



NEW YORK
CITY BAR

FOR IMMEDIATE RELEASE – August 21, 2023

Contact: Eric Friedman
efriedman@nycbar.org

Eli Cohen
ecohen@nycbar.org

Restoring Public Faith in the Supreme Court Urgently Requires a Code of Ethics

Statement by Susan J. Kohlmann, President, New York City Bar Association

The New York City Bar Association, the nation’s largest voluntary local bar organization, is gravely concerned about the plummeting level of public trust in the United States Supreme Court. A functioning democracy requires public confidence in its governmental institutions, and in their impartiality in implementing the rule of law. Confidence in the rule of law further requires public trust in the integrity of those who serve on our nation’s highest court to uphold both their commitment to the Constitution and their oath to “faithfully and impartially” perform their judicial duties. As citizens, as officers of the courts in the many jurisdictions in which our members practice, and as a bar association committed to protecting the rule of law, we bear a special responsibility to speak when public confidence in the Supreme Court wavers because of the Court’s own conduct or omissions. We believe this is such a time.

Recent polling reveals that approval of the Supreme Court – albeit with stark divisions along political lines – is at an all-time low.¹ When the country is so politically divided, it is even more important that confidence in the Court not be further undermined by questions of ethics and independence. Recent disclosures of receipt by certain members of the Court of lavish gifts, lodging, travel, entertainment, vacations, real estate transactions and benefits to their family members,² many of which were not disclosed notwithstanding existing federal disclosure requirements, have raised alarm.³ Reasonable concerns have also been raised about the

¹ A June 2023 Quinnipiac poll found that American voters’ approval of the Supreme Court is at 30%, an all-time low. “...Supreme Court Job Approvals Hits All-Time Low,” Quinnipiac University POLL, June 21, 2023, <https://poll.qu.edu/poll-release?releaseid=3874>. An August 2023 Gallup poll found that Americans approval of the Court is at 40%, also a record low. Jeffrey M. Jones, “Supreme Court Approval Holds at Record Low,” Gallup News, Aug. 2, 2023, <https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx#:~:text=Job%20Approval%20Rating%20of%20the%20U.S.%20Supreme%20Court&text=Currently%2C%2040%25%20approve%2C%20tied,a%2042%25%20reading%20in%202005> (noting that ratings differ starkly by political party). (All websites last accessed August 16, 2023.)

² Jeffrey Shesol, “The Tragedy of John Roberts,” New York Times, July 2, 2023, <https://www.nytimes.com/2023/07/03/opinion/john-roberts-supreme-court.html>.

³ See Ethics in Government Act of 1978, 5 U.S.C. Ch. 131.

promotion of books or the granting of interviews by members of the Court.⁴ These disclosures have raised fair questions, both about potential conflicts of interest for the justices involved and the infrequency of recusals where their impartiality might reasonably be questioned, notwithstanding requirements of existing law and the justices' oaths of office.⁵ These reported actions of the justices violate established norms of behavior for those holding public office, which prohibit the receipt of such emoluments from persons or entities having matters before the public officials. In addition to violating these norms, the justices' actions raise at least the appearance of ethical impropriety. The absence of any credible process through which the facts relevant to these allegations can be investigated and established and a resolution reached which is consistent with existing norms of federal judicial ethics causes the situation to fester, doing grave damage to the reputation of the Court as an institution.

The justices of the Supreme Court must be held to the highest ethical standards. Existing guardrails and norms have proven insufficient. The Code of Conduct for United States Judges does not apply to the justices of the Supreme Court.⁶ Existing statutory restrictions which require all judges, including Supreme Court Justices, to avoid even the appearance of impropriety, have proven ineffectual as a deterrent,⁷ as have federal rules on receipt and disclosure by public officials of gifts and benefits.⁸ That this is so is both shameful and a continuing threat to the rule of law.

We find it deeply disturbing, and unacceptable, that the Court itself has thus far failed as an institution to address this crisis of confidence in its own integrity.⁹ Members of the Court, including the Chief Justice, have contended that they are capable of policing themselves and are the sole members of the federal judiciary to have no need for any enforceable standards for their ethical behavior. The Chief Justice has responded dismissively to a Congressional invitation to

⁴ See Associated Press, "Justice Sotomayor's staff urged schools and libraries to buy her memoir or kids' books," NPR, July 11, 2023, <https://www.npr.org/2023/07/11/1187005372/sonia-sotomayor-supreme-court-staff-book-sales-signings-memoir>.

⁵ Federal law mandates recusal of *any* federal judge, including a Justice of the Supreme Court, in such circumstances: "Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455a. The Supreme Court oath of Office states in relevant part:

I, _____, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

See <https://www.constitutionfacts.com/us-supreme-court/history-of-oaths-of-office>.

⁶ See 28 U.S.C. § § 351-364. Authored by the Judicial Conference, the Code only applies to judicial officers of the lower federal courts. Further, it limits the availability of advisory ethics opinions from the Conference's Committee on Codes of Conduct to those judges to whom the Code applies.

⁷ See 28 U.S.C. § 455a, and n. 5, *supra*.

⁸ 5 U.S.C. Ch. 131.

⁹ Similar concern has been raised by the American Bar Association. See *Report of the Task Force On Law, Society and the Judiciary*, American Bar Association, Aug. 2023, <https://www.americanbar.org/content/dam/aba/administrative/news/2023/task-force-law-society-justice-report.pdf>.

discuss the matter,¹⁰ citing separation of powers, a position which is not historically tenable. And a prebuttal in the public press by one member of the Court¹¹ attacking investigative reporting on ethical questions raised by his conduct – and flatly denying even the appearance of impropriety – has only served to undermine the confidence and expectation of the public that the justices of the Supreme Court take care to adhere to the highest ethical standards. The Court’s refusal to take any initiative to police itself and its continued insistence that the conduct of its members is beyond reproach has had the opposite effect.

The Supreme Court’s sense of its own impunity is damaging its stature and diminishing its role in preserving the rule of law. The Chief Justice’s deflection of rising public concern, in lieu of transparency necessary to restore trust in the Court and its members, has expanded the crisis in confidence affecting the Court as an institution. It is preeminently the responsibility of the Chief Justice to oversee a process which would lead the Court to adopt a set of ethics standards which can be no less rigorous than those contained in the Code of Conduct for other federal judges and which incorporates a credible regime of oversight and enforcement. The premise under which the Court currently operates, that each justice shall decide ethics issues individually, is no longer tenable or credible. The Court’s failure to date to implement any policy changes to assure the ethical behavior of its members has only further eroded respect for the Court and increased the public’s perception of unfairness and partiality in its performance of its duties. More critically, the Court’s refusal to create its own ethical code and provide for greater transparency of its members’ conduct deprives the public of meaningful accountability for the actions of those who serve it in life-tenured positions.

In the absence of immediate action by the Supreme Court itself, we believe it essential that Congress act promptly to address this crisis. The Court and its members require clear rules of ethical behavior, arising from a binding ethics code closely paralleling the one governing all other federal judges.¹² In addition, existing applicable standards for financial disclosure and recusals by justices must be strengthened, in order to promote transparency and eliminate opportunities for obfuscation. We further believe that both an ethical oversight body and an institutionalized enforcement mechanism to assure accountability are now necessary.

With these requirements in mind, we have reviewed the current version of Senate Bill 359, the *Supreme Court Ethics, Recusal and Transparency Act of 2023*, introduced by Senator Sheldon Whitehouse earlier this year. As amended and reported out of the Senate Judiciary Committee on July 20, 2023, this bill would:

- (a) require the Supreme Court to issue, after an opportunity for public comment, a code of conduct for its members within 180 days after the statute’s enactment;

¹⁰ Nina Totenberg, “Chief Justice Roberts declines to testify before Senate panel,” NPR, Apr. 25, 2023, <https://www.npr.org/2023/04/25/1172083875/chief-justice-roberts-declines-to-testify-before-senate-panel>.

¹¹ Samuel A. Alito, Jr., “Justice Samuel Alito: ProPublica Misleads Its Readers,” *Wall Street Journal*, June 20, 2023, <https://www.wsj.com/articles/propublica-misleads-its-readers-alito>.

¹² See *Resolution 400*, adopted by the American Bar Association House of Delegates at its Midyear Meeting 2023, https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/400.

- (b) require recusal of a justice if that justice or a family member received any income, gifts or reimbursements from a party (or affiliate) to any proceeding at any time during the past six years;
- (c) require the Court to provide procedures for filing and investigating complaints against individual justices alleging a violation of the new Supreme Court code of conduct or “conduct that undermines the integrity of the Supreme Court;”
- (d) direct the Counselor of the Court to establish, with the approval of the Chief Justice, rules governing the disclosure of gifts, income or reimbursements received by any justice or any immediate family member;
- (e) establish procedures for receiving and reviewing motions to disqualify a justice who is the subject of a good faith and factual motion to disqualify; and
- (f) provide for the disclosure by persons filing amicus briefs in federal courts of the identities of persons contributing to those briefs or making substantial contributions to that amicus within the previous year.

Overall, we believe that S. 359, as reported out by the Judiciary Committee, is a reasonable and measured response to the need identified above for prompt action either by the Supreme Court itself or by Congress to help restore public confidence in the Supreme Court. While there might be debate over the details of specific provisions of the bill, we believe S.359 provides a fair and workable way to assure that Supreme Court Justices adhere to the standards which the public rightly expects of them in the performance of their judicial duties.¹³ We therefore call on Congress to enact this or similar legislation without further delay, and we call on the justices of the Supreme Court to act promptly to put their treasured institution in order so that it can resume its honored place in our Constitutional democracy.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org

¹³ The City Bar expresses no opinion on the “Sense of Congress” provisions in section 10 of S.359.