=C1735D98-6E76-4D6B-A89E-A06B47DAB8CA.

⁷⁹ U.S. Senate, Select Comm. on Ethics, *S.R. 35 Requirements*, https://www.senate.gov/legislative/Public_Disclosure/Rule_35_Travel.htm (last visited Apr. 28, 2023); U.S. Senate, *Gift Rule/Outside Paid Travel Database*, <https://giftrule-disclosure.senate.gov/> (last visited Apr. 28, 2023).

⁸⁰ "Under the previous version of the gift rule, the Standards Committee did not have authority to approve trips paid for by a private source. The previous rule placed on individual Members and officers, for themselves and their staff, the responsibility of making the determination that a particular trip was in connection with official duties and would not create the appearance of using public office for private gain. Pursuant to the rules adopted at the beginning of the 110th Congress, no such travel may be accepted without first receiving written approval by the Standards Committee." *House Ethics Manual* (2008), *supra* note 70, at 88; *See, e.g.*, Juan Williams, *Cleaning Up Capitol Hill After Abramoff*, NPR (Jan. 20, 2006), <https://www.npr.org/templates/story/story.php?storyId=5165211>.

rules appear to allow outside sources the ability to provide lavish trips to Justices without the public ever knowing the full nature of the relationship between the Justices and the hosts of the trips or other participants—or whether those parties have interests before the Court. Reform of the disclosure requirement is needed to restore public trust.

IV. The Supreme Court Recusal Requirement Lacks a Compliance Procedure

In all three branches of the federal government, recusal requirements exist to disqualify public officials from participating in decisions in which they have conflicts of interest. The legislative branch has limited recusal rules that apply only in very specific circumstances because of the concern that a lawmaker’s recusal from voting denies constituents representation.⁸¹ Although the executive and judicial branches have recusal requirements that apply to a broader range of matters, the frequency of allegations that Justices fail to recuse themselves from matters in which they have conflicts strongly suggests that the Supreme Court’s recusal requirement needs improvement. Increased transparency can improve public confidence in Supreme Court Justices’ recusal decisions.

A. Supreme Court Recusal Requirement

Federal law requires Supreme Court Justices to recuse themselves from any proceeding in which they have a conflict of interest as described in the disqualification statute, 28 U.S.C. § 455. The listed conflicts include, among others, “any proceeding in which [the Justice’s] impartiality might be reasonably questioned,” and circumstances in which the Justice has a financial interest or personal bias concerning a party.⁸²

The purpose of the recusal law is to resolve the ambiguity of previous recusal provisions.⁸³ Congress found “the existence of dual standards . . . couched in uncertain language” not only put judges and Justices in a difficult position to decide whether to recuse, but also could “weaken public confidence in the judicial system.”⁸⁴ Indeed, a Justice’s choice to recuse or not to recuse directly implicates

⁸¹ See *House Ethics Manual 2022 Print Ed.*, *supra* note 51, at 237 (“House precedents favor ‘the idea that there is no authority in the House to deprive a Member of the right to vote.’ Given the size of today’s districts, when a Member refrains from voting, well over half a million people are denied a voice on the pending legislation.”).

⁸² 28 U.S.C. § 455(a)-(b).

⁸³ Previously, there were two ethics provisions that judges and Justices had to consider. The first stated that a judge or Justice should not preside when a near relative is a party and the second stated that a judge or Justice should not participate in a case where their substantial personal interests are involved. Neither provision defined their terms, making it unclear what was considered a “near relative” or a “substantial interest.” H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6352.

⁸⁴ *Id.*

their oath of impartiality.⁸⁵ “Recusal aims to ensure both actual judicial impartiality and the appearance of judicial impartiality, which are necessary to ensure due process.”⁸⁶ Despite the intent of the recusal requirement to uphold the integrity of the Court and strengthen public confidence in the judicial system, public controversies involving Justices deciding not to recuse themselves persist.

During the past decade alone, there have been numerous allegations of Justices failing to comply with the recusal requirement. For example, in 2011, Justices Elena Kagan and Clarence Thomas were criticized for failing to disqualify themselves from participating in a decision to determine the fate of the Affordable Care Act. Justice Thomas’ perceived conflict of interest involved the political activities of his spouse in opposition to the healthcare law, while Justice Kagan was allegedly involved in developing the legal defense of the law during her prior role as Solicitor General.⁸⁷ From 2015 to 2022, there were at least 18 instances where Justices allegedly failed to recuse themselves despite perceived or actual conflicts of interest.⁸⁸ The allegations involve multiple Justices, including Justices Samuel Alito, Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, and Chief Justice John Roberts. The conflicts of interests range from owning stock in one of the parties to the litigation, to prior work on the matter while previously serving in government positions. In 2022, Justice Thomas was criticized for failing to recuse himself from participating in a case that determined whether certain White House records must be provided to Congress where correspondence from his spouse were later revealed in connection with the same investigation.⁸⁹

One reason for the recurrent criticism of the recusal law is the absence of any compliance procedure. The Justices alone decide if and when they should recuse

⁸⁵ Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 661 (2005).

⁸⁶ *Id.*

⁸⁷ See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, n.6 (2013) citing Editorial, *The Supreme Court’s Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38 (“Liberals in Congress have called for Justice Clarence Thomas to recuse himself from the review of the health care reform law because his wife, Virginia, has campaigned fervently against it. Conservatives insist that Justice Elena Kagan should remove herself from the case because, they claim, as solicitor general she was more involved in shaping the law than she lets on.”); Josh Gerstein, *No Sign Elena Kagan, Clarence Thomas will recuse on health care law*, POLITICO (Nov. 14, 2011), <https://www.politico.com/blogs/under-the-radar/2011/11/no-sign-elena-kagan-clarence-thomas-will-recuse-on-health-care-law-040802>.

⁸⁸ *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (Mar. 7, 2023), <https://fixthecourt.com/2022/01/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>.

⁸⁹ Jordan S. Rubin, *Where Ginni Thomas’s Texts Meet High-Court Ethics: Explained (1)*, BLOOMBERG LAW (Mar. 30, 2022), <https://news.bloomberglaw.com/us-law-week/ginni-thomas-texts-and-recusal-calls-top-court-ethics-explained>; Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022), <https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases>; Adam Liptak, *Justice Thomas Ruled on Election Cases. Should His Wife’s Texts Have Stopped Him?*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/supreme-court-clarence-thomas-recusal.html>.

themselves, and they are not required to provide any rationale for their decisions. In addition, there is not even an informal, non-binding review of the recusal decision to inform the public whether the decision is considered appropriate and aligns with prior decisions by other Justices. If a decision not to recuse raises questions about the Justice’s impartiality, there is no investigatory body to conduct oversight of the decision.

B. Executive Branch Recusal Requirements

The Supreme Court’s approach to compliance with its recusal requirement stands in stark contrast to the transparency of executive branch recusals. Federal criminal law and the executive branch code of conduct require that executive branch officials recuse themselves from participating in decisions in which they have conflicts of interest. The criminal statute, 18 U.S.C. § 208, requires recusal for conflicts involving certain financial interests. The code of conduct is broader and requires recusal “to avoid an appearance of loss of impartiality in the performance of . . . official duties.”⁹⁰ Circumstances that create an appearance of loss of impartiality include those where the official has certain business or personal relationships with a party in the matter.⁹¹ In addition, political appointees are subject to an ethics pledge to ensure recusal from matters involving work performed prior to entering public service.⁹²

To facilitate compliance with the recusal requirement, OGE enters into ethics agreements with senior officials. These agreements list the matters from which an official will recuse, the financial interests they will divest, or the termination of business relationships that conflict with official duties. The disclosures are available online and enable the public to know about specific recusals from matters involving certain parties with personal or business relationships with the official; specific assets divested to avoid conflicts; recusals related to a spouse’s employer; resignations from affiliated entities with conflicts; and other steps the official will take to avoid any actual or apparent conflicts of interest.⁹³ Furthermore, all ethics

⁹⁰ 5 C.F.R. § 2635.501(a).

⁹¹ 5 C.F.R. § 2635.502.

⁹² Exec. Ord. No. 13989, 86 Fed. Reg. 7029 (Jan. 25, 2021).

⁹³ See, e.g., Janet Yellen Ethics Agreement (Dec. 29, 2020),

[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/18A4D129DD5675888525864F0081071C/\\$FILE/Yellen.%20Janet%20L.%20final%20EA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/18A4D129DD5675888525864F0081071C/$FILE/Yellen.%20Janet%20L.%20final%20EA.pdf); Antony Blinken Ethics Agreement (Dec. 30, 2020),

[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/709E518A700361B08525864F008106BB/\\$FILE/Blinken.%20Antony%20%20final%20EA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/709E518A700361B08525864F008106BB/$FILE/Blinken.%20Antony%20%20final%20EA.pdf); Shereef Elnahal Ethics Agreement Supplement (May 16, 2022),

[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3D6ED41B788CEB258525882D002E47C9/\\$FILE/Elnahal.%20Shereef%20%20AMENDEDfinalEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3D6ED41B788CEB258525882D002E47C9/$FILE/Elnahal.%20Shereef%20%20AMENDEDfinalEA.pdf).

pledge waivers, which are granted to officials only in limited circumstances,⁹⁴ are made public by OGE.⁹⁵

OGE does not have authority to enforce the recusal requirement or issue sanctions for those who do not comply with the recusal requirement.⁹⁶ However, publicly available ethics agreements facilitate compliance by creating precedents for the types of matters that officials determine require recusal. If an official fails to recuse when they should have, the matter can be investigated by an agency inspector general.⁹⁷

C. Reforming the Supreme Court Recusal Requirement

The executive branch demonstrates that increased transparency improves implementation of a recusal requirement. The Supreme Court can better achieve the purpose of § 455 if Justices are required to disclose the rationale of their recusal decision when a party before the Court requests recusal. Regardless of whether the party agrees with the recusal decision, publishing the rationale underlying the decision decreases uncertainty and speculation about the Justice's choice.

To support consistency with recusal decisions and provide needed guidance, the Committee on Codes of Conduct of the Judicial Conference should issue non-binding reviews regarding whether a recusal decision appears to comply with § 455. These reviews from the Judicial Conference would neither be disciplinary actions nor direct the Justices to recuse themselves or take any action. Instead, the reviews would create much-needed informal interpretations of the application of § 455, thus providing guidance to Justices regarding compliance with the recusal requirement.

V. Conclusion

Because of the relatively small size of the Supreme Court and the nature of the role of the judicial branch, the ethics laws that apply to Supreme Court Justices need not exactly match those that apply to the executive and legislative branches. Nevertheless, the history of repeated ethics concerns with Justices' potential conflicts of interest demonstrates the limits of the Supreme Court's current ethics practices. The Statement on Ethics Principles and Practices is not a substitute for legally binding ethics standards and actual enforcement of those standards. Establishing specific and relevant ethics practices that are effective in the other two branches to the Supreme Court can increase public trust in the judiciary.

⁹⁴ Exec. Ord. No. 13989, *supra* note 92, at Sec. 3.

⁹⁵ See, e.g., U.S. Off. of Gov't Ethics, *Pledge Waivers (E.O. 13989) – Biden Administration*, [https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+\(EO+13989\)](https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+(EO+13989)) (last visited Apr. 28, 2023).

⁹⁶ The Standards of Ethical Conduct for Employees of the Executive Branch calls for agencies to create their own corrective or disciplinary regulations. 5 C.F.R. § 2635.106.

⁹⁷ 5 C.F.R. § 2638.106.