



AMERICAN **BAR** ASSOCIATION



Task Force on
Law, Society and the Judiciary

REPORT OF THE TASK FORCE ON LAW, SOCIETY AND THE JUDICIARY

AUGUST 2023



TABLE OF CONTENTS

I. EXECUTIVE SUMMARY	1
II. BACKGROUND	4
III. THE CONFIRMATION PROCESS	8
IV. JUDICIAL ETHICS	12
V. TRANSPARENCY	22
VI. JUDICIAL SECURITY	27
VII. PUBLIC EDUCATION	28
BIOGRAPHIES OF TASK FORCE MEMBERS AND TASK FORCE REPORT REVIEWER, AND RAPPORTEURS	35

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I. EXECUTIVE SUMMARY

The American Bar Association (ABA)'s Task Force on Law, Society and the Judiciary was constituted in 2022 to identify and recommend concrete steps to improve the public's trust and understanding of the judiciary.¹ In the course of its work, the Task Force has identified the following areas of particular concern and makes the following recommendations:

1. The Confirmation Process

- ◆ The Task Force is concerned that confirmation hearings do not adequately provide the public with a meaningful way to understand a nominee's qualifications, experience, and approach to deciding cases, and that the process depicts judicial decision-making as partisan.
- ◆ The Task Force proposes a list of ten questions that should be asked of every judicial nominee during the confirmation process.

2. Judicial Ethics

- ◆ The Task Force recognizes that the lack of a binding code of ethics at the Supreme Court, combined with allegations that some members of the Court have failed to live up to the highest ethical standards, erodes public trust in the Court and the judiciary.
- ◆ The Task Force recommends the following:
 - ◇ The Supreme Court should adopt and publish a Code of Conduct.
 - ◇ To provide greater transparency regarding recusals, the Supreme Court and Congress should consider a mechanism for communicating a Justice's reasoning for or against recusal, and for addressing any concerns arising from circumstances in which multiple Justices recuse themselves in a particular case.
 - ◇ Federal judges and Justices should, wherever possible, hold investments in a blind trust.

¹ This Report includes reference to, and discussion of, events that took place on or before June 30, 2023, the last day of the Supreme Court's October 2022 Term. The Task Force did not take into account any events taking place between that date and the date of publication in making these recommendations.

- ◇ The Administrative Office of the United States Courts (AO) should designate staff members to answer questions, assist, and review federal judges' and Justices' annual financial disclosures.
- ◇ The Judicial Conference and the Supreme Court should establish more robust rules governing disclosure of income, investments, and transactions held by immediate family members (defined as a spouse, domestic partner, dependent children, and any other member of his/her household) and any other relative who the judge knows or has reason to know has financial holdings that may give rise to the appearance of bias.
- ◇ Congress should enact legislation prohibiting judges and Justices and their immediate families from receiving any reimbursement from any entity except for reasonable out-of-pocket expenses.
- ◇ Congress should enact legislation prohibiting judges and Justices and their immediate families from receiving any financial gift, honorarium, or other payment except as reimbursement for reasonable out-of-pocket expenses for travel or from a school, college, university, law school, or other academic institution for teaching or speaking engagements.

3. Transparency

- ◆ The Task Force is concerned that certain procedural rules make it more difficult for litigants and the public to understand the decision-making process, thus undermining public confidence in the judiciary.
- ◆ The Task Force recommends the following:
 - ◇ Federal courts at all levels should take concrete steps to explain why a particular decision was made and make that reasoning readily available to the public.
 - ◇ Courts of Appeals should provide at least brief written decisions for substantive motions and unpublished or summary decisions.
 - ◇ The Supreme Court should provide at least brief written decisions for all motions, requests for emergency relief, interim orders, and merits cases.
 - ◇ Courts, wherever practicable, should continue to provide public access for hearings and dockets, including by using the procedures adopted during the COVID-19 pandemic and making recordings of arguments and hearings publicly available.

- ◇ Courts should establish a learning center and designate a public education officer to help the public understand the judicial function.

4. Judicial Security

- ◆ The Task Force is heartened by recent legislation aimed at protecting judges and their families and encourages continued action to assure judicial security.

5. Public Education

- ◆ The Task Force recognizes the importance of public education to bolster public confidence in the judiciary, including civics education in the K-12 curriculum and for the general public, and programming offered by federal and state courts.
- ◆ The Task Force is heartened by the steps already being taken by organizations around the country, including the ABA, to improve media literacy and public understanding of the law and the judicial function and to provide reliable resources to the public at little-to-no cost.
- ◆ The Task Force encourages these efforts to continue and, in collaboration with the ABA's Public Education Division, has established a database of resources to deepen public understanding of law and the judiciary.

II. BACKGROUND

From the outset of the American Republic, the nation’s courts and judges have played a vital role in our democracy. The courts not only safeguard the rule of law, they also provide individuals with a neutral, unbiased forum to peacefully resolve disputes, hold government accountable, and vindicate fundamental rights and civil liberties.

To advance these goals, the United States Constitution, drawing on the experience of the states and the courts of England, expressly insulated federal judges from public influence and direct political control. The Constitution guaranteed both life tenure and salary protection for federal judges to ensure that they were not held hostage by the political branches and could serve as truly neutral decision-makers.² To assure that the federal courts can serve this vital function in our democratic system and to fortify public confidence in the courts, judges follow rules to avoid actual conflicts and even the appearance of impropriety in their work.³ Indeed, the federal judiciary’s ability to operate effectively requires not only that judges bring independent and unbiased judgment to bear when interpreting and giving effect to our Constitution and laws, but also that the public has confidence in the judiciary’s ability to serve as neutral arbiters.

By virtue of their constitutional mandate, courts and judges help shape and implement the broader fabric of government and are called upon to make important, often controversial decisions. For some controversies, this pivotal role has made courts arbiters of last resort. Reactions to judicial decisions in cases with wide-reaching impact on the lives of Americans are often intertwined with larger societal debates.⁴ This has been true throughout American history, and citizens and politicians alike have long displayed strong, often intemperate reactions to judicial decisions.

2 U.S. CONST. art. III § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”); THE FEDERALIST No. 79 (Alexander Hamilton) (“Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.”).

3 “A judge shall uphold and promote the independent, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS’N., 2020).

4 See Mark Sherman & Emily Swanson, *Trust in Supreme Court fell to lowest point in 50 years after abortion decision, poll shows*, AP NEWS (May 17, 2023).

However, the current political moment is, in important ways, unprecedented. Public confidence and trust in the judiciary are at an historic low.⁵ A poll from the National Center for State Courts found that confidence in the United States Supreme Court dropped from 63% in 2021 to 53% in 2022.⁶ A similar poll from Gallup in June 2022 reported that only 25% of American adults say that they have “a great deal” or “quite a lot” of confidence in the U.S. Supreme Court, down from 36% in 2021 and five percentage points lower than a previously recorded low in 2014.⁷ Though many institutions saw a decline in public confidence between 2021 and 2022, this decline is “roughly double what it is for most institutions” in the same time period.⁸

The causes of this decline in confidence are complex. The Court’s decisions revisiting established constitutional and statutory guarantees have played a role. Likewise, increased concerns about transparency in the Court’s emergency orders decisions, also known as the “shadow docket,” have drawn increasing attention and criticism. The Senate’s exercise of its constitutional “advise and consent” function has also drawn concern and in some cases, alarm. And finally, longstanding concerns about the Court’s disclosure, recusal and ethics practices have increased, as investigative reports have revealed troubling details of financial dealings and receipt of gifts and travel by the Justices and their families. This decline in public confidence has coincided with significant calls for reform of the Supreme Court and the federal judiciary. President Biden created a Commission to study the Supreme Court that issued a report in 2022 exploring many of these issues.⁹

In response to these events, the American Bar Association created this Task Force on Law, Society and the Judiciary—comprised of lawyers from the public, private, and corporate sectors, retired judges, and academics—to identify and recommend steps to restore public confidence in the judicial

5 See *id.*

6 2022 saw a similar decline in public confidence in both the state courts and the lower federal courts, to 60% and 57% respectively. See *State of the State Courts survey reveals declining public trust, growing confidence in remote hearings*, NAT’L CTR. FOR STATE CTS. (Dec. 7, 2022).

7 See Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022).

8 *Id.*; see also Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021) (reporting that public approval of the U.S. Supreme Court was down to 40%, a new record low, in September 2021). A poll from the Pew Research Center reached a similar conclusion. See Pew Research Center, *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (Sept. 1, 2022).

9 See Proclamation No. 14,023, 86 Fed. Reg. 19569 (Apr. 9, 2021) (directing the commission to provide an account of the current debate over the “role and operation of the Supreme Court in our constitutional system”); PRESIDENTIAL COMM’N ON THE SUPREME CT. OF THE U.S., FINAL REPORT (Dec. 8, 2021).

branch and to educate the public about the judicial function. The Task Force’s mission is predicated on the principle that an independent judiciary is vital to protect individual rights and safeguard robust democratic processes.

The work of the Task Force has only become more urgent since it started. Over the course of several months, detailed reporting has revealed a number of troubling potential conflicts and disclosure failures that have confirmed for many the urgent need for change in aspects of how the Supreme Court addresses its ethical obligations. The Task Force believes that the ABA, and the legal profession as a whole, should play a leadership role in promoting and protecting judicial independence by offering concrete proposals to assist the Court and Congress as they confront this challenging moment.

The Task Force takes seriously the obligation to ensure that the public regards the Supreme Court as a respected and trusted institution, whose work is critical to the viability of our democracy. After all, “[a]ny loss in confidence in what [federal judges] do, or what the Supreme Court does, makes the rule of law somewhat more vulnerable.”¹⁰ This loss of confidence makes it more likely that the public will be prone to regard judicial decisions as the product of political will instead of carefully reasoned legal analysis.¹¹ This, in turn, increases the risk that people will simply ignore judicial decisions¹² and even resort to other disruptive means to resolve conflicts.

As the world’s largest voluntary association of attorneys — who have special obligations to support, defend, and protect the legal system, the judiciary, and the rule of law—the American Bar Association has a critical role to play in ensuring that our judges remain fair and impartial, and independent of political pressure, and that the public understands its role and the corresponding roles of other government officials and individual citizens.

Accordingly, the Task Force has focused on providing concrete recommendations to help ensure that judicial decision-making in the federal courts remains fair, impartial, and transparent and that the judiciary serves

10 Lohier, Raymond J., et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 *Judicature* 71, 72 (2022).

11 *Id.*

12 *Id.*; see Sam Levine, *AOC urges Biden to ignore Texas ruling suspending approval of abortion drug*, *THE GUARDIAN* (Apr. 9, 2023); see also Judy Woodruff, Sam Lane, and Frank Carlson, *How Wisconsin’s sharp political divides shaped state Supreme Court election*, PBS (Apr. 3, 2023) (noting that the more skeptical that people are of the Court’s legitimacy, the less inclined people may be to follow its decisions).

both the ends of justice and the “appearance of justice.”¹³ It has also focused on identifying and recommending resources to help improve the public’s understanding of the judiciary and its role in our society.¹⁴

The Task Force’s recommendations focus on three primary categories of concern that it believes are most influential in shaping the public’s perception of the federal judiciary: (1) the confirmation process; (2) the Supreme Court’s ethics practices; and (3) the federal courts’ processes and procedures. Additionally, the Task Force addresses the need for continued efforts to protect judges and their families and to improve public education and awareness of the judicial function.

In making these recommendations, the Task Force acknowledges that the vast majority of cases are heard in the state courts, not the federal courts. Although the state courts can serve as valuable models for the federal system, the Task Force has confined its focus to the federal judiciary and, in some circumstances, to the Supreme Court given the broader impact of decisions made in these courts. The Task Force recommends that each state conduct a similar review of its court system and develop recommendations tailored to its needs.¹⁵

13 *Offutt v. United States*, 348 U.S. 11, 13 (1954) (quoting *R v. Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259).

14 These recommendations are not meant to be exhaustive. Rather, they are focused on the issues identified at the outset of this report and are meant to offer realistic avenues to help the Court and Congress strengthen public confidence in the Judiciary.

15 The ABA has previously opposed the election of judges. *Judicial Selection: The Process of Choosing Judges*, American Bar Association, Coalition for Justice, 2008. However, because the Task Force has confined its scope to the federal courts, it does not consider or address this issue in this report.

III. THE CONFIRMATION PROCESS

Under the Constitution, federal judges must be nominated by the President and are subject to confirmation by the Senate, in part to assure that judicial nominees are qualified and subject to some measure of democratic process while still being insulated from partisan ends.¹⁶ Yet, over time, the confirmation process has become increasingly partisan and volatile. Some presidential candidates have campaigned on platforms that included nominating judges based on how the jurist would decide certain cases.¹⁷ Some Senators have tried to use the confirmation process as a political bargaining chip, at times refusing to advance or vote on certain judicial nominees until Senate leadership agreed to unrelated demands.¹⁸ Supreme Court confirmation hearings have become must-see TV events that draw national attention, and confirmation votes mirror party lines, seemingly without regard to a nominee’s qualifications.

Most importantly, the current state of confirmation hearings does more to obscure, rather than educate the public about, the qualities and experience that are important to the judicial function and those that are disqualifying. Despite the extensive record that may be generated during the confirmation process, that process may provide little substantive information about a nominee’s judicial temperament, preparedness for the rigors of the work, demonstrated open-mindedness, understanding of impartiality, intentions regarding the hiring of and reliance on clerks, record of collegiality and collaboration with colleagues, and respect among leaders in the profession. Instead, confirmation hearings often focus exclusively on ideology, using “buzz words” that have little meaning to the public for which these hearings

¹⁶ U.S. CONST. art. II § 2; see also THE FEDERALIST No. 66 (Alexander Hamilton).

¹⁷ The composition of the Supreme Court and future nominations were a central point of Congressional and Presidential elections in 2020. Priyanka Boghanj, *How McConnell's Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, PBS (Oct. 16, 2020).

¹⁸ This occurs not just at the Supreme Court level but with other federal court nominees. See Mary Clare Jalonick, *With Feinstein back in Senate, 3 of Biden's stalled judicial nominees move forward*, AP NEWS (May 11, 2023) (discussing how President Biden’s First Circuit nominees were stalled in the Senate while there was no partisan majority).

may be the only opportunity to hear from judicial nominees.¹⁹ The result is that the public may be left with a distorted image of what judges do and the expectations we should have of those who receive this lifetime appointment.²⁰

The Senate stands as a proxy for the public. As such, the public must have confidence that the Senate has received all the relevant information about the nominee's record and that the Senate will engage with nominees in a good faith effort to assess their fitness for the office. The Senate must have the time it needs to gather all the relevant information and to review it. And the Senate must make inquiries of the nominee that are relevant and most illuminating in determining the nominee's fitness to serve on our highest court.

The Task Force also understands that hearings conducted in a way that degrades what should be a serious, sober, and rigorous assessment may well discourage those who are most qualified to serve on the federal bench from offering themselves as potential nominees. It firmly believes that the current confirmation process must be strengthened if public confidence in the judiciary is to be restored.

Considering this, the Task Force proposes the following list of 10 questions that should be asked of every judicial nominee during the confirmation process. These questions would publicly examine a nominee's judicial temperament and open-mindedness as qualifications to serve on the federal bench, along with other professional qualifications.

The Task Force understands that each Senator serving on the Senate Judiciary Committee will ask many other questions that they regard as critical to assessing the qualifications of a nominee. However, it also believes that expanding the framework for assessing the merits of a nominee in a nonpartisan manner will help the public understand how individual

19 See, e.g., Tayo Bero, *Ketanji Brown Jackson's confirmation hearing is a disgrace to her qualifications*, THE GUARDIAN (Mar. 24, 2022) (discussing gender and racism as ideological topics during the trial); Deirdre Walsh, *Takeaways From Amy Coney Barrett's Judiciary Confirmation Hearings*, NPR (Oct. 15, 2020) (using abortion as a buzz word), Molly Ball and Tessa Berenson, *Brett Kavanaugh's Confirmation Fight Exposes Major Problems With the Nation's Most Powerful Court*, TIME (Sept. 27, 2018) (exemplifying political divisiveness during a confirmation hearing).

20 See Jones, *supra* note 7. Recent polling shows that survey participant expectations of the Supreme Court are correlated to the Justices' political affiliations. See also *Has the Confirmation Process of Supreme Court Nominees Become Too Political*, BILL OF RIGHTS INST. (Apr. 28, 2022). 84.9% of students surveyed answered 'Yes' to the question 'Has the Confirmation Process of Supreme Court Nominees Become Too Political'?

nominees would approach the cases before them and enable a better evaluation of a nominee's ability to serve on the federal bench. Moreover, ensuring that every nominee is asked a set of common questions will offer the public a consistent frame of analysis that is not driven by political considerations:

1. What are the most important qualities that you have seen in a judge and would seek to emulate? Conversely, can you identify any characteristics you have seen in a judge that you would avoid?
2. Many disputes in the federal system never go to trial, often with good reason. But trials have long been understood to play a unique function in our adversarial system of litigation. What do you think is the value of a trial to litigants, to the courts, and to the justice system? What are your views about the value of the adversarial process?
3. There is clearly a trade-off between making decisions public quickly and producing reasoned opinions. How would you approach the process of writing an opinion, deciding when to write a separate opinion (whether a concurrence or dissent), and issuing a written decision on an emergency or interim request? What do you think is the value of the written judicial opinion?
4. Recent polls reveal that public confidence in the judiciary, including the Supreme Court, is at an all-time low. Please name specific actions that judges and Justices can take to promote respect for and confidence in the integrity and independence of the Supreme Court specifically and the judiciary in general?
5. What do you see as an appropriate public role for a federal judge? Do you believe that membership in professional associations or advocacy organizations compromises a judge's ability to be independent? Should federal judges be free to affiliate with, or participate in, activities such as panel attendance, panel discussions, speeches or programs sponsored by such groups? Are there unacknowledged benefits to membership and participation that could enhance the judicial role?
6. We all have unconscious biases that influence our decisions. But, as you know, our Constitution requires that disputes be heard before an impartial tribunal. We expect our judges to be impartial and objective but provide little guidance on how a judicial nominee approaches the process of becoming "objective" or "impartial." Can you provide an example of steps you have taken either as a judge or a lawyer in a

particular circumstance to ensure that your approach to an important matter in dispute remained impartial?

7. Can you provide an example of an occasion when you initially held a firm view of what you thought at the time was the “right” answer to a dispute or dilemma, but changed your mind after hearing arguments or reviewing the facts and evidence? Do you recall what made you change your mind?
8. Justices on the Supreme Court have described a variety of approaches to constitutional interpretation, including, but not limited to textualism, originalism, or a “developmentalism” approach. What is your interpretive approach to the Constitution? Could you specify how you would adjudicate a constitutional question?
9. Similarly, Justices of the Court have described a variety of approaches to statutory interpretation. Please share your views about how you would analyze a federal statute.
10. How do you understand the ways in which ratification of the Reconstruction Amendments to the Constitution (the Thirteenth, Fourteenth, and Fifteenth) shifted the constitutional order – federal, state, regional, racial? If you do not believe that any such fundamental shifts were created, please share your views.

IV. JUDICIAL ETHICS

The Task Force and the American Bar Association are deeply concerned about the effect of the lack of a binding code of ethics at the Supreme Court on that institution’s legitimacy.

During its February 2023 Midyear meeting, the American Bar Association House of Delegates approved Resolution 400, urging the Supreme Court “to adopt a code of judicial ethics binding on justices of the Supreme Court of the United States that is comparable to the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States.”²¹ ABA President Deborah Enix-Ross renewed calls for the Court to adopt a binding ethics code in a May 9, 2023 statement.²² Multiple former judges have similarly called for a binding ethics code, and legislation mandating that the Supreme Court adopt a code of conduct has been introduced in Congress but has not been enacted.²³

The Judicial Code of Conduct referenced in Resolution 400 was first adopted in 1973 by the Judicial Conference of the United States²⁴ to set ethics standards for judges on the lower federal courts and is based on the ABA Model Code of Judicial Conduct.²⁵ The Committee of Codes of Conduct, whose members are appointed by the Chief Justice, provide guidance to judges and judicial nominees, and may, at the request of a judge to whom the Code applies, provide advisory opinions.²⁶

21 ABA Resolution 400 (Feb. 6, 2023).

22 *Statement of ABA President Deborah Enix-Ross Re: Supreme Court ethics code*, AM. BAR ASS’N. (May 9, 2023).

23 See, e.g., Supreme Court Ethics Act, S.2512, 117th Cong. (2021); Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R.7647, 117th Congress (2021); Abbie VanSickle, *Prominent Retired Judge Calls for Ethics Rules for Supreme Court Justices*, N.Y. TIMES (May 2, 2023).

24 The Judicial Conference is the policy-making body for the federal courts and supervises the Director of the Administrative Office of the U.S. Courts. The Chief Justice is the presiding officer of the Judicial Conference, and its membership includes the Chief Judge of each judicial circuit, the Chief Judge of the Court of International Trade, and one district judge from each judicial circuit.

25 The ABA Model Code of Judicial Conduct was adopted by the ABA in 1990 and incorporates many of the Canons of Judicial Ethics, which were first approved by the ABA’s Commission on Judicial Ethics in 1924. Lower court judges are also bound by the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364.

26 CODE OF CONDUCT FOR U.S. JUDGES, Introduction (2019).

However, this Code does not apply to Justices of the Supreme Court. Though every federal judge, including members of the Supreme Court, takes an oath to “faithfully and impartially discharge and perform” the duties of judicial office, Supreme Court Justices are not bound by a code of ethics. There is no enforcement mechanism, short of impeachment, to guarantee that Supreme Court Justices apply and uphold the same ethical standards that bind all other members of the federal judiciary.²⁷

Chief Justice Roberts has observed that the absence of specific application and enforceability does not prevent the Court’s members from following the ethical principles that lower courts observe.²⁸ Congress has adopted legislation that addresses certain ethical matters, including requiring all federal judges to comply with financial reporting requirements and imposing limitations on gifts and other earned income.²⁹ However, there is no clear enforcement mechanism to verify that Supreme Court Justices’ disclosures are accurate. Recently, members of Congress³⁰ and former judges have called for binding ethics rules for Supreme Court Justices.³¹

This, in turn, has increased concerns about the Supreme Court’s approach to its ethical obligations and has led to calls for congressional action, including calls by members of Congress to enforce ethical standards through

27 See CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2 (2011).

28 See *Id.* at 4 (“Some observers have suggested that, because the Judicial Conference’s Code of Conduct applies only to the lower federal courts, the Supreme Court is exempt from the ethical principles that lower courts observe. That observation rests on misconceptions about both the Supreme Court and the Code...The Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court.”).

29 5 U.S.C. §§ 101, 109(10), 501-502.

30 There is proposed legislation that would require the Justices of the Supreme Court to adopt a binding ethics code. See Press Release, Murphy, Johnson Reintroduce Bicameral Bill Requiring SCOTUS to Follow Code of Ethics (Feb. 9, 2023) (describing the Supreme Court Ethics Act which would establish the appointment of an Ethics Investigation Counsel for the Supreme Court in addition to the Judicial Conference adopting a Supreme Court code of ethics); Abbie VanSickle, *In Bipartisan Bill, Senators Urge Supreme Court to Adopt Ethics Code*, N.Y. TIMES (Apr. 28, 2023) (describing the Supreme Court Code of Conduct Act, which would require the establishment of a code of ethics, publication of rules to its website, designation of an official to handle violations, and publication of complaints). In the lower federal courts, a judge’s financial disclosures are subject to review by the chief judge of the relevant circuit and a judge’s conduct can be reviewed by the Judicial Conference. It is not clear that the Chief Justice, as a “first among equals,” has the same kind of enforcement authority over the Associate Justices. Robert S. Peck, *When an Ethics Code is Not Enough*, APP. ADV. BLOG (Apr. 9, 2023).

31 VanSickle, *supra* note 23.

the appropriations process.³² Even Justices on the Supreme Court have acknowledged the need to improve public confidence in the Court.³³ The Task Force is concerned that the perceived lack of ethical standards that bind the Justices undermines public respect for and confidence in the Court. It understands the unique position of the Court and the need for an independent judiciary. To that end, the Task Force urges the Supreme Court to adopt and publicly publish a Code of Conduct and puts forward these additional recommendations to bolster public confidence in the Court.³⁴

A. Recusal

1. Discussion

Under federal law, “[a]ny justice, judge, or magistrate judge of the United States shall disqualify [themselves] in any proceeding in which [their] impartiality might reasonably be questioned.”³⁵ Historically, the Supreme Court and the courts of appeals have had the authority to review a lower court judge’s decision not to recuse him/herself. The deciding Court considers whether a judge’s impartiality can be questioned based on “the facts as they exist at the time of the case.”³⁶ The Court has required recusal when there is a “probability of bias” to protect a litigant’s right to due process of law.³⁷ Thus constitutional arguments necessitate the recusal of judges when a judge’s impartiality may be called into question. Importantly, the standard is not whether actual impartiality exists but rather the appearance of impartiality, such that it is not “tolerable” under the Constitution.³⁸

32 Madison Adler & Lydia Wheeler, *Senate Appropriator Plans Justices Ethics Push in Spending Bill*, BLOOMBERG LAW (Apr. 3, 2023).

33 Adam Liptak, *Chief Justice Says Supreme Court Is Working to Address Ethics Questions*, N.Y. TIMES (May 24, 2023).

34 Beyond newly proposed legislation in Congress, several professional organizations have developed their own recommended sets of ethics codes. See *Model Code of Conduct for U.S. Supreme Court Justices* LAWYERS DEFENDING AM. DEMOCRACY (Mar. 9, 2023); *ABA House adopts host of new policies, including support for ethics code for U.S. Supreme Court*, AM. BAR ASS’N. (Feb. 6, 2023).

35 28 U.S.C. § 455(a).

36 See *Scalia Memorandum in Cheney v. United States Dist. Ct. for D.C.* (03-475) 542 U.S. 367 (2004). This authority is not uncontroversial given Justice Scalia’s decision not to recuse himself based on the facts, despite news coverage giving the appearance of impropriety.

37 See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876–84 (2009) (tracing the history of this authority). This authority is not uncontroversial. In *Massey Coal*, for example, Chief Justice Roberts, criticized both the “probability of bias” standard and the decision of the Court to wade into questions of when recusal was proper, noting that this standard “will do far more to erode public confidence in judicial impartiality.” *Caperton*, 556 U.S. at 890–91 (Roberts, C.J., dissenting).

38 *Id.*

Despite due process arguments, judges have debated whether the standard of “probability of bias” promotes or detracts from an independent and impartial judiciary, for fear that forcing judges to recuse themselves when there *may* be bias erodes public confidence in the courts.³⁹ However, the opposite is true. The lack of consistency in recusals, particularly at the Supreme Court, is what detracts from public understanding and support of the Court’s legitimacy. It has created an appearance that members of the Supreme Court believe that recusal standards do not apply to them, which runs counter to due process.

The confusion is two-fold regarding (1) whether Justices should recuse themselves and (2) what the recusal process should look like. Historically, Justices have cited a fear that there is no one to replace them if they recuse themselves and that this risks a tie vote with eight Justices on cases with significant, large-scale impact on both litigants and the development of the law in a particular area.⁴⁰ While these fears are not unfounded, Justices do recuse themselves where they deem it to be appropriate, leaving the decision to eight Justices.⁴¹ Given the discretion Justices have over their recusals, however, some have chosen not to recuse themselves in circumstances where prudence would appear to dictate otherwise.⁴²

In his 2011 Annual Report on the Federal Judiciary, Chief Justice Roberts noted that “the individual Justices decide for themselves whether recusal is warranted under Section 455. The Supreme Court does not sit in judgment of one of its own Members’ decisions whether to recuse in the course of deciding a case ... There is no higher court to review a Justice’s decision not to recuse in a particular case.”⁴³ Whether or not other Justices decline to weigh in on a Justice’s decision to recuse themselves does not eliminate the requirement to recuse. The Justices, as members of the federal judiciary, must follow the standard for recusal in Section 455, noting that this means recusals based on the appearance of impropriety and not necessarily actual impropriety. This creates a question about whether Justices’ personal opinions of their own appearance of impropriety is an adequate means of deciding on a recusal. Justices’ explanations about their choices to recuse

39 *See id.*

40 *See* Scalia Memorandum in *Cheney*, *supra* note 36.

41 *See generally* Andrew Glass, *Abe Fortas resigns from Supreme Court, May 15, 1969*, POLITICO (May 14, 2017). Fortas’s ties to President Johnson as well as financial entanglements caused others to doubt his integrity on the Court.

42 *Id.*

43 ROBERTS, *supra* note 27, at 8.

may be helpful in providing the public with more context,⁴⁴ but without consistency they create confusion about why Justices are making decisions to recuse.⁴⁵ Thus, more transparency is needed regarding the Justices' decisions to recuse themselves and how they are applying Section 455.

2. Recommendation

The Task Force observes that the Supreme Court has operated effectively with eight members in the past. However, it also acknowledges that the adoption of more robust ethical standards may lead to circumstances in which multiple Justices are required to recuse in a given case. In such circumstances, the Task Force encourages both the Supreme Court and Congress to consider the best approach to adopt in such circumstances—for example, by authorizing the designation of a retired Justice of the Supreme Court to serve—while being mindful of the constitutional concerns that such an approach may pose. In addition to the means of recusal, the Task Force also recommends that the Supreme Court and Congress consider a mechanism for communicating the Justices' reasoning for or against recusal, in an effort to improve transparency.

B. Financial Disclosures

1. Discussion

Under 28 U.S.C. § 455, a federal judge, including a Supreme Court Justice,⁴⁶ is required to “disqualify himself” if “[h]e knows that he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.”⁴⁷ The statute also does not allow judges simply

44 Justice Elena Kagan recently published an explanation for her recusal in a case, which is a rare practice by Justices. See ORDER LIST: 598 U.S., p. 8 (May 22, 2023); but see Mark Joseph Stern, *It Took Alito Barely a Month to Violate the Supreme Court's New Ethics Rules*, SLATE (May 30, 2023) (exemplifying that without explanation, an interpretation about a Justice's decision to recuse is left up to public interpretation).

45 Jimmy Hoover, *2 Justices Diverge on Explaining Reasons for Recusals*, LAW.COM (May 30, 2023).

46 Chief Justice Roberts has noted that it is not clear “whether Congress may impose those requirements on the Supreme Court. The Justices nevertheless comply with those provisions.” The Justices have also adopted an “internal resolution” to comply with “limitations on the receipt of gifts and outside earned income,” established by the Judicial Conference. Chief Justice Robert, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2.

47 28 U.S.C. § 455(b).

to ignore their financial interests to avoid recusal; a judge is required to “inform himself about his personal fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.”⁴⁸

To enforce this mandate, *all* federal judges, including Supreme Court Justices, are required to file annual financial disclosures with the Administrative Office of the U.S. Courts.⁴⁹ Judges, Justices and their spouses are required to report on a range of financial interests, including noninvestment income, positions and agreements. And, since November 2022, these reports are required to be available in “full-text searchable, sortable, and downloadable format for access by the public.”⁵⁰

Yet, despite these requirements, there have been several troubling examples in recent years of judges and Justices either failing to report financial interests or continuing to preside over cases that implicate those interests.⁵¹ Consequently, the Task Force is concerned that existing financial disclosure requirements are insufficient.

2. Recommendations

The Task Force recommends that the Judicial Conference and the Supreme Court adopt rules prohibiting federal judges and Supreme Court Justices from holding individual stocks or similar financial instruments. It also encourages the Judicial Conference to require judges and Justices to hold investments, including individual stocks, bonds and real estate with the exception of the judge’s primary residence, in a blind trust to eliminate even the appearance of bias.

48 28 U.S.C. § 455(c).

49 Ethics in Government Act of 1978, 5 U.S.C. §§101-11.

50 The Courthouse Ethics and Transparency Act, 5 U.S.C. App. 4 §105(c).

51 Michael Siconolfi et al., *Dozens of Federal Judges Had Financial Conflicts: What You Need to Know*, WALL ST. J. (Apr. 27, 2022); Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023); *Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests, Fix the Court* (June 12, 2023). This has included a failure to timely disclose information about income earned by a judge or justice’s spouse. Debra Cassens Weiss, *Wife of Chief Justice Roberts generated \$10M in commissions in this job, whistleblower says*, ABA JOURNAL (May 1, 2023). This has also included information about significant transactions between the judge or justice and a third party. Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, POLITICO (Apr. 25, 2023); Ann E. Marimow & Robert Barnes, *Justice Thomas delays disclosures after reports of travel, property sale*, WASH. POST (June 7, 2023).

The Task Force also recommends that the Administrative Office of the United States Courts designate staff members to answer questions, assist, and review judges' and Justices' annual financial disclosures.

Additionally, the Task Force recommends that the Judicial Conference and the Supreme Court establish rules requiring judges to disclose income, investments, and transactions for their immediate family members, including the source of that income and the approximate value/income range.⁵² In this context, the Task Force recommends that "immediate family" be defined to include a judge's spouse, domestic partner, dependent children, and any other member of his/her household.⁵³ However, the Task Force also recognizes that, in some circumstances, a judge may know or have reason to know that the income, profession, financial holdings, or transaction of a relative other than an immediate family member may give rise to the appearance of bias.⁵⁴ In such circumstances, judges should also disclose that information as part of their annual financial disclosures.

The Task Force supports in full Chief Justice Roberts' commitment to ensure that Justices of the Court "adhere to the highest standards" of ethical conduct and is heartened that the Court is "continuing to look at the things [it] can do to give practical effect to that commitment."⁵⁵ The Task Force encourages the Court to adopt the measures similar to those set forth in this Report in a reasonable time frame in order to bolster public confidence in the Court and obviate the need for legislation in this area.⁵⁶

52 For example, disclosure may be limited to explaining that a certain income source of investment falls in one of the following ranges: \$0-\$50,000; \$50,001-\$100,000; \$100,001-\$1,000,000; \$1,000,001-\$5,000,000; and above \$5,000,000.

53 Judges are currently required to disclose financial information concerning their spouse or dependent children, but not other members of their household. FILING INSTRUCTIONS FOR JUDICIAL OFFICERS AND EMPLOYEES (AO-10) 5 (2023) (citing 5 U.S.C. § 13104(e)(1)).

54 For example, a judge whose sibling is a senior executive at a major corporation would have reason to know that the relationship may give rise to the appearance of bias in favor of that corporation and so should disclose that information.

55 Mark Sherman, *Chief Justice John Roberts says Supreme Court looking at ethics standards, provides no specifics*, PBS (May 24, 2023).

56 The Task Force acknowledges that legislation requiring the Supreme Court to adopt a code of ethics may raise separation-of-powers concerns. Nevertheless, it underscores the importance of disclosures and other ethics rules to ensure public confidence in the Courts' impartiality.

C. Gifts, Travel Expenses, and Hospitality

1. Discussion

The Task Force’s recommendations with respect to gifts, travel expenses, and hospitality are, in many ways, informed by recent revelations about sitting Justices’ acceptance of gifts and hospitality, without timely disclosure.⁵⁷ These incidents have received widespread media attention and have undermined public confidence in both the Court itself and in the judgment of its members.⁵⁸ However, the acceptance of gifts without timely disclosure is not a new problem, and it erodes public trust and confidence in the judiciary.⁵⁹

The Judicial Conference sets strict limits and guidelines for judges with respect to travel expenses, gifts, and speaking engagements to safeguard the impartiality of the federal judiciary.⁶⁰ However, the Judicial Conference does not have authority over Supreme Court Justices, and in recent months significant questions have arisen about Justices’ acceptance of gifts and

57 Kaplan, *supra* note 51. See also Stephen Engelberg & Jesse Eisinger, *The Origins of Our Investigation into Clarence Thomas’ Relationship with Harlan Crow*, PROPUBLICA (May 11, 2023); Marimow & Barnes, *supra* note 51 (noting that Justice Jackson also received gifts, as detailed in her annual disclosures). These revelations have triggered an investigation by the Senate Judiciary Committee as part of the Committee’s “ongoing effort to craft legislation” to strengthen the ethical rules and standards governing the Supreme Court. Joe Patrice, *Harlan Crow’s Lawyers Tell Senate They’re Going to Take Their Chances with Contempt*, ABOVE THE LAW (May 23, 2023). As Chief Justice Roberts explained, they have also led to the Court “considering steps to adhere to the highest standards of conduct.” Jacqueline Thomsen, *Supreme Court’s Roberts says committed to ‘highest standards of conduct’*, REUTERS (May 24, 2023).

58 See *Senators ask billionaire for a list of gifts to Supreme Court Justice Thomas*, REUTERS (May 9, 2023); see also Justin Elliott et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023).

59 For example, in 1968, a series of hearings revealed that then-Justice Abe Fortas was paid by clients of his prior law firm, Arnold & Porter, to teach a summer class at American University while many of those same clients has cases that would be heard by the Court. Ciara Torres-Spelliscy, *The Cautionary Tale of Abe Fortas*, BRENNAN CTR. (Feb. 6, 2018).

60 See, e.g., 28 U.S.C. §456(a) (authorizing the Director of the Administrative Office of the United States Courts to pay “each justice or judge of the United States. . . while attending court or transacting official business at a place other than his official duty station for any continuous period of less than thirty calendar days (1) all necessary transportation expenses certified by the justice or judge; and (2) payments for subsistence expenses at rates at or in amounts which the Director establishes...with the approval of the Judicial Conference of the United States and after considering the rates or amounts set by the Administrator of General Services[.]”); Guide to Judicial Policy §§ 620.25–35 (defining “gifts,” placing restrictions on when a judge is allowed to accept a gift, and prohibiting acceptance when the judge’s duties or impartiality could be implicated by such a gift).

hospitality. While these questions have resulted in changes to the Judicial Conference’s regulations,⁶¹ it is still not clear that these changes bind Justices of the Supreme Court.

2. Recommendations

The Task Force recommends that that Congress enact legislation to prohibit judges and Supreme Court Justices, together with their spouse, domestic partner, or dependent children, and other members of their household from receiving any “gift,” as defined by Section 625 of the Guide to Judicial Policy, but excluding: “any payment, compensation, or reimbursement the acceptance of which is permitted by the Regulations of the Judicial Conference Concerning Outside Earned Income” and “anything that is paid for by the judiciary or secured by the judiciary under § 620.45 Additional Limitations.”

The Task Force also recommends that Congress enact legislation prohibiting all federal judges, including Supreme Court Justices, together with their spouses, domestic partners, dependent children, and other members of their household from receiving reimbursement for travel expenses for anything other than actual, reasonable, out-of-pocket expenses.

D. Speaking Engagements

1. Discussion

Justices and their families do not forfeit the privileges guaranteed by the First Amendment simply by assuming public office. However, judges and Justices should be mindful that public statements can give rise to the appearance of bias and may result in judges being required to recuse themselves from consideration of a particular dispute. Additionally, a judge or Justice’s decision to accept a speaking engagement may result in financial benefits that,⁶² while not contrary to the limitations set on gifts and hospitality, nevertheless contribute to the appearance of partiality or partisanship.

61 See Letter from Admin. Office of U.S. Courts to Senator Sheldon Whitehouse (Mar. 23, 2023).

62 Recently, a report by the Associated Press suggests that taxpayer-funded staff at the Supreme Court have pressured colleges and libraries to purchase more of Justice Sotomayor’s books for events where she has been invited to speak. See Brian Slodysko et al., *Supreme Court Justice Sotomayor’s staff prodded colleges and libraries to buy her books*, ASSOCIATED PRESS (July 11, 2023).

2. Recommendations

The Task Force recommends that Congress enact legislation prohibiting Supreme Court Justices, their spouses, domestic partners, dependent children and other members of their households from receiving any financial gift, honorarium, or other payment from any institution except: (1) as reimbursement for actual, reasonable, out-of-pocket expenses for travel; or (2) from a school, college, university, law school or other academic institution for teaching or speaking engagements. Any financial gift, honorarium, or other payment from a college, university, or law school should not exceed the amount that the institution ordinarily offers to others teaching a similar class or speaking at a similar event. It also recommends that this legislation provide that any institution found to violate this law may be subject to revocation of any federal funding or IRC 501(c) status.

E. Enforcement

ABA Resolution 400 proposes that ethics rules adopted by the Supreme Court be “binding,” suggesting that there be some form of enforcement mechanism for those rules. The Task Force does not recommend involving the executive branch in any enforcement regimen. Rather, it recommends that the Court develop an internal process for considering and investigating ethics complaints and for providing formal advice to Justices by an ethics officer. This could include, for example, an advisory opinion board modeled on the process used by state bar associations and state courts.

The Task Force also recommends that the process and procedures used by this internal board be made public to ensure transparency and lend greater credibility to the Justices’ adherence to the applicable rules.

V. TRANSPARENCY

The Task Force is also concerned that certain procedural rules, including summary orders, make it more difficult for litigants and the public to understand the judicial process. This lack of transparency can contribute to the public's lack of confidence in the federal judiciary.

Indeed, the federal courts have long touted the virtues of transparency to protect and maintain public confidence in the administration of justice. The Supreme Court, for example, has recognized that “the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.”⁶³ This kind of openness and transparency in civil and criminal cases “enhances both the basic fairness” of proceedings “and the appearance of fairness so essential to public confidence in the system.”⁶⁴

However, transparency goes beyond allowing members of the public to attend hearings and watch trials. With the advent of new technology and greater public awareness of the work done by courts, litigants and members of the public often seek out court documents and tune in to hear arguments in highly publicized or controversial cases. During the COVID-19 pandemic, courts leveraged these technologies to permit remote attendance and participation in hearings, making it easier for the public to access not only written opinions but also oral arguments. This has increased the importance of public access to judicial records and has made clear that judicial opinions are essential to help litigants and the public at large understand why decisions were made and how those decisions should apply going forward.

The Task Force acknowledges the need for confidentiality in the deliberative process, especially in multi-member courts where decisions are made by a panel of judges. To protect the deliberative process and promote a free exchange of ideas, judges need to be sure that their discussions with each other and with their employees in chambers are confidential.

However, once a decision has been made, both the parties to a dispute and the public have a right to understand not only the final outcome, but also the reasoning underlying a particular decision or order. At the district court level, litigants depend on the court's explanation of reasons to evaluate

⁶³ *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984).

⁶⁴ *Id.*

their next steps and understand how to proceed either in that case or a subsequent one. At the courts of appeals or the Supreme Court, even a procedural decision can be binding on the lower courts and set precedent. To that end, the lower courts, litigants, and the public all depend on written decisions from the Supreme Court and the courts of appeals to understand the appropriate legal standard and how to apply that standard in subsequent cases that raise similar procedural and substantive questions.

Yet, courts often fail to provide even the most basic explanation for a decision. In cases that implicate questions of individual rights, public safety, and public health, the lack of a reasoned, written decision makes it difficult (if not impossible) for members of the public to understand why a decision was made and how it affects their lives. In the absence of a written decision, people may find it easier to ascribe political or partisan motivations to a particular outcome, even if the court's actual reasoning is entirely consistent with binding precedent.⁶⁵

To combat this perceived lack of transparency, the Task Force makes the following recommendations to promote access to judicial proceedings so that both litigants and the public understand why a decision was made and how that decision should be applied in subsequent proceedings.

A. Recommendations

1. To improve transparency and increase public awareness and understanding, federal courts at all levels should take concrete steps, wherever practicable, to explain why a particular decision was made, particularly in cases involving individual rights or public health and safety.

- (a) Trial Courts:⁶⁶

- (i) When a decision is issued from the bench, take steps to assure that a transcript of proceedings is prepared and made public as soon as practicable to make certain that the public and litigants have access to a record of the judge's reasoning. This

⁶⁵ The shadow docket, as it has come to be known, has drawn scrutiny for lack of transparency over decision-making with broad consequences. See Barry P. MacDonald, *This Is the Shadiest Part of the Supreme Court*, N.Y. TIMES (NOV. 3, 2021); SEE ALSO STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 13, 82–83, 239–51 (Basic Books 2023).

⁶⁶ This includes the federal district courts, the bankruptcy courts and Article I courts.

includes establishing a mechanism to assure that transcripts are prepared even if neither party orders a transcript of proceedings.⁶⁷

- (ii) For dispositive motions or motions that affect substantive rights, provide a reasoned decision, either in writing or from the bench (with a transcript). Written decisions may be short but should identify the precedent the court is applying.
- (iii) Consider additional programs, including engagement with journalists and journalism students, to bolster accurate public reporting about cases that may have a significant impact on the community.

(b) Courts of Appeals:

- (i) For both substantive motions and unpublished or summary decisions, provide at least a paragraph of explanation that reflects the standard being applied.⁶⁸
- (ii) If a written explanation is not provided, provide a basis for that decision as a line entry on the docket. Where practicable, supplement that line entry with a written decision of at least a paragraph within a reasonable time after a decision has been rendered.
- (iii) Adopt uniform rules that apply to all courts of appeals regarding when a decision can be classified as “unpublished.”

(c) The Supreme Court:

- (i) For all motions, requests for emergency relief, interim orders, and merits cases, provide a written decision of at least a paragraph explaining the reasoning underlying a decision and the appropriate standard to apply in subsequent cases. This is particularly important in cases where

⁶⁷ For example, courts may consider using auto-generated or rough transcripts.

⁶⁸ This recommendation would not apply to *pro forma* procedural motions, like motions for extension of time, to supplement the record on appeal, or to withdraw as or substitute counsel.

- there is a written dissent.
- (ii) For emergency motions that require an immediate decision, supplement any order with a written explanation of the Court's reasons within a reasonable period of time.
 - (iii) Provide clear written explanations of the Supreme Court's internal practices and procedures, including rules regarding when *certiorari* is granted, when motions are referred to the full Court for a decision, and how emergency motions will be evaluated and decided.
2. Additionally, the Task Force recommends the following to improve public access to judicial proceedings:
- (a) Where practicable, continue to provide public access for hearings using the procedures adopted during the COVID-19 pandemic; for example, by providing public dial-in numbers for hearings or live streaming audio of oral argument.⁶⁹
 - (b) Make recordings of oral arguments and hearings publicly available within a day of argument.⁷⁰
 - (c) Maintain and provide public access to an archive of past oral arguments and hearings for a reasonable period of time.
 - (d) Establish a learning center in the court, either independently or in partnership with a nonprofit organization, to educate members of the public about the work done by the courts and encourage members of the public to observe court proceedings.⁷¹

69 Cara Bayles, *Why Virtual Courtroom Access of COVID Era May Be Ending*, LAW360 (Mar. 30, 2023).

70 See e.g., Christopher D. Kromphardt, *The 9th Circuit Live-Streams All of Its Arguments. Will that Spread?*, WASH. POST (Sept. 14, 2022); *Court Livestreams*, Michigan Courts, <https://www.courts.michigan.gov/court-livestream/> (last visited June 16, 2023).

71 Many state and federal courts already have programs like this. For example, the Second Circuit has established a civics education program that brings the community into the courthouse and offers educational programs for both students and adults. See JUSTICE FOR ALL: COURTS AND THE COMMUNITY INITIATIVE. The District of Massachusetts has established a partnership with Discovering Justice, a non-profit organization, to do similar community outreach work. See *About Discovering Justice*, DISCOVERING JUSTICE, <https://discoveringjustice.org/about-discovering-justice/> (last visited June 16, 2023).

- (e) In addition, appoint a public education or public information officer to help members of the public understand key decisions released by the court.⁷²
 - (f) Guarantee free public access to all federal dockets.⁷³
3. Finally, the Task Force encourages Congress to ensure that the federal courts have sufficient funds to effectuate these recommendations.

⁷² Robert Craig Walters & Thomas D. Hall, *How Bush v. Gore Changed Courts Across the World*.

⁷³ There have been several proposals in Congress to update and make the Public Access to Court Electronic Records (“PACER”) system free, although most recently, the proposal stalled in late 2022 during the budget process. See Nate Raymond, *No Free PACER as U.S. Lawmakers Exclude Proposal from Spending Bill*, REUTERS (Dec. 20, 2022). Currently, there is no charge for accessing up to \$30 of documents per quarter (January to March, April to June, July to September, and October to December), but individuals are charged per page for any dockets and filings they view after reaching that \$30 limit.

VI. JUDICIAL SECURITY

Enhancing the security of federal judges and their families has been a focus area of the ABA.⁷⁴ Because judges' personal information is often available online, many judges have received threats of violence stemming from their work. In 2020, an individual violently attacked Judge Esther Salas's family in their home.⁷⁵ More recently, in June 2022, a former Wisconsin judge was killed in his home in what officials believe was a targeted attack against members of the state government.⁷⁶ Threats of physical violence against judges have continued to escalate.⁷⁷

The Task Force is concerned with threats to judges and their families and believes that threats fundamentally harm the judiciary's independence and ability to decide the cases before it. Simultaneously, some judges have used the fear of threats to justify spending on car services and security details.⁷⁸

In response, the ABA has consistently advocated for additional security for judges and their families, including for the Daniel Anderl Judicial Security and Privacy Act.⁷⁹ Signed into law by President Biden in 2022, the Act restricts the disclosure and publication of certain information of judges, including home address, license plate number, and the name of the schools attended by immediate family members.⁸⁰ The Act also prohibits government agencies from publicly posting judges' information and prohibits data brokers from selling or purchasing such information.

The Task Force is heartened by the passage of this statute and urges Congress and the judiciary to continue to take steps to protect judges and their families.

74 AM. BAR ASS'N, RESOLUTION 10E (Feb. 22, 2021); see also Judicial Security Resources, AM. BAR ASS'N.

75 Nicole Acevedo, *Judge Esther Salas applauds new law named after her son, who was killed by a gunman targeting her*, NBC NEWS (Dec. 20, 2022).

76 Whitney Wild, *A former judge was killed in his Wisconsin home in a targeted attack, officials say*, CNN (June 4, 2022).

77 In 2021, there were over 4,500 threats or inappropriate communications against judges and their staff. Dan Mangan, *1,000 federal judges seek to remove personal info from internet as threats skyrocket*, CNBC (Mar. 17, 2023).

78 See Frank Runyeon, *2 NY Chief Judges Failed to Report Income But Only 1 Fixed It*, LAW360 (May 30, 2023).

79 Matt Reynolds, *ABA House urges Congress to pass judicial security bill*, ABA JOURNAL (Feb. 22, 2021).

80 Tierney Sneed, *What to know about a judicial privacy bill Congress is passing with a major defense package*, CNN (Dec. 14, 2022).

VII. PUBLIC EDUCATION

In addition to the factors discussed above, the Task Force also recognizes the importance of public education to bolster public confidence in and understanding of the work done by the judiciary.

The current crisis of confidence in the courts is merely one aspect of the public's growing distrust in a range of institutions, including in the other branches of government.⁸¹ Yet evidence suggests that a greater focus on civics education can bolster public trust and understanding of these institutions and build resilience against sources of misinformation or disinformation that can undermine public trust and confidence in public institutions, including in the judiciary.⁸²

With respect to the judiciary, the lack of public understanding — and by extension, confidence — is aggravated because the judiciary does not receive the same level of attention as the political branches in either the news media or in the K-12 curriculum. It is, as the Ohio Bar Association has exclaimed, the “least understood branch.”⁸³ Thankfully, there is no shortage of reliable and easily accessible programs, created and maintained by organizations around the country, to help improve public understanding of civics in general, and the judiciary in particular.⁸⁴

The Task Force recognizes that the recommendations made above, alone, are insufficient to bolster public confidence in the judiciary. Rather, they must be accompanied by more robust civics education for both children and adults to help the public understand the judicial function. It therefore endorses the following programs and resources that presently exist at the ABA and elsewhere.

A. Civics Education in Schools

The Task Force recognizes the importance of civics education in the nation's schools to help children across the country understand and uphold our

81 See JENNIFER KAVANAGH ET AL., *THE DRIVERS OF INSTITUTIONAL TRUST AND DISTRUST: EXPLORING COMPONENTS OF TRUSTWORTHINESS* (RAND CORPORATION 2020).

82 *Want to Rebuild Public Trust? Focus on Civic Education*, RAND CORPORATION (Dec. 8, 2020).

83 Michael E. Flowers, *What you should know about the least understood branch of government*, OHIO BAR (May 1, 2018).

84 Many of these resources are listed at the end of this section.

democratic systems. Because of the importance of civics education in our democracy, the state of civics education (or lack thereof) in schools across the country is of deep concern to the Task Force. In its April 2023 report, the National Assessment of Educational Progress (NAEP) found that the average score for eighth-grade students in its civics assessment was 2 points lower compared to 2018, and the overall average score has fallen back to the level of 1998.⁸⁵ At the same time, educators and librarians have come under fire for using educational resources to help students understand and engage with the political and democratic process.⁸⁶

The ABA has long supported improvements in civics education and has worked to support educators engaged in that effort.⁸⁷ This includes its support of and participation in CivXNow, a coalition of more than 300 organizations around the country that advocates for legislation to increase funding to expand and improve civics education in K-12 classrooms.⁸⁸

Given the importance of civics education in schools, the Task Force encourages the ABA to continue these efforts and urges Congress to pass legislation to improve funding for civics education around the country.

B. Resources for K-12 Education

The Task Force also recognizes the work done by hundreds of organizations around the country to create and make accessible programming and resources for teachers and students to understand our democratic systems and, in particular, the judiciary. For example, the Civics Renewal Network (CRN), a consortium of nonprofit, nonpartisan educational organizations, provides educational resources and programs to teachers and students around the country free of charge and serves as a clearing house for civics

85 NAEP Report Card: Civics, THE NATION'S REPORT CARD, <https://www.nationsreportcard.gov/civics> (last visited June 21, 2023). The civics assessment measures students' knowledge and understanding of civics based on three components: knowledge, intellectual and participatory skills, and civics disposition.

86 AM. BAR ASSOC., REPORT 110 (2010), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2010/2010_am_110.pdf.

87 *Id.*

88 See Patricia D. Lee & Frank Valadez, *American Bar Association Advances Civic Education*, AM. BAR ASSOC. (Jan. 4, 2022); see also *ABA and Civic Education*, AM. BAR ASSOC., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/election-integrity-and-civic-education-/civics-secures-democracy-act/?login (last visited June 21, 2023); *The Roadmap*, EDUCATING FOR AM. DEMOCRACY, <https://www.educatingforamericandemocracy.org/the-roadmap/> (last visited June 21, 2023).

educational materials available online.⁸⁹

While all of CRN's members are national organizations, there are also hundreds of regional, state, and local organizations that support civics education. The Task Force commends these organizations for their work and encourages members of the legal community, including lawyers and judges, to support these organizations and the work they do where possible.

C. Civics Education by the Courts

In addition to independent organizations, courts around the country at both the state and federal levels have taken strides to improve public access to the courtroom and bolster public understanding of the judicial function.

For example, in 2014, the Second Circuit Court of Appeals established the Justice for All program, which brings judges, court staff, lawyers, and educators together to develop and implement a cohesive strategy for outreach to the community.⁹⁰ In addition to providing resources, the Justice for All program also organizes courthouse visits and student contests to help the public learn more about the work done by the Second Circuit and the District of Connecticut. Similarly, the Eastern District of Missouri's Judicial Learning Center in St. Louis offers robust programming for teachers and students, including student contests, court visits, speakers, and other programs that bring the public into the courthouse to learn about the work of the judiciary.⁹¹ The federal courts in Sacramento, Chicago, and Boston have launched similar programs.⁹² The Administrative Office of the U.S. Courts also offers a wide array of educational programs focused on the federal judiciary.⁹³

State courts have taken similar steps to bring the public into the courtroom to understand the judicial function. For example, the Supreme Court of Texas often hears argument in the community and, following argument, invites

89 CIVICS RENEWAL NETWORK, <https://www.civicsrenewalnetwork.org/> (last visited June 21, 2023).

90 *Our Mission*, JUSTICE FOR ALL: COURTS AND THE COMMUNITY INITIATIVE, https://justiceforall.ca2.uscourts.gov/mission_home.html (last visited June 21, 2023).

91 *Events & Programs*, U.S. DIST. CT. FOR THE E. DIST. OF MO., <https://www.moed.uscourts.gov/events-programs> (last visited June 21, 2023).

92 *See Kennedy Learning Center*, SACRAMENTO FED. JUD. LIBR. AND LEARNING CTR., <https://www.sacjlc.com/learning-center/> (last visited June 21, 2023); *DISCOVERING JUSTICE*, <https://discoveringjustice.org/> (last visited June 21, 2023); *Community Outreach Program*, U.S. DIST. CT. FOR THE N. DIST. OF ILL., <https://www.ilnd.uscourts.gov/Pages.aspx?page=outreach> (last visited June 22, 2023).

93 *About Federal Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts> (last visited June 21, 2023).

members of the community to ask questions about the judicial process. State courts in Pennsylvania and Washington have developed public programs and offer resources to improve public education about civics.⁹⁴ And state courts around the country have also appointed a dedicated Public Education or Public Information Officer to oversee communications with the public, including the information posted on the court’s website, and to help the public understand major decisions from that court.⁹⁵

The Task Force encourages courts around the country to develop programs to improve public understanding of the judicial function and encourages Congress to ensure that the courts have sufficient funding to carry out these programs.

D. Civics Education for Adults

The Task Force recognizes the importance of civics education beyond the nation’s schools and is heartened that many of the programs developed by the courts are designed to help both children and adults understand the judicial function.

In addition, the Task Force is encouraged by the development of programs around the country to bring civics education to adults. For example, the Annenberg Public Policy Center is working to expand its civics education efforts and plans to invest \$2 million over five years to fund digital resources to improve the general public’s understanding of civics. Other nonprofits, including the National Constitution Center and New Hampshire Public Radio, have expanded digital resources to provide the public with reliable information about our democratic systems. Similarly, Suzanne Spaulding, the Senior Advisor for Homeland Security and International Security Program at the Center for Strategic and International Studies (CSIS), has launched the Civics at Work Initiative to encourage corporations to foster workplace conversations on civics issues and provide resources for organizations to plan and develop programs to help employees expand their civics knowledge.⁹⁶

94 *Civic Learning*, WASH. CTS., <https://www.courts.wa.gov/education/> (last visited June 21, 2023); *Civics-Ed*, THE UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/civics-ed> (last visited June 21, 2023).

95 Walters & Hall, *supra* note 72.

96 *The ‘Civics at Work’ Initiative*, CTR. FOR STRATEGIC & INT’L STUD., <https://www.csis.org/programs/international-security-program/defending-democratic-institutions/civics/civics-work> (last visited June 21, 2023).

The ABA also plans and develops resources every year to commemorate Law Day on May 1, and these include events directed to the general public.⁹⁷ Indeed, in 2023, the ABA’s Law Day programming was specifically focused on “Cornerstones of Democracy: Civics, Civility, and Collaboration,” and its programs offered several avenues to rebuild trust in public institutions.

The Task Force encourages both the ABA and organizations around the country to continue these efforts to improve public understanding of the courts and of public institutions more generally.

E. Media Literacy and Online Resources

The Task Force also recognizes that, in order to improve public understanding of the judicial function, individuals need access to tools and resources to help them identify reliable and accurate reporting. In the past 20 years, the media landscape has shifted significantly; the internet and social media have moved their focus to sound bites, rather than full articles, and have made it easier for inaccurate or false reports to spread, including about judicial decisions and the work done by the courts.⁹⁸ Artificial Intelligence (AI) programs have lowered the barriers to entry for organizations to create and distribute false or misleading reports based on snippets of information gleaned from various online sources.

However, the Task Force is heartened by ongoing efforts by both public institutions and private companies to improve media literacy and utilize the power of technology and AI to support journalists and help individuals identify reliable sources.⁹⁹ This includes a range of initiatives from Microsoft, Sony, Adobe and other companies to provide context and history for digital media and tackle disinformation in digital news.¹⁰⁰ It also includes efforts to utilize AI to find points of consensus and identify (in an internet browser) what information is real and what information is generated by AI. It also includes efforts by journalists and news organizations to help the public understand how better to consume the news.¹⁰¹

97 *Law Day 2023*, AM. BAR ASSOC., https://www.americanbar.org/groups/public_education/law-day/ (last visited June 22, 2023).

98 Ginny Badanes, *In the digital age, democracy depends on information literacy*, MICROSOFT ON THE ISSUES (Jan. 25, 2023).

99 *Microsoft Journalism Hub*, MICROSOFT CORPORATE RESPONSIBILITY, <https://www.microsoft.com/en-us/corporate-responsibility/journalism-hub> (last visited June 21, 2023); CTR. FOR AN INFORMED PUBLIC: UNIV. OF WASH., cip.uw.edu (last visited June 22, 2023).

100 COALITION FOR CONTENT PROVENANCE AND AUTHENTICITY, <https://c2pa.org/> (last visited June 22, 2023); Badanes, *supra* note 98.

101 For example, Semafor structures its reporting to help the public understand the various viewpoints presented. SEMAFOR, <https://www.semafor.com/> (last visited June 22, 2023).

The Task Force encourages members of the bar to utilize these programs and contribute as appropriate to these efforts to improve media literacy and public understanding of the law and the judicial function.

F. Resources for Public Education

The Task Force acknowledges the range of resources that are already available to improve public understanding of the judiciary and of the issues discussed in this report. A short list of leading national resource providers for information about the judicial system and its role in the American constitutional system is included here. For a more thorough list of organizations, resources, and programs to deepen public understanding of law and the judiciary, please visit the Task Force web page at https://www.americanbar.org/groups/public_education/resources/task-force-law-society-judiciary.

- ◆ **The Administrative Office of the U.S. Courts:** Provides resources and programs to help people, including K-12 teachers and students, understand the American federal court system.
- ◆ **The American Bar Association:** Provides programs and resources to advance public understanding of law and the legal system, the rule of law, and the role of law and the courts in American constitutional democracy both for public audiences and for K-12 civic education.
- ◆ **Bill of Rights Institute:** Provides high-quality educational resources and programs for teachers and students, focused on the Constitution.
- ◆ **Center for Civic Education (CCE):** Best known for organizing the national “We the People” program, in which students develop policy recommendations on issues important to them. CCE also has high-quality classroom resources for teachers and students.
- ◆ **Civics Renewal Network (CRN):** A consortium of nonpartisan, nonprofit organizations committed to strengthening civil life in the United States by improving civic education in American schools through expanded access to high-quality, no-cost learning materials.
- ◆ **iCivics:** The leading civic education organization in the nation. Best known for its initial game-centered approach to learning civics, it also now spearheads civic education advocacy through the CivXNow coalition.
- ◆ **National Constitution Center (NCC):** Chartered by Congress, NCC is strictly non-partisan, and provides outstanding programming and resources for educational and public audiences to learn about the Constitution.

- ◆ **News Literacy Project:** Nonpartisan education nonprofit that aims to advance the practice of news literacy throughout American society, creating better informed, more engaged, more empowered individuals, and a stronger democracy.
- ◆ **Street Law:** Develops programs and provides training and educational materials that enable individuals, organizations, and communities worldwide to gain an understanding of law and government, foster the rule of law, and empower marginalized communities.
- ◆ **Supreme Court Historical Society:** The Society's mission is to preserve and collect "the history of the Supreme Court of the United States, increasing public awareness of the Court's contribution to our nation's rich constitutional heritage, and acquiring knowledge covering the history of the entire Judicial Branch." It is currently expanding its programs and resources for educators.

Respectfully submitted,
Linda Klein, Chair
Task Force on Law, Society and the Judiciary

BIOGRAPHIES OF TASK FORCE MEMBERS AND TASK FORCE REPORT REVIEWER, AND RAPPORTEURS

The Report of the Task Force on Law, Society and the Judiciary was primarily authored by the Task Force members. Thomas Susman, the ABA's Strategic Advisor for Governmental Affairs & Global Programs, served as Strategic Advisor to the members. Anagha Sundararajan and Perpétua B. Chéry of Debevoise & Plimpton LLP were the Rapporteurs. Their bios are below.

The Task Force members thank Frank Valadez, Director, and Catherine E. Hawke, Associate Director, of the ABA's Public Education Division, as well as Melyssa Eigen, Basil Fawaz, and Alexander Demircan of Debevoise & Plimpton LLP who contributed to the Report in various capacities.

Linda Klein (Task Force Chair): Klein, a shareholder with Baker Donelson in Atlanta, served as president of the ABA in 2016-2017. She previously served as chair of the ABA's House of Delegates, the association's policy-making body. She has also served as chair of the Tort Trial and Insurance Practice Section, chair of the Coalition for Justice, and chair of ABA Day, the association's congressional outreach effort. President Jimmy Carter appointed Klein to The Carter Center Board of Councilors for the 2019–2022 term. She also currently serves on the boards of directors of the Metro Atlanta Chamber of Commerce and the Presidential Precinct. Klein is the first woman to serve as president of the State Bar of Georgia. She was honored as an ABA Margaret Brent Award winner in 2004.

Susan G. Braden (Member): Braden is a former Chief Judge of the U.S. Court of Federal Claims to which she was appointed in 2003 by President George W. Bush. On March 13, 2017, she was designated as Chief Judge. Since her retirement from the federal bench, she has been appointed as a Public Member of the Administrative Conference of the United States, a Fellow of the American Bar Association, and to the Boards of Directors of privately-held companies in the software, artificial intelligence, and construction industries.

Judge Braden was designated as one of ten U.S. Arbitrators to resolve disputes under the USMCA (United States-Mexico-Canada-Agreement) Treaty and is the Jurist-in-Residence for the Center for Intellectual Property and Policy, Antonin Scalia Law School, George Mason University.

Sherrilyn Ifill (Member): Ifill served as the seventh president and director-counsel of the NAACP Legal Defense Fund (LDF) from 2013 to 2022, and currently serves as president and director-counsel emeritus. Ifill began her career as a fellow at the American Civil Liberties Union before joining the staff of the LDF as an assistant counsel in 1988, where she litigated voting rights cases. Ifill taught civil procedure and constitutional law at the University of Maryland School of Law and pioneered a series of law clinics, including one focused on challenging legal barriers to the reentry of ex-offenders. In 2021, Ifill was appointed to President Joe Biden’s Commission on the Supreme Court. She received the ABA’s Thurgood Marshall Award at its Annual Meeting in 2022.

Wallace B. Jefferson (Member): Jefferson is co-chair of Alexander Dubose & Jefferson’s Texas Supreme Court and State Appellate Practice. Prior to joining the firm in 2013, he served as chief justice of the Supreme Court of Texas, making history as the court’s first African American Justice and Chief Justice. He led the court’s efforts to fund access to justice programs, helped reform juvenile justice and inaugurated a statewide electronic filing system for Texas courts. During his time on the bench, Jefferson was elected president of the Conference of Chief Justices.

Melissa Murray (Member): Murray is a legal scholar and law professor at New York University. She clerked for Sonia Sotomayor on the Second Circuit and Stefan R. Underhill of the U.S. District Court for the District of Connecticut. Before NYU, Murray was a tenured law professor at Cal Berkeley School of Law. She is a leading expert in family law, constitutional law and reproductive rights and justice. Murray’s award-winning research focuses on the legal regulation of intimate life and encompasses such topics as the regulation of sex and sexuality, marriage and its alternatives and reproductive rights and justice. Murray’s scholarship has won several awards, including the Dukeminier Awards’ Michael Cunningham Prize. Murray also co-hosted the popular podcast “Strict Scrutiny,” which focuses on the U.S. Supreme Court and the legal culture surrounding it.

Hossein Nowbar (Member): Nowbar is General Counsel for Microsoft’s Corporate and Legal Affairs organization. He is also Microsoft’s Corporate Secretary. In his General Counsel capacity, Nowbar leads a dedicated team of professionals responsible for Microsoft’s intellectual property, litigation,

compliance and ethics, competition and market regulation, HR and immigration, finance, M&A, business development, and legal operations functions. He also leads the strategic projects, pro bono, and cloud initiatives team focused on advancing Microsoft's broader aspirations. In his Corporate Secretary capacity, Nowbar leads a dedicated team of professionals that oversee corporate governance and are responsible for providing strategic legal counsel to the Company's business leaders on a broad range of legal and regulatory issues.

Wendy Shiba (Member): Shiba is principal at The Red Bee Group and a corporate attorney who served in executive positions for three companies. Shiba is a member of the ABA's House of Delegates and Standing Committee on Bar Activities and Services, and is vice chair of the Committee on Rights of Women of the ABA Section on Civil Rights and Social Justice. She previously served on the board of directors of the ABA's Rule of Law Initiative, the ABA Commission on Women in the Profession, and the ABA Presidential Diversity & Inclusion 360 Commission. She is a past president of the National Asian Pacific American Bar Association and a co-founder of the Collaborative Bar Leadership Academy. Shiba received the 2022 ABA Margaret Brent Women Lawyers of Achievement Award.

Thomas Susman (Special Advisor): Susman is the ABA's Strategic Advisor for Governmental Affairs and Global Programs. He assumed that role after retiring in 2018 as the Director of the Governmental Affairs Office and Associate Executive Director of the ABA. Prior to joining the ABA, he was a partner at Ropes & Gray LLP for 27 years. Before joining Ropes & Gray, Susman served in the Office of Legal Counsel of the U.S. Department of Justice and then for over 11 years in various senior positions in the U.S. Senate Judiciary Committee. He chaired the Administrative Law Section of the ABA and served in the ABA's House of Delegates and on its Board of Governors. He is a graduate of Yale University and received his J.D. from the University of Texas Law School.

Anagha Sundararajan (Rapporteur): Sundararajan is an associate in the Litigation Department of Debevoise & Plimpton LLP, where her practice focuses on complex commercial matters and on appellate and Supreme Court litigation. Sundararajan is also a Lecturer in Law at the University of Chicago Law School, where she taught a seminar on appellate practice. Before joining Debevoise, Sundararajan clerked for the Hon. Judge Douglas P. Woodlock for the United States District Court for the District of Massachusetts and the Hon. Chief Judge Jeffrey R. Howard for the Court of Appeals for the First Circuit. She is also a recipient of the Temple Bar Scholarship for 2020 from the American Inns of Court.

Perpétua B. Chéry (Rapporteur): Chéry is an associate in the International Disputes Resolution and Public International Law groups at Debevoise & Plimpton LLP. Before joining the firm, she served as a clerk to H.E. Judge Mohamed Bennouna at the International Court of Justice in the Netherlands. Ms. Chéry received a J.D. from Georgetown University Law Center, where she was a Global Law Scholar, and a Master’s in Economic Law from the Institut d’Etudes Politiques de Paris (Sciences Po). Prior to law school, Ms. Chéry worked extensively with governments and non-State actors throughout West and Central Africa on issues related to peace and security, governance, and human rights. She obtained a B.A. with honors from the University of Florida in 2011.



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