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Supreme Court Reform: Examining Key Issues and Proposals

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The U.S. Supreme Court has major decisions pending on cases related to abortion, religion, gun violence prevention, climate, and more, as well as a new justice—Judge Ketanji Brown Jackson—recently confirmed by the Senate. The Court is also poised to make a number of consequential and, undoubtedly, polarizing rulings later this year. While the stakes around matters before the Court have never been higher, its legitimacy in the eyes of the public has never been lower. A September 2021 Gallup poll found that just 40 percent of Americans approve of the job the Supreme Court is doing, which is an all-time low. This finding came shortly after the Supreme Court allowed a Texas law instituting a near-total ban on abortion to remain in place (*Whole Woman's Health v. Jackson*), a ruling most Americans opposed. The Court's crisis of legitimacy has profound implications for American democracy.. As Chief Justice of the United States John G. Roberts, Jr. wrote in his 2021 Year-End Report on the Federal Judiciary, "public trust is essential, not incidental, to our function."

As lawmakers, scholars, advocates, and even the White House have grappled with the question of how to restore the Court's legitimacy, myriad recommendations have emerged. Among the most discussed are proposed reforms concerning the Court's size and justices' ethical conduct. This explainer will put these proposals into context, examine the issues that precipitated them, and highlight legislation Congress might consider to make them a reality.

The Size of the Court: Historical Context and Current Debates

Under the Constitution, Congress has the authority to modify the size and structure of federal courts. While there are nine Supreme Court justices presently, the Court's precise size is not fixed by the Constitution, and Congress and the president have agreed to increase and decrease the number of seats on the Court legislatively several times in American history.

The Judiciary Act of 1789 established a Supreme Court with six justices. In the eighty years that followed, Congress would change the size of the Court seven times to as few as five justices and as many as 10, before reaching the current size of nine in 1869. In 2016, then-Senate Majority Leader Mitch McConnell and his fellow Republicans acted unilaterally to reduce the Court to eight justices for more than a year following the death of Justice Antonin Scalia. The Senate Republican majority refused to consider then-President Barack Obama's nomination of Merrick Garland so that the seat might be filled by a Republican president following the 2016 election. Leader McConnell claimed at the time—almost eight months before the presidential election—that "the nomination should be made by the president the people elect in the election that's underway right now," despite there being no legal standard preventing a nomination from moving forward in an election year, nor a precedent for such a blockade since the Civil War era. Indeed, the Senate Republican majority would go on to confirm Justice Amy Coney Barrett, whom then-President Trump nominated 38 days before the 2020 presidential election.

Proponents of expanding the Court contend that such a change is necessary to rebalance it in the wake of Republicans' refusal to consider Garland's nomination. Attorney and author Mark Pickett argues:

> *"...increasing the size of the Court is an entirely proportional response to the GOP's abuse of process. Gorsuch's appointment alone justifies it. In shifting the Court from a potential 5 to 4 liberal majority to a 5 to 4 conservative majority, the Republicans effectively stole two votes. Increasing the Court's size to 11 justices would merely rebalance what was taken."*[1]

Expanding the Court to undo such a change is not without precedent: prior to the inauguration of Thomas Jefferson, the Federalist-controlled Congress reduced the number of seats on the Supreme Court from six to five in order to prevent the Democratic-Republican Jefferson from appointing a justice. Once Jefferson was in the White House—and his party in control of Congress—he restored the size of the Court to six justices. Advocates have also pointed out that the last five times Congress expanded the Supreme Court, it did so in a manner wherein the number of seats on the Court would mirror the number of circuit courts, which is now 13. Therefore, they contend, increasing the number of Supreme Court justices to 13 would be in line with this precedent.

Proponents of expansion also argue that the change is critical to restoring the Court's legitimacy in the eyes of the public, as decisions made by the current

[1] Pickett's argument was written in 2018, prior to the Court reaching its current 6-3 conservative majority.

conservative majority could further degrade Americans' trust in the institution. Political scientist David Faris explains:

> *"A Court that strikes down a Medicare For All insurance system, or legislation establishing equal funding for public education, or that chips away at abortion rights, gay rights, and other issues that are now supported clearly by a majority of the public will create a profound crisis in American society of the likes that we haven't seen since the Great Depression."*

Scholars on both sides of the expansion debate have endorsed the notion that the Supreme Court's composition should at least indirectly reflect the will of the American people as expressed in elections.[2] Advocates of expansion note that the composition of the Court has been inconsistent with the will of the people for years, and it is likely to remain so for years into the future absent reform. They note that Democrats have won the popular vote in seven of the last eight presidential elections, yet Republicans have appointed 15 of the last 19 justices. The Court currently has a 6-3 supermajority wherein two-thirds of the justices have been appointed by Republican presidents, including five justices who were appointed by Republican presidents who took office after losing the popular vote.

Critics argue that Court expansion is a slippery slope, potentially begetting an ever-expanding Court to which justices are added every time a party has sufficient power in the White House and Congress to confirm them. While, theoretically, this is possible, a similar scenario may also play out regardless of whether Congress acts to expand the current nine-justice Court. Again, in 2016, Senate Republicans shrunk the Court by denying President Obama an opportunity to select a justice and, in 2017, eliminated the filibuster for Supreme Court nominees to allow for the confirmation of Justice Neil Gorsuch. Should the balance of the Court shift in favor of liberals, Republicans in control of Congress and the White House may again dismiss long-standing norms and expand the Court to restore a conservative majority.

On April 9, 2021, President Joe Biden signed Executive Order (EO) 14023, which created the Presidential Commission on the Supreme Court of the United States. The EO required the commission to issue a report with "an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform

[2] On the anti-expansion side, for example, Hoover Institution senior fellow and Stanford Law professor Michael W. McConnell argued in testimony before the Presidential Commission on the Supreme Court of the United States that the balance of the Court ought to "reflect the opinions of the people over time as expressed in their choice of presidents and senators." On the pro-expansion side, Harvard Law professor Michael J. Klarman asserted in testimony before the Commission that "Democrats today should expand the Court to provide a center-left country with a center-left Court that will defend democracy."

proposals." That report, issued late last year, affirms "that Congress has broad authority to modify the Court's size," but does not take a position on the merits of doing so, detailing the arguments in favor and opposition to expansion and noting, "mirroring the broader public debate, there is profound disagreement among Commissioners on these issues." Since the report's publication, four commissioners have come out in support of expansion, in part because of recent Court rulings that significantly undermine democracy and voting rights.[3]

The Judiciary Act of 2021

On April 15, 2021, Congressman Henry C. "Hank" Johnson, Jr. (D-GA-04), Congressman Jerry Nadler (D-NY-10), and Congressman Mondaire Jones (D-NY-17)introduced the Judiciary Act of 2021. Congressman Nadler is the chairman of the House Judiciary Committee, which has jurisdiction over the bill and U.S. courts generally, and Congressman Johnson is the chairman of Judiciary's subcommittee on Courts, Intellectual Property, and the Internet. Congressman Jones is the subcommittee's vice chair. The Senate version of the bill was introduced by Senator Ed Markey (D-MA), and has been cosponsored by Senators Tina Smith (D-MN) and Elizabeth Warren (D-MA).

The Judiciary Act would increase the number of justices on the Supreme Court to 13. In a statement, Congressman Johnson explained the need for the bill as a response to Republican actions:

> *"This bill would restore balance to the nation's highest court after four years of norm-breaking actions by Republicans led to its current composition and greatly damaged the Court's standing in the eyes of the American people. In order for the Court to fulfill its duty to deliver equal justice under the law and protect the rights and well-being of millions of Americans, the legislation expands the Court to restore balance, integrity and independence to it."*

At the time of publication, neither the House nor Senate Judiciary Committee had considered the legislation.

[3] Nancy Gertner, a retired U.S. District Court judge, and Laurence H. Tribe, Carl M. Loeb University professor emeritus and professor of constitutional law emeritus at Harvard Law, authored a *Washington Post* op-ed in favor of expansion on December 9, 2021. Kermit Roosevelt III, professor of constitutional law at the University of Pennsylvania Carey School of Law, published a *Time* op-ed supporting expansion on December 10, 2021. Caroline Fredrickson, a distinguished visitor from practice at Georgetown Law Center and senior fellow at the Brennan Center for Justice, wrote a *New York Daily News* op-ed in favor of expansion on December 15, 2021.

Ethics on the Court: Historical Context and Current Debates

While there are laws in place concerning the conduct of Supreme Court justices, there are also gaps that, critics contend, have further deteriorated public trust in the Court. The aforementioned Presidential Commission on the Supreme Court of the United States explored a number of these gaps, including the lack of a system for disciplining Supreme Court justices, a code of ethics, or accountability for recusal decisions.

Code of Ethics

Unlike judges on the state and federal levels, Supreme Court justices are not bound by a code of ethics, though Chief Justice John Roberts has said the justices "do in fact consult" the code that governs other judges' behavior. Similarly, Supreme Court justices are exempt from the complaint and disciplinary framework used for other federal judges. According to the Project On Government Oversight, "this real and perceived 'above the law' stance of the Supreme Court has a damaging effect on its legitimacy and integrity."

The Brennan Center for Justice has recommended that the Court formally adopt an ethics code, which—especially if done by choice—might help shore up its reputation with the public. The Presidential Commission also explored this issue, noting various advantages and disadvantages of the Court adopting a code of ethics internally versus Congress imposing one. The Commission did not recommend one option over another, but did note that, should Congress impose a code, "it would need to be careful to ensure that the code's demands did not encroach on the Court's constitutionally exclusive judicial decisionmaking function. Further, Congress has largely delegated procedural matters to the courts."

Financial Disclosures

Even standards that apply to judges universally, however, can allow for conflicts of interest to persist. While all federal judges, including justices on the Supreme Court, are required to submit financial disclosures each year, the information they disclose is not publicly available online, and they are exempted from the requirements of the STOCK Act, which mandates that other federal officials share information about certain financial transactions promptly. The *Wall Street Journal* drew attention to this exemption in September 2021: an investigation found that, between 2010 and 2018, 131 federal judges neglected to recuse themselves from almost 700 cases concerning companies in which they or their family members owned stocks.

Recusals

Policies around Supreme Court recusals are particularly murky. Current law requires that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Justices must decide for themselves, though, when this standard is met. Moreover, justices are not required to provide an explanation when they do recuse themselves. The Brennan Center for Justice has suggested that the Court provide public explanations for recusals, noting, "given that the loss of even a single justice can shift the outcome in significant and controversial cases, the public deserves to understand the reason for a justice's absence." Justices are also not required to respond in writing when parties with business before the Court seek a recusal. The Brennan Center has recommended that a written explanation be provided in these cases as well, pointing out that "recusal motions question the impartiality and independence of the Court; the justices should respond in written opinions to illuminate their reasoning, promote consistency and fairness in their decision-making, and build the public's trust in their judgments."

The Presidential Commission explored the benefits and drawbacks of requiring the justices to explain why they do—or do not—recuse themselves from cases, noting that while such explanations could help build public trust, they might also be time-consuming and present interested parties with "an opportunity to harry or embarrass Justices with whom they disagree." The Commission also examined the implications of a review process around recusal decisions and reforms regarding financial conflicts of interest, but did not make specific recommendations on either.

Justices' perceived conflicts of interest and tremendous discretion around recusals garnered public attention following multiple reports regarding Justice Clarence Thomas in early 2022. A February *New York Times* report revealed that Justice Thomas's wife, Virginia "Ginni" Thomas, was a board member of an organization that encouraged steps "to pressure Republican lawmakers into challenging the election results and appointing alternate slates of electors" to prevent then-President-elect Joe Biden from taking office. In March, a *Washington Post* and *CBS News* report revealed more than two dozen text messages between Ginni Thomas and then-White House Chief of Staff Mark Meadows. In the texts, Ginni Thomas repeatedly urged Meadows to ensure the 2020 election results were overturned in order to keep Donald Trump in the White House. As the *Washington Post* reported, the texts "reveal an extraordinary pipeline between Virginia Thomas, who goes by Ginni, and President Donald Trump's top aide during a period when Trump and his allies were vowing to go to the Supreme Court in an effort to negate the election results."

Indeed, Justice Thomas failed to recuse himself from a case regarding White House records that President Trump sought to shield from the House committee investigating the January 6, 2021 insurrection. He was the only justice who backed President Trump's effort to stonewall the committee. In doing so, the *New York Times* reported, Justice Thomas "[echoed] the arguments advanced by C.N.P. Action," the group for which Ginni Thomas is a board member.

Legal ethics scholars asserted after the text messages were revealed that Justice Thomas should recuse himself from cases concerning the 2020 election, citing the aforementioned law regarding judges' "impartiality" and one stating that judges should not take part in cases in which their spouse has "an interest that could be substantially affected by the outcome of the proceeding." Others have asserted that Justice Thomas should be impeached; political scientist Norman Orstein, for example, suggested that "at minimum" an impeachment resolution should be introduced in the House and "let the evidence be aired."

Several members of Congress, led by Senator Elizabeth Warren and Congresswoman Pramila Jayapal (D-WA-07), have also called for Justice Thomas to recuse himself from cases concerning the election results or the insurrection. They also requested a written explanation regarding Justice Thomas's failure to recuse himself from the aforementioned case and asked Chief Justice Roberts to establish "a binding Code of Conduct for the Supreme Court…that includes (1) enforceable provisions to ensure that the Justices comply with this Code and (2) a requirement that all Justices issue written recusal decisions." Other members of Congress have suggested that Justice Thomas resign or be impeached. Congressman Mondaire Jones, vice chair of the House Judiciary Committee's subcommittee on Courts, Intellectual Property, and the Internet, suggested Congress would investigate the matter, telling *Axios*, "there is a robust, distinct role for the Judiciary Committee to do its own investigation…my intention is for the Judiciary Committee, or at least the subcommittee on courts, to do precisely that."

Legislative Proposals on Supreme Court Ethics and Transparency

In recent years, several bills have been introduced aimed at promoting ethics on the Supreme Court and bolstering transparency around justices' actions and financial interests. On July 28, 2021, Congressman Hank Johnson and Senator Chris Murphy (D-CT) introduced the Supreme Court Ethics Act, which would direct the Judicial Conference of the United States to create a code of conduct for Supreme Court justices. While the text of the legislation does not prescribe which issues must be addressed in the code of conduct, it could presumably outline policies regarding recusals to address the issues described above. The Supreme Court Ethics Act has

been referred to the Judiciary Committee in the respective chambers, neither of which has acted on the bill at the time of publication.

On April 6, 2022, Senator Sheldon Whitehouse (D-RI) and Congressman Hank Johnson introduced the Twenty-First Century Courts Act, which establishes a code of ethics for the Supreme Court, puts new recusal standards in place, mandates additional transparency around recusal decisions and gifts, and more. In the 116th Congress, Congressman David Cicilline (D-RI-01) and Senator Sheldon Whitehouse introduced the Judicial Travel Accountability Act. This bill similarly sought to improve transparency around justices' actions by requiring federal judges—including Supreme Court justices—to disclose details regarding travel gifts they receive. This bill has not been reintroduced.

On October 25, 2021, Congresswoman Deborah Ross (D-NC-02) and Senator John Cornyn (R-TX) introduced the Courthouse Ethics and Transparency Act in response to the aforementioned *Wall Street Journal* report on judges' financial conflicts. The bill would end federal judges' exemption from STOCK Act requirements and mandate that they report the purchase, sale, or exchange of stocks, bonds, commodities futures, and other securities over $1,000 within 45 days. The bill would also make federal judges' financial disclosures publicly available online. The Courthouse Ethics and Transparency Act passed in the House on December 1, 2021 and the Senate on February 17, 2022, though the respective versions had slight differences. A compromise version had not yet been signed into law at the time of publication.

Conclusion

Public confidence in the Supreme Court is already at a nadir. This crisis of legitimacy, coupled with alarming revelations around judges' financial conflicts of interest and the risks posed by a laissez-faire approach to ethics, provide ample cause for Congress to examine the above proposals more closely. Both chambers have acted to address financial conflicts by approving the Courthouse Ethics and Transparency Act. Congress can build on this momentum by considering the legislation discussed in this explainer and investigating justices' known conflicts of interest. Doing so would not only advance the policies in these bills, but also signal to the public at a pivotal moment that issues plaguing the Court will not go unchecked.

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