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Freedom of the Press and Supreme Court Ethics

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I. INTRODUCTION

The United States Supreme Court has a public relations problem that is threatening its legitimacy within American constitutional democracy. The Court, which is populated by nine life-tenured, salary-protected, unreviewable justices, describes itself as deriving authority from its credibility with the populace it helps govern.[1] Yet years of controversies separate and apart from the justices' decisions in high-profile cases have driven public confidence in the Court to historic lows.[2]

The events of the last few months have exacerbated the Court's lack of popularity. Since April 6, 2023, there have been multiple reports involving Justice Clarence Thomas's financial relationship with Harlan Crow, a wealthy conservative donor (and member of several organizations that regularly file amicus briefs before the Court).[3] These reports contain information regarding several substantial gifts from Mr. Crow to Justice Thomas. The reported gifts include six-figure vacations, complete with transportation on Mr. Crow's private plane,[4] and

* Professor of Law, Stetson University College of Law. I want to thank all of the participants in the 2023 Free Speech Discussion Forum hosted by the University of Luxembourg for their insightful comments and suggestions.

[1] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865–66 (1992) ("[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

[2] Devin Dwyer, *All 9 Supreme Court Justices Push Back on Oversight: 'Raises More Questions,' Senate Chair Says*, ABC NEWS, (Apr. 8, 2023), https://abcnews.go.com/Politics/9-supreme-court-justices-push-back-oversight-raises/story?id=98917921 (on file with the *University of the Pacific Law Review*).

[3] Ed Pilkington, *Judicial Record Undermines Clarence Thomas Defence in Luxury Gifts Scandal*, GUARDIAN (Apr. 20, 2023), https://www.theguardian.com/us-news/2023/apr/20/clarence-thomas-supreme-court-harlan-crow-luxury-gifts (on file with the *University of the Pacific Law Review*).

[4] Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PRO PUBLICA (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow (on file with the *University of the Pacific Law Review*).

private school tuition for Justice Thomas's great nephew, who was under the justice's legal guardianship and was being raised by him "as a son."[5] Mr. Crow also reportedly purchased property from Justice Thomas and his family, including the home that Justice Thomas's mother continued to live in,[6] and gifted the Thomas family valuable art projects.[7] None were disclosed by the Justice.

Justice Thomas's wife, Virginia ("Ginny") Thomas, has been similarly implicated in controversial reports relating to her husband. Leonard Leo, a conservative judicial activist, "arranged for [Ginny Thomas] to be paid tens of thousands of dollars for consulting work just over a decade ago, specifying that her name be left off billing paperwork."[8] A few months prior, in September 2022, reports surfaced that Justice Thomas dissented in a case ordering the disclosure of presidential records relating to the insurrection at the U.S. Capitol on January 6, 2021, at the same time Ginny Thomas was secretly trying to overturn the results of the election that gave rise to that insurrection.[9]

The recent wave of reported ethical violations at the Court are not, however, limited to Justice Thomas and his wife. Justices Neil Gorsuch and Sonia Sotomayor reportedly failed to recuse themselves from cases involving book publishers they had lucrative relationships with; in all three cases, the Court refused to hear the case when the publisher had prevailed in the lower court.[10] Pro

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[5] Dan Mangan, *Supreme Court: Harlan Crow Paid School Tuition for Clarence Thomas' Nephew, Report Says*, CNBC (May 4, 2023), https://www.cnbc.com/2023/05/04/supreme-court-harlan-crow-clarence-thomas-nephew.html (on file with the *University of the Pacific Law Review*); Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PRO PUBLICA (May 4, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus (on file with the *University of the Pacific Law Review*).

[6] Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PRO PUBLICA (Apr. 13, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus (on file with the *University of the Pacific Law Review*).

[7] *See* Kaplan et al., *supra* note 4 (reporting that Justice Thomas spoke at the dedication of a statute of his "beloved eighth grade teacher, a nun," and that the statue was paid for by "Harlan and Kathy Crow").

[8] Emma Brown, Shawn Boburg, & Jonathan O'Connell, *Judicial Activist Directed Fees to Clarence Thomas's Wife, Urged 'No Mention of Ginni'*, WASH. POST (May 4, 2023), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway/ (on file with the *University of the Pacific Law Review*).

[9] Jo Becker & Danny Hakim, *Ginni Thomas Urged Arizona Lawmakers to Overturn Election*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/20/us/politics/ginni-thomas-election-trump.html (on file with the *University of the Pacific Law Review*); Luke Broadwater & Stephanie Lai, *Ginni Thomas Denies Discussing Election Subversion Efforts With Her Husband*, N.Y. TIMES (Sept. 29, 2022), https://www.nytimes.com/2022/09/29/us/politics/ginni-thomas-jan-6-committee.html (explaining that the case in which Justice Thomas participated, *Trump v. Thompson*, did not directly involve his wife's activities and Ginny Thomas denied, in testimony before the congressional committee investigating the insurrection, that "she never discussed [her efforts to overturn the election] with her husband"). Nevertheless, this event is an example of a justice's conduct raising serious questions about impartiality, which only came to light after it was reported in the press. Had Justice Thomas recused himself from the case, which was decided 8 to 1, with Thomas as the lone dissenter, the ethical controversy would never have arisen. Had the press never uncovered Ginny Thomas's attempts to subvert the election results, the public would have never known of the issue.

[10] Denial of review by the Court is not a decision on the merits, and only requires the votes of six justices, so the fact that none of the cases were accepted by the Court does not directly implicate either Justice Gorsuch or Sotomayor.However, their conduct raised ethical questions and was not known publicly because the Court does not disclose justice's votes on whether to hear a case. The conduct was only revealed by investigative reporting. Devan Cole, *2 Supreme Court Justices Did Not Recuse Themselves in Cases Involving Their Book Publisher*,

Publica first reported that Justice Samuel Alito went on a luxury fishing trip—worth over $100,000—with wealthy conservative donor Paul Singer.[11] Justice Alito failed to include the trip on his annual disclosure documents and then participated in a case before the Court in which Singer's fund was a named party.[12] At the start of 2023, a former colleague of Chief Justice John Roberts's wife claimed that she earned "'millions' . . . 'recruiting attorneys for jobs at law firms,'" including "firms that have cases before the Supreme Court."[13] Just two months earlier, a former friend of Justice Alito accused him of revealing the outcome of a highly controversial case "involving contraception and religious rights" before it was made public,[14] and Justice Brett Kavanaugh was criticized in the press for attending a holiday party "hosted by the head of the Conservative Political Action Coalition (CPAC)."[15]

To be clear, the above list of controversial activity by the justices is not meant to be exhaustive. It is also not a comment on the ethics of any specific activity, nor should it be read to suggest that all of the above conduct should be viewed similarly. While the question of whether a justice acted ethically in a given circumstance is critical to the legitimacy of the individual justice and the Court as an institution, those specific ethical determinations are beyond the scope of this Essay. For present purposes, it is enough to acknowledge that each example raises a significant ethical issue that merits public attention in a constitutional democracy and then to address the question that logically follows—what, then, are we to do about it?

The remainder of this piece will focus on that question. More specifically, it will argue that a free and energetic press is not just *an* important check on ethically questionable behavior by the justices; it is perhaps *the most* productive way to constrain their behavior. This perspective is important because it runs counter to the popular wisdom regarding ethics at the Court, namely that the justices must either adopt their own legally binding code of ethics or have one imposed on them by Congress. Part II of this Essay offers some background on the source of the Court's recent reputational decline. Part III outlines existing ethics standards for the Court, including the Court's recently adopted Code of Conduct

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CNN (May 4, 2023), https://www.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html (on file with the *University of the Pacific Law Review*).

[11] Justin Elliott, Joshua Kaplan, & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PRO PUBLICA (June 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court (on file with the *University of the Pacific Law Review*).

[12] *See id.*

[13] Alison Durkee, *Chief Justice Roberts' Wife Is Latest Supreme Court Spouse To Spark Ethics Concerns*, FORBES (Jan. 31, 2023), https://www.forbes.com/sites/alisondurkee/2023/01/31/chief-justice-roberts-wife-is-latest-supreme-court-spouse-to-spark-ethics-concerns/?sh=756f84ea5bb8 (on file with the *University of the Pacific Law Review*).

[14] Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html (on file with the *University of the Pacific Law Review*).

[15] Alison Durkee, *Brett Kavanaugh Attends Conservative Holiday Party: Latest Supreme Justice Caught Cozying Up With Partisans*, FORBES (Dec. 14, 2022), https://www.forbes.com/sites/alisondurkee/2022/12/14/brett-kavanaugh-attends-conservative-holiday-party-latest-supreme-justice-caught-cozying-up-with-partisans/ (on file with the *University of the Pacific Law Review*).

for Justices of the Supreme Court of the United States,[16] and their limitations. Part IV summarizes alternative proposals for Supreme Court ethics reform and why they are not likely to achieve reformers' goals or meet their expectations. Part V offers some media-based checks on the justices' ethical conduct and argues that those checks are more likely to both constrain the justices and promote the legitimacy of the Court than more traditional command-and-control approaches.

II. THE "BEGINNING"

Although ethical conundrums at the Supreme Court are nothing new—and any attempt to identify the "start" of something in an institution that is over 240 year old is inherently fraught—the Court's current reputational deficit can be traced at least in part to a series of events that only tangentially included the justices.

Beginning in 2016, the Court came under intense public scrutiny over the appointment and confirmation of three new justices during the Trump Administration. Senate Republicans first took the unprecedented step of refusing to consider President Barack Obama's nominee to the Court, Judge Merrick Garland, ostensibly because it was a presidential election year, and the public should be permitted to weigh in on the selection of the next justice.[17]

Two years later, as then-Judge Kavanaugh was embroiled in a confirmation battle over alleged sexual assaults, a partisan feud broke out over the need for additional investigation into the allegations. In fact, but for one Senator's last-minute break from their party's position, the committee would have voted to send then-Judge Kavanaugh's nomination to the Senate floor on strict party lines, without any additional investigation. As it happened, the abbreviated investigation was cast as another example of partisanship's hold on the confirmation process. Justice Kavanaugh was confirmed by only two votes—the narrowest margin for a justice since 1881—only one Democrat supported his nomination.[18]

The nomination in 2020 of then-Judge Amy Coney Barrett to fill the seat vacated by Justice Ruth Bader Ginsburg's death less than two months before the presidential election rekindled the partisan divide over the propriety of considering a Supreme Court nomination so close to an election. This divide was made worse

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[16] SUPREME COURT OF THE UNITED STATES, CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (Nov. 13, 2023) [hereinafter "Supreme Court Code"], *available at* https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[17] Before President Obama nominated Judge Garland to fill the late Justice Scalia's seat, Senator Mitch McConnell, the Senate majority leader, stated that "The American people should have a voice in the selection of their next Supreme Court justice . . . . Therefore, this vacancy should not be filled until we have a new president." Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (Oct. 19, 2020), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html (on file with the *University of the Pacific Law Review*).

[18] *See* Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html ("The Kavanaugh confirmation . . . gave Republicans what they believe is momentum to ensure that they keep their slim Senate majority. . . . But it also . . . challenged Americans' faith in the Supreme Court as an institution that is above politics."); *see also* Natasha Bertrand, *The FBI Investigation Didn't Go Very Far by Design*, ATLANTIC (Oct. 5 2018) (describing the sharp partisan divide over the integrity and conclusions of the FBI investigation into allegations of sexual assault against then-Judge Kavanaugh).

by the facts that the same committee that voted to move Justice Barrett's nomination to the Senate floor refused to consider Judge Garland's nomination four years earlier under nearly identical—and logistically more manageable[19]—circumstances, and that the president explicitly tied the timing of Judge Barrett's nomination to the pending election.[20]

The fallout from these confirmation battles was a loss of public respect for, and confidence in, the Court's ability to separate itself from party politics. Controversy accompanying the confirmations of Justices Gorsuch, Kavanaugh, and Barrett set the stage for criticism of those justices' decisions as being motivated by the same rank partisanship that was seemingly responsible for elevating the justices to the Court in the first place. That is not to say that perception is reality, just that it is indeed perception. Through no fault of the new justices, their appointment became its own stain on the Court's reputation, a stain that would only grow with reports of the justices' most recent ethical controversies.

Those reports sparked renewed calls for ethics reform at the Court. In February 2023, the American Bar Association adopted a resolution urging the Supreme Court to adopt a binding code of ethics for the Justices. In May 2023, the Senate Judiciary Committee held hearings on judicial ethics and the problem of waning public confidence in the Court. The committee chair invited Chief Justice John Roberts to testify at that hearing. He declined in a letter dated April 25, 2023, but took the opportunity to try and clarify the Court's view of its ethical obligations in an attached Statement of Ethics Principles and Practices.[21] The chair responded with a statement indicating that the Statement was not sufficient to deter Congress from pursuing a binding ethics code for the justices.[22]

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[19] *See* Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg's Seat on the Supreme Court*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html (stating that Judge Garland was nominated on March 16, 2016, 237 days before the 2016 presidential election, whileJustice Barrett's nomination occurred within 38 days of the 2020 election; BARRY MCMILLION, CONG. RSCH. SERV., R44234, SUPREME COURT APPOINTMENT PROCESS: SENATE DEBATE AND CONFIRMATION VOTE 14 (Oct. 16, 2020), https://fas.org/sgp/crs/misc/R44234.pdf (explaining that, since 1975, "the average number of days from nomination to final Senate vote is 68.2 days (or approximately 2.2 months), while the median is 69.0 days").

[20] Josh Wingrove, *Trump Talks Up Need for Full Court as He Casts Doubt on Election*, BLOOMBERG (Sept. 23, 2020), https://www.bloomberg.com/news/articles/2020-09-23/trump-says-supreme-court-needs-ninth-justice-to-decide-election (on file with the *University of the Pacific Law Review*) (President Trump made clear that he thought installing his nominee on the Court before the election was important because the election "will end up in the Supreme Court and I think it's very important that we have nine justices, and I think the system's going to go very quickly.").

[21] Letter from Chief Justice John Roberts to Chairman Durbin 1 (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf ("The Justices, like other federal courts, consult a wide variety of authorities to address specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, disciplinary decisions, and the historical practice of the Court and the federal judiciary. They may also seek advice from the Court's Legal Office and from their colleagues.").

[22] Press Release, Sen. Durbin, Statement on Chief Justice Roberts Declining to Testify Before the Judiciary Committee Regarding Supreme Court Ethics (Apr. 25, 2023), https://www.judiciary.senate.gov/press/dem/releases/durbin-statement-on-chief-justice-roberts-declining-to-testify-before-the-judiciary-committee-regarding-supreme-court-ethics ("I am surprised that the Chief Justice's recounting of existing legal standards of ethics suggests current law is adequate and ignores the obvious. . . . It is time for Congress to accept its responsibility to establish an enforceable code of ethics for the Supreme Court, the only agency of our government without it.").

On July 20, 2023, the Democrat-controlled Senate Judiciary Committee voted to advance the Supreme Court Ethics, Recusal and Transparency (SCERT) Act of 2023 out of committee on a strict party-line vote, making it the most successful attempt (among dozens since 2011) at statutory Supreme Court ethics reform. The Act "would 'require Supreme Court Justices to adopt a code of conduct, create a mechanism to investigate alleged violations of the code . . . , improve disclosure and transparency when a Justice has a connection to a party or amicus before the Court, and require Justices to explain their recusal decisions . . . .'"[23]

Roughly one week after the Act's advancement out of committee, Justice Alito granted an interview to a Wall Street Journal reporter who was also counsel in a pending case before the Court.[24] In that interview, the justice maintained that "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court – period."[25] This prompted a letter from the chair of the Senate Judiciary Committee to Chief Justice Roberts, demanding the Chief Justice require Justice Alito to recuse himself from both *Moore v. United States*—the tax case involving Mr. Rivkin as counsel—and "any future cases concerning legislation that regulates the Court."[26] Justice Alito declined and responded with a four-page statement supporting his decision.[27]

While SCERT is unlikely to be adopted by the current Congress,[28] its advancement out of committee, in conjunction with the other recent ethical controversies surrounding the Court, cannot be overlooked. On November 13, 2023, the Court adopted the Code of Conduct for Justices of the Supreme Court of the United States.[29] Regardless of whether the Court's adoption of its new code

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[23] Brittany Bernstein, *Kagan Publicly Addresses Congressional Oversight of Court Hours After Senate Dems Demand Alito's Recusal for Doing the Same*, NAT'L REV. (Aug. 4, 2023), https://www.nationalreview.com/news/kagan-publicly-addresses-congressional-oversight-of-court-hours-after-senate-dems-demand-alitos-recusal-for-doing-the-same/ (on file with the *University of the Pacific Law Review*).

[24] Dan Berman, *Samuel Alito Tells Congress to Stay Out of Supreme Court Ethics Controversy*, CNN.COM (July 28, 2023), https://www.cnn.com/2023/07/28/politics/samuel-alito-congress-ethics-rules-wall-street-journal/index.html.

[25] *Id.*

[26] Letter from Senator Richard Durbin to Chief Justice John Roberts, Aug. 3, 2023, *available at* https://www.judiciary.senate.gov/imo/media/doc/durbin_judiciary_committee_dems_urge_chief_justice_to_address_justice_alitos_wall_street_journal_interview_that_violates_the_courts_statement_on_ethics.pdf.

[27] Moore v. United States, No. 22-800 (statement of Alito, J., Sept. 8, 2023), *available at* https://www.supremecourt.gov/opinions/22pdf/22-800_1an2.pdf (noting that "Justices have participated in interviews with representatives of media entities that have frequently been parties in cases before the Court," and "have been interviewed by attorneys who have also practiced in this Court").

[28] As one reporter described it:

> The SCERT Act will next go to the full Senate, though it faces extremely long odds of passing Congress. The legislation would need a majority of lawmakers in the Republican-controlled House and at least 60 Senate votes to pass. Republicans have been strongly opposed to Democrats' Supreme Court ethics efforts, casting it as a partisan campaign to punish the 6-3 conservative-majority court for issuing opinions Democrats don't like.

Alison Durkee, *Supreme Court Ethics: Senate Committee Approves Court Reforms—Here's What Would Change*, FORBES (July 20, 2023), https://www.forbes.com/sites/alisondurkee/2023/07/20/supreme-court-ethics-senate-committee-approves-court-reforms-heres-what-would-change/ (on file with the *University of the Pacific Law Review*).

[29] *See* SUPREME COURT CODE, *supra* note 16.

was in fact caused by recent events, there is evidence that rising public pressure on the Court to update its ethics standards played a role in its adoption.[30]

Understanding the causes and incentives for Supreme Court ethics reform is necessary to identify the optimal method of promoting ethical conduct by the justices, but it is not sufficient. In order to understand better the relative merits of existing reform proposals, we must first consider the existing legal landscape around Supreme Court ethics.

III. THE CURRENT ETHICAL LANDSCAPE AT THE COURT

The best way to describe the ethics laws that bind the justices is to first highlight those that do not. Federal judges are bound by the Judicial Conference of the United States' Code of Conduct for United States Judges,[31] but the Code of Conduct expressly excludes Supreme Court justices.[32] The American Bar Association's Model Code of Judicial Conduct refers only to "judges," rather than justices, and has been historically interpreted by the Court as at best advisory.[33] The Judicial Conduct and Disability Act provides a vehicle for applying various forms of discipline to federal judges, including suspension, censure, and reprimand, but it too expressly excludes the Supreme Court.[34] The specific reasons for excluding the justices from these ethical provisions are somewhat varied and beyond the scope of this Essay. However, there is a common theme that the separation of powers and principle of judicial supremacy prevent other branches of government or lower court judges from imposing, and certainly from enforcing, legally binding ethical standards on members of the highest Court.[35]

Notwithstanding concerns about judicial independence and enforcement, there are some ethical requirements that do purport to be legally binding on the justices. The federal judicial recusal statute expressly includes the justices, but it has proven largely ineffective for at least three reasons. First is that statutory recusal requirements are likely unconstitutional. Because individual justices cannot be replaced when they are removed from a case, mandatory recusal alters the makeup of the Court in a given case and, in more extreme circumstances, could deprive the Court of the quorum necessary to resolve a dispute over which it has

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[30] *See, e.g.*, Robert Barnes & Ann E. Marimow, *For Supreme Court, Ethics Have Become the Elephant in the Courtroom*, WASH. POST (Oct. 2, 2023), https://www.washingtonpost.com/politics/2023/10/01/supreme-court-new-term-ethics/ (describing as a "concern" for the Court at the start of its term "how to convince the public that the justices take seriously their ethical obligations"); Devin Dwyer, *Under Ethics Pressure, Supreme Court Announces It's Adopting Code of Conduct*, ABC NEWS (Nov. 13, 2023), https://abcnews.go.com/Politics/ethics-pressure-supreme-court-announces-adopting-code-conduct/story?id=104856337 (describing publication of Supreme Court Code as "responding to years of criticism that the nation's highest court does not have transparent or enforceable ethics guidelines").

[31] *Code of Conduct for United States Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (effective Mar. 12, 2019).

[32] *Id.* (explaining that code applies to "circuit judges, district judges," and other federal judges, but not Supreme Court justices).

[33] MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

[34] 28 U.S.C. § 351(d) ("'[J]udge' means a circuit judge, district judge, bankruptcy judge, or magistrate judge.").

[35] *See* Charlie Savage, *Tightening Supreme Court Ethics Rules Faces Steep Hurdles*, N.Y. TIMES (May 5, 2023), https://www.nytimes.com/2023/05/05/us/politics/supreme-court-ethics-rules-justice-thomas-crow.html ("[I]t is hard to envision any binding way to enforce a code of ethics on the Supreme Court.").

jurisdiction. Because Article III of the Constitution mandates "one Supreme Court" to exercise jurisdiction in all cases properly before it, any outside threat to the Court's ability to carry out its constitutional obligation to decide cases is an unconstitutional interference with the Court's authority under Article III.[36]

Perhaps more important than the constitutional argument, however, is the fact that the justices do not believe—or act as if—they are bound by the federal recusal statute for constitutional reasons. While testifying before the House Subcommittee on Financial Services and General Government, Justice Kennedy pointed out that "there is a…constitutional…problem" with making recusal standards binding on the Court.[37] In his 2011Year-End Report on the Federal Judiciary, Chief Justice Roberts made a point of explaining that "the limits of Congress's power to require recusal [of Supreme Court Justices] have never been tested. The Justices follow the same general principles with respect to recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court."[38] This approach to recusal has been confirmed by decades of recusal decisions by the justices that do not comport with statutory requirements.[39]

Lastly, the recusal statute is not an effective constraint on the justices because it is effectively unenforceable. Despite being written in mandatory terms, the only judges with authority to bind Supreme Court justices are other members of the Court, and while they theoretically could judge one another's recusal decisions, they have clearly and repeatedly expressed their reluctance, and indeed refusal, to do so.[40] In his 2011 Year-End Report, Chief Justice Roberts explained that, like other federal judges, Supreme Court justices make their own recusal decisions, but unlike other judges, the justices' decisions are not reviewable by a higher court.[41] Discipline from other branches is similarly unlikely, as evidenced by the fact that the Judicial Conduct and Disability Act excludes members of the Court from suspension or other sanctions that are available against lower court judges under the Act.[42]

Financial disclosure requirements, in particular those in the Ethics in Government Act (EIGA) and the corresponding guidance,[43] do not come with any

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[36] For a detailed version of this argument, see LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION (2016).

[37] 79 U.S. L.W. 2389, 2389 (Apr. 19, 2011).

[38] CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FED. JUDICIARY 7 (Dec. 31, 2011) [HEREINAFTER "2011 YEAR-END REPORT"], http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[39] *See* Virelli, *supra* note 36, at 9–16, 22–40 (describing history of recusal decisions at the Court since application of the recusal statute to the justices in 1948).

[40] In congressional testimony about recusal at the Court, Justice Kennedy explained that an individual justice's recusal decisions "should never be discussed," even with other members of the Court, because "[t]hat's almost like lobbying." *Hearing on the Supreme Court Budget: Hearings Before the Fin. Servs. and Gen. Gov't Subcomm. of the H. Appropriations Comm.*, 114th Cong., 1st Sess. 14 (2015).

[41] 2011 YEAR-END REPORT, *supra* note 26, at 7–8 ("Like lower court judges, the individual Justices decide for themselves whether recusal is warranted.").

[42] 28 U.S.C. § 351(d) ("'[J]udge' [for disciplinary purposes] means a circuit judge, district judge, bankruptcy judge, or magistrate judge.").

[43] 5 U.S.C. app. §§ 101-111; *Guide to Judiciary Policy*, https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf.

of the potential separation of powers problems that accompany recusal, nor do the justices openly question whether they are bound by them, as they have done with recusal standards.[44] Yet they are largely ineffective at preventing unethical conduct by members of the Court because they are basically unenforceable.[45] The only way to hold the justices legally accountable is through impeachment, which has never been used to oust a sitting justice and is politically untenable.

The new Supreme Court Code is the most promising legal source of ethics reform for the Court.[46] It is constitutionally sound because it was adopted by the members of the Court, rather than Congress, and it incorporates nearly all of the ethical canons applicable to lower federal court judges.[47] It also, however, reflects the reality of Supreme Court recusal doctrine by explicitly acknowledging a presumption of impartiality for the justices and the relevance of the rule of necessity to Supreme Court recusal.[48] Both of these are longstanding features of the justices' recusal practices, but are also highly controversial, not to mention inconsistent with the plain language of the federal recusal statute.[49] Perhaps most importantly, the new code also lacks any enforcement mechanism, leaving the justices to make their own, unreviewable, ethical determinations.[50]

The result is a very confusing and frustrating situation around the Court. Proponents of ethics reform were underwhelmed by the justices' new ethics code, which they contend leaves ample room for improvement.[51] The implication is that additional legislative measures may be necessary to address perceived shortcomings in the Court's code.[52]

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[44] *See, e.g.*, 2011 YEAR-END REPORT, *supra* note 26, at 6–8.

[45] WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10949, LEGAL SIDEBAR: FINANCIAL DISCLOSURE AND THE SUPREME COURT 5 (Nov. 22, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10949 ("Without enforcement mechanisms in the Code, however, compliance with federal ethics laws may be left to the discretion of the Justices.").

[46] *See* SUPREME COURT CODE, *supra* note 16.

[47] *Id.*; VIRELLI, DISQUALIFYING THE HIGH COURT, *supra* note 36 (explaining the constitutional problems with congressionally mandated recusal standards).

[48] *See* SUPREME COURT CODE, *supra* note 16.

[49] 28 U.S.C. § 455 (stating that a justice "shall" recuse when the relevant requirements are met, and excluding any mention of a presumpiton of impartiality or the rule of necessity); Hassan Kanu, *U.S. Supreme Court's 'Duty to Sit' in New Ethics Code Could Strengthen Shield for Misconduct*, REUTERS, Nov. 16, 2023, https://www.reuters.com/legal/legalindustry/column-us-supreme-courts-duty-sit-new-ethics-code-could-strengthen-shield-2023-11-16/ ("The new [recusal] provisions seem to make it harder to compel the justices to recuse themselves.").

[50] *See, e.g.*, Erwin Chemerinsky, *Opinion: The Supreme Court Finally Has a Code of Ethics, But It Has a Fatal Flaw*, L.A. TIMES (Nov. 14, 2023), https://www.latimes.com/opinion/story/2023-11-14/supreme-court-justices-recusal-code-of-ethics ("Although it is welcome and overdue that the Supreme Court finally adopted an ethics code for its justices . . . the approach is seriously flawed in that it includes no enforcement mechanism.").

[51] *See, e.g.*, Adam Liptak, *Supreme Court's New Ethics Code is Toothless, Experts Say*, N.Y. TIMES.COM, Nov. 14, 2023 ("The new . . . code . . . looks good on paper, experts in legal ethics said. But . . . [i]ts lack of an enforcement mechanism means that it will operate on the honor system, with individual justices deciding for themselves whether their conduct complies with the code.").

[52] *See, e.g.*, Ian Couzens, Kyle Midura, & Amna Nawaz, *New Supreme Court Ethics Code 'Does Very Little' to Hold Justices Accountable, Expert Says*, PBS NEWS (Nov. 13, 2023), https://www.pbs.org/newshour/show/new-supreme-court-ethics-code-does-very-little-to-hold-justices-accountable-expert-says (arguing that even after the Court's adoption of its new ethics code, "there's definitely a role for Congress" to further regulate Supreme Court ethics).

IV. POTENTIAL REFORM PROPOSALS

Frustration over the ineffectiveness of existing ethics rules and standards led to calls for a comprehensive code of ethics for the Court. Although dozens of bills have been proposed over the past decade either setting out a code for the Court or requiring the justices to adopt their own—including the SCERT Act of 2023—none have been enacted into law. New attention to the issue inspired by recent media reports of the justices' conduct created even greater momentum for reform, which led to the Senate and House considering bills calling for the Judicial Conference of the United States to promulgate a code of conduct for the Court and the Senate Judiciary Committee hearings on Supreme Court ethics.[53] The justices' newly adopted Code has done little to quell ethical concerns about the Court.[54] Despite this continued momentum for reform, a legislatively enacted ethics code is likely to face the same legal and practical obstacles as existing ethics laws governing the justices.

If Congress seeks to impose a code on the justices, it will likely run afoul of separation of powers concerns, at least as it pertains to remedies like suspension or recusal.[55] At the most basic level, and as commentators have explained with respect to the Code of Judicial Conduct and Judicial Conduct and Disability Act, no other government actors have the ability to interfere with the fundamental operations of the head of a coordinate branch in a way that is enforceable.[56] That is the standard articulated by the Supreme Court with respect to congressional

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[53] *See* S. 325, 118th Cong. (Feb. 9, 2023); H.R. 927, 118th Cong. (Feb. 9, 2023). Both bills also called for the creation of an ethics investigation counsel who is empowered to adopt rules for enforcing the code of conduct, perform investigations into the justices' allegedly unethical activities, and produce an annual report of their findings.

[54] *See, e.g.*, Couzens et al., *supra* note 53.

[55] It is not clear how each of the justices feels about how separation of powers impacts Congress's authority to regulate Supreme Court ethics generally, primarily because they have been loath to express their views on the matter publicly. There have been multiple indications in the past that the justices do not feel legally obligated to follow the strict letter of the recusal statute, *see, e.g.*, 2011 YEAR-END REPORT, *supra* note 38, but that argument had not been expanded to include all ethical regulation of the Court until Justice Alito's recent op-ed in the *Wall Street Journal*, which Justice Kagan appeared to rebuff in her own interview with the *National Review*. *Compare* David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7 ("'Congress did not create the Supreme Court, ... I know this is a controversial view, but I'm willing to say it,' . . . . No provision in the Constitution gives them the authority to regulate the Supreme Court — period."), *with* Brittany Bernstein, *Kagan Publicly Addresses Congressional Oversight of Court Hours After Senate Dems Demand Alito's Recusal for Doing the Same*, NAT'L REV. (Aug. 4, 2023), https://www.nationalreview.com/news/kagan-publicly-addresses-congressional-oversight-of-court-hours-after-senate-dems-demand-alitos-recusal-for-doing-the-same/ ("It just can't be that the court is the only institution that somehow is not subject to checks and balances from anybody else. We're not imperial," . . . . Of course, Congress can regulate various aspects of what the Supreme Court does"). In any event, this recent willingness on the justices' part to discuss ethical issues more openly is better understood as the result of public scrutiny by the press, rather than congressional efforts. *See infra* Part V (describing the potential impact of increased media scrutiny on the justices' public conduct).

[56] *See, e.g.*, JOANNA LAMPKE, CONG. RSCH. SERV., LSB11078, LEGAL SIDEBAR: THE SUPREME COURT ADOPTS A CODE OF CONDUCT 3 (Nov. 23, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB11078 (noting that "[a]ny Congressional attempts to create enforcement mechanisms for the Justices' Code of Conduct would likely be subject to constitutional limits," and "[i]f Congress amended the Judicial Conduct and Disability Act to apply to Justices, it could raise issues under Article III, section 1 of the Constitution").

subpoenas of presidential records,[57] and has been the model for judicial ethics codes promulgated by lower court judges at the behest of Congress.

More specifically, a code of conduct promulgated by Congress or any entity other than the Court would lack constitutional authority to exclude justices—via recusal or suspension—from individual cases over which the Court has jurisdiction.[58] Much like the constitutional infirmities with the federal judicial recusal statute, any congressionally mandated removal of a justice from a case will change the makeup of the Court due to the lack of replacement justices. This in turn could empower Congress, through a legally binding ethics code, to deprive the Court of a quorum or, less dramatically, to force the justices into a tie vote in a case for which there are strong institutional reasons to avoid such an outcome. Imagine, for example, a disputed presidential election being adjudicated in the federal courts.[59] The lower appellate court, which is only one of eleven geographically assigned courts, concludes that candidate X won. On appeal to the Supreme Court, the binding ethics code requires recusal when a justice does not appear impartial.[60] It turns out four justices, two from each party, publicly criticized one of the candidate's fitness for office during the campaign and are therefore required to recuse. This would deprive the Court of a quorum to decide the election and unconstitutionally infringe on the Court's authority to exercise the "judicial power" of the United States by deciding cases properly before it.[61]

The new code drafted by the justices does not raise constitutional problems but does little to mitigate the serious practical difficulties associated with ethical decisions at the Court.[62] As mentioned above, any ethical standards that require the exclusion of a justice from a case create institutional effects that may need to be avoided in order to preserve the Court's ability to function. This problem is

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[57] Trump v. Mazars, 140 S. Ct. 2019, 2035–36 (2020) (explaining that whether a subpoena for presidential records is enforceable depends on "whether the asserted legislative purpose warrants the significant step of involving the President and his papers. *** Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. *** Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. *** Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. *** [B]urdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.***).

[58] The same constitutional difficulties may not attach for less consequential remedies such as censure or reprimand, but based on the history of proposed ethical reforms for the Court, remedies such as recusal and/or suspension are almost certain to be included in the code. This would also be consistent with reformers' goals to protect the integrity and legitimacy of the Court in its primary institutional role of deciding cases.

[59] *See* Bush v. Gore, 531 U.S. 98 (2000) (analyzing the 2000 presidential election, with barely a majority of justices ultimately awarding the presidency to George W. Bush); William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USATODAY (Jan. 6, 2021).

[60] This is essentially identical to the requirement in the federal recusal statute, and is a common recusal standard for judges. *See* 28 U.S.C. § 455; CODE OF CONDUCT FOR U.S. JUDGES Canon 3C (U.S. CTS. 2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#d.

[61] U.S. CONST. art. III (assigning the "judicial Power" to the Supreme Court and any inferior courts that Congress "may from time to time ordain and establish"). If this seems far-fetched, note that the same outcome would attach if one of the parties or lawyers in the case were close personal friends with multiple justices, a far more common scenario that would lead to similarly unconstitutional results.

[62] *See supra* notes 46–52 and accompanying text (describing common objections to the Court's new ethics code).

magnified because individual justices not only make their own recusal decisions but are also not subject to review by their fellow justices.[63]

In the above example of the disputed presidential election, imagine instead of four justices being excluded, only one is. The Court is thus left with a quorum but an even number of participating justices. The remaining justices deadlock over which candidate should prevail, resulting in the lower appellate court's decision in favor of candidate X taking effect. The ultimate result is that a collection of judges from only one of eleven geographic regions in the country chooses the president. Now imagine that appellate courts from two different regions split on the outcome of the election, which was then appealed to the Supreme Court for decision. A tie vote in that instance could lead to chaos: which decision prevails if there are two and the Court did not reach a definitive conclusion on either? Of course, the justices could avoid this problem by altering their votes to ensure that a tie did not occur, but while that may be better for resolving the election, it would not necessarily be a more legitimate exercise of judicial power than if the excluded justice participated in the case, even if it were in violation of the code. Put more simply, the lack of replacement justices creates an issue for the Supreme Court that does not exist in lower courts—how to balance a justice's ethical challenges in a given case with the Court's institutional obligation to decide cases. The new code's necessity provision reflects this phenomenon but drew significant criticism for it.[64]

Even if the justices successfully navigate the balance between their ethical and institutional obligations, public reaction confirms that the lack of enforceability may cause the new code to seem ineffective. This does little to advance the Court's reputation or ethical credentials and may set them both back. Moreover, the justices have been vehement in maintaining that they will not sit in judgment of each other's ethical decisions. They are concerned that they may be viewed as setting precedent over fact-specific ethical issues, and that a decision to hold a justice accountable may be perceived as an attempt to influence the outcome of the case by affecting the composition of the Court.[65]

It is easy to understand why there is a groundswell of proposals for ethics reform at the Court. But despite their being thoughtful and well-intentioned, they do not adequately accommodate the full scope of the issues presented to a justice. Because the Court has an institutional obligation to decide cases, it cannot be subject to any binding outside requirements to exclude members from a case, even for ethical reasons. In adopting its own code, the Court's real need for flexibility in the rules governing ethical questions and the enforcement of those rules against the justices left reformers feeling unsatisfied, unheard, or both. The better solution, this Essay suggests, is to openly acknowledge that the Court's lack of replacement justices and its institutional obligations make a clear and effective legally binding ethics code unrealistic. Instead, we should look to other options for holding justices

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[63] *See Hearing on the Supreme Court Budget*, *supra* note 40.

[64] *See, e.g.*, Jennifer Ahearn, *What's Missing from the Supreme Court's New Ethics Code*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/whats-missing-supreme-courts-new-ethics-code (on file with the *University of the Pacific Law Review*) (arguing that the rule of necessity provision in the new Code's recusal standards suggests that "the Court's members continue to hold themselves to lower ethics standards than all other federal judges").

[65] *See id.*

accountable to their ethical obligations in ways that are more constitutionally and pragmatically sound.

V. MEDIA-BASED SOLUTIONS AND THEIR ADVANTAGES

Media-based solutions focused on transparency and public accountability may be the most realistic way to address concerns about Supreme Court ethics. The phrase "media-based solutions" is admittedly vague, but its open-endedness is a feature, rather than a flaw, for present purposes. The feature lies in its value as a paradigm-shifting approach to ethics at the Court.

As explained above, the ongoing debate about the justices' ethical practices is heavily focused on command-and-control legal solutions, even though such solutions are either constitutionally problematic, likely to be ineffective or unsatisfactory to their proponents, unenforceable, or some combination thereof. Moving the focus away from traditional legal processes toward one focused on the "media and transparency," in all its permutations, has inherent value for at least two reasons. First, it allows us to more accurately describe the nature of the problem and to set more informed expectations as to what a more ethical Court will and should look like.[66] Second, for reform advocates who are skeptical about the value of departing from traditional legal constraints, a shift to media-based approaches can also be seen as facilitating and renewing focus on existing constitutional remedies like impeachment. If discussions about Supreme Court ethics pay closer attention to transparency and less to statutory or regulatory attempts to constrain the justices, it may force critics of the justices' conduct to take impeachment more seriously as a remedy, a route that will in turn be facilitated by the additional information generated by a more emboldened and empowered media.

What might this emboldened media look like if it is to help promote a more ethical Court? There are likely many insightful answers to this question, but at least three seem to be both easy to implement and useful examples for future discussion. The least profound is a continued commitment to the type of reporting and investigation that has led to recent revelations about the justices' failure to report financial and other transactions with potentially interested parties. The advent of digital and social media only expands the possibilities for future success in this area. As new generations of justices take the bench, they are far more likely to have an online presence that will reveal even more about them. Greater access to details about the justices' lives will inevitably lead to greater information pertaining to their ethical choices.

At first glance, there may not appear to be much value in arguing for something that has been happening since the inception of the Court. However, like

[66] This could also be achieved by the "Judicial Investigation Panel" prescribed by the SCERT Act—a group of randomly selected federal judges (or other independent experts in a different formulation) empowered by statute to investigate complaints and issue "findings and recommendations" designed to advise the Court about controversial ethical issues facing the justices. Although an elegant approach, the panel described in the SCERT Act faces political obstacles to adoption that the media-based solutions do not. The panel is created and governed by the same lawmaking procedures that have consistently prevented ethics reform from being adopted. Even though something like a Judicial Investigation Panel maybe a useful way to hold justices accountable, it is so unlikely to be enacted into law that media alternatives, even if otherwise second best, are preferable.

the broader shift toward viewing the media as an active and primary bulwark against justices' unethical conduct, highlighting the media's role in protecting against justices' apparent missteps may lend additional credibility, attention, and even resources to the media's interaction with the Court. The public reaction to the recent stories about the justices reflects the potential for public pressure to influence the Court. In addition to likely playing a role in the Court's adoption of its own ethics code,[67] public backlash prompted a statement by Justice Thomas, regarding his relationship with Harlan Crow, and a statement from Chief Justice Roberts about the justices' ethical practices more broadly.[68] It led to Justice Alito's *Wall Street Journal* op-ed and interview, and in turn Justice Kagan's remarks about congressional power over the Court, all of which provide sharper (and novel) insight into the justices' approach to judicial ethics. In a slightly less direct way, Chief Justice Roberts took the opportunity to mention Supreme Court ethics at an address to the American Law Institute,[69] and Justice Kagan took the highly unusual step of publicly explaining her decision to recuse herself from a case involving a death row inmate.[70] This unusual amount of public interaction from the Court, especially in response to criticism, may be a positive sign in terms of the impact public criticism can have on the justices.

Of course, there is reason for concern that politically or ideologically motivated reporting can do more harm to the Court than good. This becomes less problematic, however, once we are reminded that the justices are confronted with little external discipline. Therefore, thorough reporting will not directly threaten their ability to do their job, unless it rises to the level of an impeachable offense or creates so much public backlash that the justices feel compelled to take their own remedial measures. Greater media attention should also empower more reporting from all ideological directions (a "more information is better information" argument), especially given that the professional incentives for reporters to break news stories do not depend on the ideology of the justice being reported on. Finally, even if the weight of reporting involves ethical transgressions by justices of one ideological or political persuasion, truthful reporting about a justice from one end of the ideological spectrum is not any less important because infractions by their colleagues may have yet to be revealed. On an unreviewable Court of nine justices, every piece of information about potential ethical problems is relevant,

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[67] *See supra* note 31 (citing reports that public pressure contributed to the justices' decision to adopt an ethics code).

[68] Press Release, United States Supreme Court Public Information Office, Statement of Justice Clarence Thomas (Apr. 7, 2023), https://www.documentcloud.org/documents/23745868-clarence-thomas-statement-4-7-23; Letter from Chief Justice John Roberts to Chairman Durbin, *supra* note 21.

[69] Robert Barnes, *Roberts Says Supreme Court Will Address Ethics Issues*, WASH. POST (May 23, 2023), https://www.washingtonpost.com/politics/2023/05/23/supreme-court-ethics-roberts/ ("Chief Justice John G. Roberts Jr. said Tuesday night that he was 'confident' the Supreme Court will convince the public that it 'adheres to the highest standards of conduct.'").

[70] Zach Schonfeld, *Why Alito, Kagan Recusal Decisions at Supreme Court Raised Eyebrows*, HILL (June 1 2023), https://thehill.com/regulation/court-battles/4029010-why-supreme-court-recusals-are-attracting-newfound-attention ("Supreme Court Justice Elena Kagan became the first to utilize a new ethics principle that indicates justices may explain why they are recusing themselves from a case.").

even if there may be additional information about other justices not yet discovered or made public.[71]

In addition to focusing on thorough media coverage of the justices' ethical practices, requiring cameras in the courtroom during Supreme Court proceedings may be an easy way to increase transparency and provide evidence of the justices' potential bias (or lack thereof) in a given case.[72] The benefit of choosing cameras in the courtroom as a solution is that it does not implicate any of the same constitutional concerns as other legal approaches to Supreme Court ethics. It also provides first-hand evidence of the justices' treatment of the parties and lawyers in a case and their level of engagement with the oral argument, both of which may serve as evidence of suspected bias and, perhaps more importantly, additional incentive for the justices to actively and openly engage with both sides in a case.

This is not a panacea for judicial ethics concerns, partly because sources of bias are not limited to the parties in the courtroom. Case in point the concerns about Justice Thomas and Harlan Crow, who was not himself in the courtroom for any of the cases in which he or an organization he was affiliated with had an interest.[73] It is also a potential overstatement of the value of information gathered by watching oral argument and may—as the justices have repeatedly argued in opposition to installing cameras—put undue pressure on the justices to "play" to the camera during hearings in a distracting way.[74] It will, however, increase overall transparency in the Court at a time where that transparency appears to be one of the only effective limitations on the justices' ethical decisions. It may also encourage the justices to be (at least marginally) more proactive in pursuing their own reforms to avoid further congressional encroachments on their operations. These potential benefits alone may be enough to overcome whatever costs accompany an iterative step like installing cameras. When paired with the added benefit of additional first-hand evidence of the justices' disposition toward a case and its parties, cameras seem like a clear step toward more accountability and, in turn, more public confidence in the Court's ethical practices.

A third, and also modest, media-based reform is publication of the justices' certiorari ("cert") votes, complete with information identifying which justices voted to hear a given case. This reform directly targets the problems encountered by Justices Gorsuch and Sotomayor participating in cert decisions for cases

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[71] This is generally a point about the phenomenon referred to as "whataboutism," where the supporters of a public figure whose actions are challenged as unethical, illegal, etc. defend those actions by highlighting similar or analogous missteps by figures to whom the initial challengers are more sympathetic. In a small institution like the Supreme Court, where every vote accounts for at least 11% of the outcome of a case, whataboutism seems even more misplaced and unpersuasive than it would in larger institutions. Put another way, every potential ethical violation by an unreplaceable Supreme Court justice is significant in a vacuum. The fact that a given ethical violation may not be an isolated or even unique incident does not dilute its newsworthiness or importance to maintaining public confidence in the Court.

[72] This is of course also not a novel idea. *See, e.g.*, Eric J. Segall, *Why There Should Be Cameras in the Supreme Court*, L.A. TIMES (June 15, 2017), http://www.latimes.com/opinion/op-ed/la-oe-segall-cameras-in-the-courtroom-20170615-story.html (on file with the *University of the Pacific Law Review*).

[73] *See* Pilkington, *supra* note 3.

[74] Jeffrey A. Rosen, *With Live Cameras, the Court Would Become More Like Congress. That's Not a Good Thing*, SCOTUSBLOG (Mar. 14, 2022), https://www.scotusblog.com/2022/03/with-live-cameras-the-court-would-become-more-like-congress-thats-not-a-good-thing/ (quoting Chief Justice John Roberts from a 2018 interview: "Our job is to carry out our role under the Constitution to interpret the Constitution and laws according to the rule of law, and I think that having cameras in the courtroom would impede that process.").

involving publishing companies from which they were receiving substantial payments.[75] As a facial matter, if the Justices voted to hear the case and their votes simply did not prevail, then any ethical concerns would be significantly diluted by disclosure of their votes. That does not mean disclosure of their relationship with the publishers was not warranted or preferred, but it would significantly change the perception that the Justices withheld that information in the interest of protecting the companies from legal liability.

More generally, holding the justices accountable for their cert votes offers insight into a source of ethical problems that is currently shrouded (unnecessarily) from view. The Court's certiorari process is governed entirely by internal Court rules and is never made public in any way; the total vote count is not disclosed, let alone how individual justices voted.[76] Recording individual justices' cert votes will reveal potentially self-serving or otherwise ethically questionable votes and will allow tracking of a justice's consistency in deciding to hear cases over time.

Moreover, requiring disclosure of vote counts and the names of the justices who cast those votes is administratively easy—it does not demand the same significant expenditure of judicial time and resources as, for example, requiring the justices to provide explanations of their recusal decisions on the record.[77] It also does not lend itself to skillful evasion by the justices in the way other disclosure requirements may. Think again of a requirement to provide written recusal explanations. A justice who is required, but reluctant, to explain their recusal decision may simply write something like "I decline to recuse because I am not required to do so by 28 U.S.C. § 455." This is largely unhelpful in terms of understanding the ethical details of the decision, and therefore may be an example of how a requirement designed to promote transparency may backfire not only by failing to expose the desired information, but also by casting a negative light on Congress for failing to draft an effective requirement and on the Court for being perceived as failing to comply with the spirit of the rule. A simple disclosure requirement for the names and votes on a cert petition, however, cannot be so easily avoided and is guaranteed to provide the (albeit limited) information it is designed to elicit.

Like cameras in the courtroom, requiring disclosure of cert votes is not a blanket solution to the Court's ethical challenges. It may also be a bit misleading, especially in cases where a justice's vote is consistent with a large majority of the votes cast. In those cases, it is far from clear why a justice voted as they did, and it may simply be a matter of expediency; the justices vote on large numbers of cert petitions and may not be able to give each petition the same degree of consideration. When the other members of the Court are overwhelmingly in

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[75] *See supra* note 10 and accompanying text (describing ethical concerns involving Justices Gorsuch and Sotomayor).

[76] *See, e.g.*, *Supreme Court Procedures: Writs of Certiorari*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (on file with the *University of the Pacific Law Review*) ("The primary means to petition the court for review is to ask it to grant a *writ of certiorari*. . . . The Supreme Court has its own set of rules [for granting cert]. According to these rules, four of the nine Justices must vote to accept a case."); SUP. CT. R. 10 (explaining that "[a] petition for a writ of certiorari will be granted only for compelling reasons," and outlining examples of some of those reasons).

[77] *See, e.g.*, S. 325, *supra* note 53 (requiring explanations of justices' recusal decisions in the public record); H.R. 927, *supra* note 53 (same).

agreement over granting cert, another vote for the clear majority is not necessarily an endorsement of the decision to grant as much as a recognition of the inevitable. A cert vote disclosure requirement must therefore be taken for what it is worth—a potential source of useful information but also a necessarily incomplete account of a justice's decision-making process.

VI. CONCLUSION

Supreme Court ethics is an important issue that merits attention. As decades of historical practice indicate, however, traditional legal avenues for controlling the justices' ethical decisions are not necessarily effective or advisable, given the unique institutional circumstances surrounding the Court. Shifting reformers' perspective from a legal framework to an accountability regime centered on a rigorous and energetic media presence allows better informed scrutiny of the justices, without exacerbating the real, complex challenges of creating enforceable legal standards for the highest Court. A sharper focus on media-based solutions to the justices' ethical controversies will properly orient public debate and better describe the realities of the balance between the Court's ethical and institutional responsibilities.

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