HARVARD LAW SCHOOL

HAUSER HALL 420
1575 MASSACHUSETTS AVENUE
CAMBRIDGE, MASSACHUSETTS 02138

LAURENCE H. TRIBE
Carl M. Loeb University Professor Emeritus

TEL: (617) 495-1767
E-MAIL: tribe@law.harvard.edu

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The Honorable Richard J. Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for inviting me to submit a statement to the Senate Judiciary Committee hearing on May 2. I am pleased to accept your invitation and ask that my statement be entered into the record.

I will confine this statement to the general principles that I believe should guide Congress in addressing what some view as a crisis in legitimacy affecting the ability of the U.S. Supreme Court to perform its vital role in our system of government under law. I leave to others the question of whether that crisis is sufficiently grave to call for particular legislative measures, although I would be less than candid were I not to confess that I regard legislation to impose ethical norms in a binding way on the Justices as eminently sensible.

Put simply, I see such legislation as a necessary though probably not sufficient response to the current situation. Indeed, even if the Court were not beset by growing doubts about the extrajudicial behavior of its Members as highlighted by recent media reports, it would seem to me to be entirely prudent for Congress to enact norms in the form of rules binding on the Justices if only as a prophylactic measure, to prevent the development of circumstances casting the Court under an ever-darker shadow unhelpful to the esteem required for it to perform its function as a branch of government lacking both the sword and the purse and thus dependent on public respect for its integrity if the judgments it renders are to be followed.

First and foremost, whatever one's views of the conduct of particular Justices, I think all should agree that it is particularly important that the Supreme Court and its Justices be beyond suspicion with respect to the external influences on their discharge of their solemn duty to "say what the law is," to quote the classic language of *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Whatever one's position on the increasingly controversial question of just how "supreme" the Court's role ought to be vis-à-vis the other branches of the Federal Government in the ongoing constitutional conversation that charts the path of our republic, that those who populate our highest judicial body should earn and retain respect in the discharge of their vital roles ought to be a given.

Second, I would argue that the especially great power of the U.S. Supreme Court in a system that secures the independence of its members through such devices as life tenure and that enshrines the influence that accompanies the privilege of having the last word on all matters of federal law, whether they reach the Court through the lower federal courts or through the state judicial systems, combine to suggest that the Justices should be bound to rules of behavior *more* rather than *less* strict than those that bind the members of any other judicial tribunal.

The idea that, because the Supreme Court sits atop our legal system and is created by the Constitution itself to perform that function, its members should be *less constrained* than those of lower judicial tribunals has things exactly backwards and upside-down. It is not just an adage popularized by Spider-Man that "with great power comes great responsibility." That maxim, which embodies wisdom as enduring as it is current, was apparently first uttered in 1817 by William Lamb, a member of Britain's Parliament, during a debate over the suspension of habeas corpus.

Congress should not be intimidated by the power and prestige of the Justices, whose position of privilege – as they pass final judgment on the most contentious issues of the day from the comfort of the Marble Palace they occupy – ought to be its own reward. As many of us learned only in recent years, the Constitution itself, in Article II, §1. Cl.7, imposes an especially onerous limit on presidential receipt of any domestic "Emolument" over and above the ban in Article I, §9, Cl. 8, on *any* federal officeholder's receipt of any foreign "present, Emolument, Office, or Title, of any kind whatever."

Although no constitutional provision similarly imposes exceptional limits on a Supreme Court Justice's receipt of valuable blandishments from friends foreign or domestic, and especially on the receipt of such potentially influential favors without full public disclosure, it is entirely appropriate for Congress to fill the resulting gap by enacting necessary and proper legislation to ensure that the judges of our apex Court be at least as insulated as are the judges of lower federal courts from potentially tempting favors done for them or their families by those with an interest, direct or indirect, in shaping the trajectory of federal jurisprudence.

One argument in particular should be addressed and refuted head-on: It is the argument that, because *the Constitution itself* in some sense creates the Supreme Court's position atop the judicial ladder, there are especially grave separation of powers concerns and worries about preserving judicial independence when Congress either investigates, or puts in place a system to investigate, the non-judicial conduct of Supreme Court Justices. That is a plain non sequitur. Whether such investigation is performed with the aid of subpoena power by a Committee of Congress, or by an Inspector General created to enforce rules of ethical behavior, or by the Department of Justice in its role of enforcing legislation requiring ethics in government, there is nothing about the separation of powers or the system of checks and balances that undergirds it to suggest that the Justices of the Supreme Court ought to be especially immune to the very same rules of conduct that apply to the judges of "such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. *All* such judges are creatures of the Constitution, whether congressional legislation is needed in order to "ordain and establish" them pursuant to Art. III or pursuant to Art. I, §8, Cl. 9's power to "constitute Tribunals inferior to the supreme Court," or they are created by the text of Art. III itself.

Indeed, although Art. III's language expressly specifies that the "judicial Power of the United States" be "vested in one supreme Court" along with the so-called "inferior Courts" that Congress might or might not opt to "ordain and establish" under Art. III or "constitute" under Art. I, it is obvious that, without enabling legislation and annual appropriations that Justices regularly testify are indispensable for them to discharge their duties, the Supreme Court itself would be but an unfulfilled idea, akin to what Justice Jackson once famously called "a munificent bequest in a pauper's will." *Edwards v.*

California, 314 U.S. 160, 186 (1941). There is nothing at all to the idea that the Supreme Court, notionally born of the Constitutional text unlike the lower federal courts, is somehow more sacrosanct when it comes to the need for, or the propriety of, subjecting the Justices in how they conduct themselves vis-à-vis the world at large to rules of behavior and disclosure at least as strict as those imposed and enforced with respect to their "inferior" counterparts. It does nothing to denigrate the high respect the nation should ideally have for the Justices of the Supreme Court to recall that they are mere mortals, subject to all the temptations and distortions of judgment that beset us all, including the judges of the U.S. district courts and the U.S. Courts of Appeals.

Third, it is beyond doubt that Congress has ample affirmative authority, delegated by the Constitution itself, to enact binding laws governing the non-judicial conduct of Supreme Court Justices just as it has authority to enact such laws governing the non-judicial conduct of lower federal court judges. Even a law like 28 U.S.C. §455, mandating 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," which some seem not to have noticed applies to Justices no less than to lower court judges, would otherwise be beyond Congress's authority to enact. And, although that recusal law is not presently accompanied by any civil or criminal penalty even for intentional violations, the constitutional power to enact that mandate carries with it, especially in light of Chief Justice John Marshall's generous understanding of the Necessary & Proper Clause in *McCulloch v. Maryland*, 17 U.S. 316 (1819), the power to enact laws to "carry[] into execution" that recusal requirement.

So too, the power to require judges to disqualify themselves in circumstances that might lead people "reasonably" to question their impartiality carries with it, under the Necessary & Proper Clause, the power to require judges, in the conduct of their social and economic affairs, to avoid *creating* those potentially compromising circumstances. It would make no sense at all – and the Constitution is, after all, meant to be read as a sensible charter for government – to say that Congress may punish a judge for insisting on participating in a proceeding despite the seeming compromise of independent judgment created by that judge's prior conduct but may not punish that judge for engaging in such conduct in the first place. The considerable inconveniences caused by mandatory recusal, especially in the highest Court (where no provision exists for another judge to fill the temporarily vacated position), may surely be rendered less likely by preventive legislation. It would be absurd to say that Congress may not attempt to prevent in advance the very thing it is agreed Congress may punish after the fact.

As for the *content* of the ethical code that Congress may properly enact to regulate the non-judicial conduct of Supreme Court Justices, filling in the details is beyond the scope of this submission. Suffice it to say that the primary constraint imposed by the separation of powers is that Congress not interfere with the decision-making process followed by those Justices by taking such steps as directing those Justices, or indeed any Art. III judges, to render a particular decision or to apply a particular rule of decision in the disposition of a specific case. See *United States v. Klein*, 80 U.S. 128, 146-47 (1871), although even that constraint leaves Congress free to lay down the law applicable to an identifiable set of cases then pending in the federal courts. See *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

Fourth, I see no constitutional obstacle to enactment of a fully enforceable federal statute not only creating far greater transparency than the Supreme Court seems to have been willing to impose on itself but also requiring considerably more modest interactions between Justices and those who, whether to curry favor or simply to enjoy the privileges of wealth and position, wine and dine the Justices under conspicuously lavish circumstances unlikely to be enjoyed by most lower court judges or indeed by most individuals whether in public or in private life.

In particular, the remarkable *Statement of Ethics Principles and Practices* signed individually by all nine Justices on April 23, 2023 – the first time that I can recall the nine doing so in such solidarity since the great desegregation opinion in *Cooper v. Aaron*, 358 U.S. 1 (1958) – would make it difficult for any of the Justices at this point to object to an Act of Congress straightforwardly imposing on the Justices "the financial disclosure requirements and limitations on gifts, outside earned income, outside employment, and honoraria" including "among other things, the Justices' non-governmental income, investments, gifts, and reimbursements from third parties," that the Justices claim to have imposed on themselves, drawing their model, purportedly, from the ethical rules and regulations imposed by the Judicial Conference on all other Article III judges.

Having said that they have "voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations" ever since 1991, none of the Justices can complain that a skeptical public, through its representatives in Congress, has decided to make those regulations, and preferably even stricter ones modeled on the Ethics in Government Act of 1978, compulsory rather than optional – to insure both the reality and the appearance that impartial justice is being meted out by the highest court in the land and that cases are being decided in accord with the rule of law. And the striking fact that all nine of the sitting Justices signed the statement issued by the Chief Justice this April 23 rebuts any suggestion that Congress's enactment of a mandatory code of ethical behavior would be a response to any particular ideological wing of the Court. This is not to deny that ideology might play a role in how many members of the public have reacted to the Court's recent behavior, just as it might play a role in that behavior itself. But the ethics of judicial independence makes no ideological distinctions. Nobody of any sophistication doubts that individual judges, including Supreme Court Justices, do not merely "call balls and strikes" but bring with them to the bench and are influenced by their personal views of law and life. But that is entirely different from molding those views to please particularly influential benefactors, either corruptly or with the best of intentions.

Accordingly, Congress has undoubted constitutional authority under the Necessary & Proper Clause of Art. I, §8, Cl.18, coupled with the vesting of the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, §1, to enact binding regulations governing the extra-judicial conduct of *all* Art. III courts including the U.S. Supreme Court.

Fifth, the *means* of implementing that authority must respect the Constitution's organization and division of legislative, judicial, and executive powers. See, e.g., *INS v. Chadha*, 462 U.S. 919, 940-43 (1983) (holding that the constitutionality of a one-House veto of a suspension of deportation was a justiciable rather than a political question). My reservations about the two bills that I understand are on the table before this Committee at present – one, a very brief measure sponsored by Senators King and Murkowski and the other, a rather more elaborate measure sponsored by Senator Whitehouse and Representative Johnson – arise principally from the means those bills would employ to achieve the binding regulations they aim to put in place.

The Supreme Court has repeatedly upheld the constitutionality of the Rules Enabling Act of 1934 as frequently amended: It is the framework statute under which the Court is entrusted with power to propose federal rules of procedure and evidence that become law after a stated time unless rejected by Act of Congress. That statute had initially employed a one-House veto until it was amended in 1988 to conform with the decision in *INS v. Chadha*. As so amended, the statute, 28 U.S.C. §2071, empowers the "Supreme Court and all courts established by Act of Congress [to] prescribe rules for the conduct of their business," by enabling the Supreme Court, after appropriate public notice and opportunity for comment, to "issue a code of conduct for the justices of the Supreme Court."

Both the Whitehouse-Johnson bill and the King-Murkowski bill are drafted as proposed amendments to 28 U.S.C. §2071, which might seem innocuous enough. After all, that is the section under which the Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence have been promulgated. But those rules, which prescribe the processes by which federal justice is to be administered by the courts created by Congress, were promulgated within a broadly understood framework and within guidelines implicitly dictated by the purposes of the fair and efficient administration of justice. No similar guidelines constrain what the Supreme Court is delegated the authority to do by the proposed bills. The absence of such guidelines could well disturb the constitutional sensibility of those worried about open-ended delegations of authority lacking in meaningful substantive guidance from Congress and in that respect presenting substantial questions about the limits on Congress's power to delegate its lawmaking powers.

Given that this is a delegation to fashion rules not of judicial proceedings but of the non-judicial conduct of the Justices that would bind those Justices and the Court itself, more troublesome than the unconstrained character of that delegation is what appears to me to be a stark violation of the separation of powers in the form of coopting and indeed commanding the Article III branch to perform a quintessentially legislative task belonging to the Article I branch.

I am not insensitive to the delicacy of the political choices Congress would be required to make in order to decide what limits to impose on how the Justices conduct themselves with respect to accepting favors from individuals and groups with business before the Court or with interests in the outcome of that business and on how transparent Justices must be in the way they lead their lives outside the Supreme Court itself and outside the performance of its judicial tasks. I have no illusions about the willingness of Congress to make those choices and be held accountable for them. But I'm afraid that those are choices that the Constitution simply does not permit Congress to foist on a coordinate branch, much less the Article III Branch of the Federal Government. This is one buck Congress cannot pass.

Just as the principles of what some call the *vertical* separation of powers inherent in federalism and embodied in the Tenth Amendment prevent Congress from commandeering state legislatures to perform quintessential lawmaking tasks, see *New York v. United States*, 505 U.S. 144 (1992); *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), and prevent Congress from commandeering state subdivisions to perform inherently executive tasks like enforcing federal laws, see *Printz v. United States*, 521 U.S. 898 (1997), with the possible exception of imposing "purely ministerial reporting requirements" to ensure transparency and public awareness, see *Printz*. at 935-37 (O'Connor, J., concurring), so too it would seem to follow that the *horizontal* separation of powers inherent in our Constitution's three-branch structure for the Federal Government prevents Congress from invading the province of the independent Third Branch by commandeering Art. III judges and courts to promulgate a federal regime of ethical behavior in their relationship with the world at large.

To be sure, the anticommandeering doctrine in its application to state-federal relations rests in part on contested views of the founding history peculiar to the transition from a confederation of sovereign states to a Union in which Congress no longer needs to depend upon the actions of state governments to perform and fund its core national functions, see *New York v. United States*, supra, at 163-66, but the more fundamental basis of that doctrine depends not on that history but on considerations of public accountability built into the constitutional design. See id., at 168 ("where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished").

Just as Congress cannot command an Article III court to reopen a final judgment and revise it to Congress's specifications, see *Plaut v. Spendthrift Farm*, *Inc*., 514 U.S. 211 (1995), and cannot tell

an Article III court how to decide a case then pending before it, see *United States v. Klein*, supra, so too— indeed, a fortiori — Congress cannot command an Article III court to perform a quintessentially lawmaking function like promulgating a code of ethical practices. It might as well pass the buck to SCOTUS to enact a national regulation of firearms that complies with the Second Amendment or a federal campaign finance regulation that meets the requirements of the First Amendment.

It is by no means certain that the Supreme Court would strike down Acts of Congress modeled on the pair of bills now under consideration by this Committee on the basis of an analogue to the currently reigning anticommandeering doctrine. I realize that doing so might strike some Justices as a bridge too far in light of the Court's currently precarious situation vis-à-vis the public. But at minimum one must conclude that a substantial constitutional cloud would overhang any congressional legislation that seeks to escape Congress's direct accountability for the choices of ethical rules to impose on Supreme Court Justices in their extrajudicial roles by employing the device of directing the Court to make those choices and to bind itself to them.

Indeed, even if it were assured that the Court would hesitate to strike down the proposed exercise of an essentially commandeering power, Congress would be under an obligation, given the Oath of every Member to abide by the Constitution, to refrain from going down that constitutionally dubious path when a far more straightforward and constitutionally unquestionable path is open to it – namely, the path of specifying, as it has already done for the lower federal courts, a set of obligations with respect to how the Justices are to conduct themselves in their social and economic lives outside the Marble Palace.

Yours truly,

Laurence H. Tribe

Laurence H. Tribe
Carl M. Loeb University Professor of Constitutional Law *Emeritus*
Harvard University*

*University affiliation noted for identification purposes only