

TESTIMONY OF STEPHEN GILLERS
ON H.R. 7426
BEFORE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
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Since 1978, I have been teaching legal and judicial ethics at New York University School of Law, where I am now Elihu Root Professor of Law and was vice dean from 1999-2004. I am the author of a popular casebook on the subject, first published in 1985 and now in its 12th edition. I have lectured throughout the country and abroad on the ethics rules, broadly defined, governing lawyers and judges in the United States. The c.v. I submitted contains my academic and many popular publications since 1978 with one exception. My article, “Because They Are Lawyers First and Foremost: Ethics Rules and Other Strategies to Protect the Justice Department From A Faithless President,” is in press and will be published later this year.

The main focus of my testimony is the bill’s direction to the United States Supreme Court to adopt an ethics code for itself. I will also briefly discuss certain of the bill’s amendments to 28 U.S.C. §455 and issues surrounding amicus briefs in the circuit courts and the Supreme Court.

At the outset, I want to stress the importance of the subcommittee’s work. The courts that Article III of the Constitution authorizes or creates have been a remarkable American success story, for which we are indebted to the foresight of the Framers. The judiciary’s twin commitments to the rule of law and political independence, in fact and appearance, are essential to public confidence in its work, which must never be taken for granted. In each generation, Congress, the Executive, and the legal profession, among others, must act to protect that confidence.

A Code of Conduct for the Supreme Court

The Judicial Conference of the United States has adopted a Code of Conduct for U.S. Judges but not for the justices. Whether that omission is a choice or a correctly perceived lack of authority is not obvious. But the consequence is that the justices alone among federal judicial officers (and nearly all state judges in courts of record) are not governed by what, for shorthand, we can call an ethics code. We should not expect the public to understand and accept that omission. It is not good for the Court or the nation.

And there is no reason for it. Correction is cost free.

Just to be clear, the Code of Conduct is not the same as §455, the recusal statute, which is law and explicitly includes the justices. The Code of Conduct has a recusal rule, too. It is the same as §455. But the Code has much else that §455 does not. And recusals, when they occur, will properly rely on the statute, not the code.

Congress should not write an ethics code for the justices, who must do so themselves. The bill's instruction to the Court in section 2 to write a code of conduct is fine as an expression of Congress's will, but seems to me unenforceable. One hopes that the Court would agree.

I suggest in this regard that the bill delete language in section 2 that would apply the Code of Conduct for U.S. Judges to the justices if they do not adopt one for themselves. The inclusion of this "or else" language may discourage the Court's cooperation in order to avoid an implied concession that the Court is subordinate to Congress on the question. In any event, if the Court does ignore Congress, Congress can act later to apply the Judicial Conference's then current code to the justices if so advised. One hopes this will not be necessary.

One reason offered for *not* creating a code of conduct for the Court is the desire to avoid recusals and an evenly divided (4-4) court. But a code of conduct violation would not be a basis for recusal or even discipline, which requires that a judge "have engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 18 U.S.C. §351. The "violation of a Canon does not necessarily amount to judicial misconduct." *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 292 (3d Cir. 2009).

Since a justice's violation of a code of conduct provision would not lead to a 4-4 Court – only the recusal statute can do that – what other reason is there to oppose a code for the justices? Two are mentioned.

First is separation of powers. This is not a reason to object to a code of conduct for the Court but a concern for how we get one. I doubt that Congress can prescribe ethics rules for the Supreme Court, which unlike other federal courts is created by Article III itself. It would be best not to have to confront that question. The Court should adopt an ethics code itself because it is the right thing to do and concedes nothing about congressional authority.

A second reason sometimes offered to oppose a code of conduct for the justices is that it would have no enforcement mechanism. The current bill describes none. But with no enforcement mechanism, one might ask, “What’s the point? Is this a debate about appearances?”

Yes, it is about appearances, but appearances backed by commitment, which matter a great deal. Since at least the mid-1950s, the Supreme Court has in numerous decisions emphasized that “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14 (1954)(Frankfurter, J.).

So applying many, perhaps most, provisions of the current code of conduct to the justices should be uncontroversial because it will be the Court itself that does so, because no authority will review whether a justice has violated a code provision, and because doing so does not create a risk of a 4-4 Court.

Some code provisions that could be incorporated in a code of conduct for the Court are, by way of example, the prohibition against belonging to a discriminatory club in canon 2C; the provision that forbids a judge to “publicly endorse or oppose a candidate for public office” (canon 5A(2)); and the prohibition in canon 2B against “lend[ing] the prestige of the judicial office to advance private interests of the judge or others.”

The public may wonder what legitimate reasons a justice could have to resist application of these and other requirements to the Court? There are none. Doing so will demonstrate the Court’s commitment to comply with the same rules that bind all federal judges and detract not at all from the independence of the Court or its ability to fulfill its constitutional role.

Recusal Provisions

Section 3 of the bill would make the full Supreme Court the “reviewing panel for a motion seeking to disqualify a justice” under §455. I believe this is unwise. First, I doubt that the other eight justices will ever implement that assignment. Second, having justices review and potentially reject a colleague’s refusal to recuse could harm collegiality among them. Third, the power lends itself to the possibility of abuse, or the appearance of abuse, if elimination of a justice can change the Court’s ruling.

Section 3 of the bill would also add three provisions to §455(b) to require a justice’s or judge’s recusal. These are subparagraphs (6), (7), and (8). These provisions do not contain a state of mind requirement. The absence of a state of mind requirement split the Court 5-4 when it was asked to construe §455(a) in *Liljeberg v. Health Services*

Acquisition Corp., 486 U.S. 847 (1988). This omission must be corrected if these provisions remain.

While the information in proposed subparagraph (6) should be known to the judge or easy to discover, information described in proposed subparagraphs (7) and (8) may not be. Subparagraph (7) requires recusal if there has been “any” lobbying contact and the bill’s definition of “substantial funds” as used in subparagraph (7) may not be easy to apply.

Subparagraph (8) goes too far. It would require recusal, for example, based on work or volunteer activities lasting more than “6 consecutive months” by the judge’s adult child or his or her spouse during the prior six years. Apart from the dubious wisdom of this basis for recusal, what is the judge’s duty to investigate? And do we want to create an incentive for litigants to investigate a judge’s relatives?

I generally support the addition of subparagraph (6) because it is tethered to information already required to be reported by the Ethics in Government Act and so available to the judge and the parties. Although the newly defined terms “supervisory capacity” and “affiliate” will create some ambiguity and may require additional investigation, the law firms representing the litigants will have the incentive to do it. However, recusal under subparagraph (6) is not conditioned on a minimum dollar amount (as little as a few hundred dollars may appear in a judge’s report), the time of receipt (many years ago?), or the identity of the donor, all of which may bear on the need for recusal. These variables should be addressed or the recusal question left to the application of §455(a) after disclosure.

It seems to me that there is an alternative to the categorical recusal rules in subparagraphs (7) and (8). It is to require the judge who knows of the facts they describe, especially if they are not easily discoverable, or who discovers them as part of his or her duty to be informed of certain potentially disqualifying information, to disclose them to the parties. In other words, the court and the parties should address and resolve recusal issues based on information described in these provisions in the context of particular litigations rather than have Congress do so a priori.

Supporting that resolution is the salutary addition of paragraph (g) to §455 to require that a judge inform the parties of a “condition requiring disqualification.” A notice requirement is a good idea because the judge may know things that support recusal of which the parties are unaware. But the notice should occur even if the judge does not believe recusal would be required so long as a party could reasonably argue otherwise.

That gives the party an opportunity to make a recusal motion and perhaps persuade the judge that recusal is required, or failing that, to make a record for appeal.

Section 3 would expand a judge or justice's duty to "be informed" by adding a duty to be informed about "*any* interest that could be substantially affected by the outcome of the proceeding." (Emphasis added.) That's too broad. The intention may be to identify a substantial effect on interests of those persons described in paragraphs (b)(4) and (b)(5)(iii).

The recusal statute should not be an obstacle course for judges, tempting though it may be to anticipate new situations (or to respond to recent ones momentarily in the news) that are not now specifically covered by §455(b). Balance is needed. An effort to capture multiple variations in legislative language carries its own costs, both in court time and in the danger of overbreadth and false positives. Further, although recusal at the Supreme Court is in the news today and will be again, the recusal statute will overwhelmingly affect the anonymous cases of lower court judges. We are legislating mainly for them and the lawyers who appear before them.

Section 455(a)'s generic basis for recusal when a judge's impartiality might reasonably be questioned provides much flexibility and should suffice if, as we must assume, the men and women who become federal judges will have a proper regard for the necessity of public confidence in the tribunals they serve and will act accordingly. It bears stressing that a judge's decision to recuse says nothing negative about her integrity or fairness. It does the opposite.

Amicus Briefs

Unclear in authorities is whether and when the identity of an amicus will require recusal. Where it does, the solution should be to strike the amicus brief rather than remove the judge. But when will that be so? (This inquiry is distinct from the aim of section 5 of the bill, which in the interest of transparency requires disclosure of the identities of certain contributors to an amicus or to the cost of an amicus brief.)

Consider some possibilities:

- A relative of a judge submits an amicus in his or her own name.
- A non-profit organization to which a judge's relative is a major contributor or where the relative is an officer submits an amicus brief.

- A business entity or trade association in which a judge’s relative is active or an officer submits the amicus brief.
- A law firm in which a judge’s relative is a partner submits an amicus brief on behalf of a client. The relative is not on the brief but does related work for the client.

In these and other instances, should the brief be struck to avoid recusal? How should we define “relative?”

Section 4 of the bill instructs the Judicial Conference and the Supreme Court to propose rules that would address questions like these. I support that assignment. It is better to have uniform answers to these questions than piecemeal responses from individual courts.

Clarence and Virginia Thomas

Spouses of justices can be politically active, including on issues that may or will come before the Court, without thereby requiring recusal. We don’t impute the political conduct or views of a justice’s spouse to the justice. This has long been my view, including in stories about Virginia Thomas. See Jackie Calmes, “Activism of Thomas’s Wife Could Raise Judicial Issues” (N.Y. Times, Oct. 8, 2010). More recently, see Kevin Daley, “EXCLUSIVE: Ginni Thomas Wants To Set the Record Straight on January 6” (Wash. Free Beacon March 14, 2022).

But the analysis changes if the spouse’s interest is not a general one shared with members of the public at large, but a direct or personal interest in how a case is decided. Usually that will happen when the spouse’s interest is financial, which is easy to understand, but it does not have to be financial.

The amicus brief in which I and others joined supporting Stephen Reinhardt’s denial of a recusal motion in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011)(opinion of Judge Reinhardt), is instructive and consistent with my views regarding the Thomases. *Perry* was a challenge to a state prohibition on same sex marriage. Ramona Ripston, Judge Reinhardt’s wife, was the longtime executive director of the Southern California CLU. Ms. Ripston and the CLU opposed the prohibition.

Virginia Thomas is not in the same position as Ms. Ripston. As I wrote in the Wall Street Journal (Apr. 1, 2022), responding to a columnist who drew a false comparison between the two situations:

The Thomas and Reinhardt situations differ in key ways. First, cases that come to the Supreme Court may reveal communications by Ms. Thomas that she and her husband prefer to keep secret. That is not conjecture, as the recent disclosure attests. Justice Thomas cannot decide those cases. Ms. Ripston had no such privacy interests in the case before her husband.

Second, judges aren't disqualified because of a spouse's public views. Here, however, Ms. Thomas sought greater influence in the legal battle by advising Mr. Meadows, who was influential in steering the effort to upset the Biden win, including through appeals to the Supreme Court. Ms. Thomas joined that effort from the inside, giving her the kind of interest in the litigation that requires Justice Thomas's recusal. Nothing comparable appears in the Reinhardt example.

I have long defended the right of judicial spouses, including Ms. Thomas specifically, to join public debates on issues that could come before their husbands or wives without affecting their ability to sit. Attention to the details of the two situations, rather than superficial similarities, reveals that this time the Thomases went too far.

The Southern California CLU had joined an amicus brief in the lower court but it was not an amicus in Judge Reinhardt's court. If it had been, as Judge Reinhardt correctly said, he would have been recused. By contrast, the Trump team – Mrs. Thomas's team -- anticipated and then filed appeals to the Supreme Court and Justice Thomas did not recuse.

Thank you for the opportunity to testify.