

The U.S. Supreme Court and Ethics Reform

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[00:00:00] Jeffrey Rosen: This summer, the Senate Judiciary Committee approved legislation that would try to set ethics rules for the US Supreme Court and a process to enforce them. The bill which still requires full Senate approval is the latest in a series of recent proposals involving Supreme Court ethics reform.

[00:00:18] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan non-profit chartered by Congress to increase awareness and understand of the constitution among the American people.

[00:00:36] Jeffrey Rosen: In this episode of We the People, we discuss ethics reform proposals for the Supreme Court, including how they would work and whether they would raise constitutional questions. Joining me to discuss these important questions are two of America's leading experts in constitutional law, Daniel Hemel and Daniel Epps.

[00:00:52] Jeffrey Rosen: Daniel Hemel is Professor of Law at New York University School of Law. His wide-ranging research explores topics in taxation, intellectual property, administrative and constitutional law. He's published more than 50 scholarly articles and essays, including a 2021 piece, Can Structural Changes Fix the Supreme Court? Daniel, it's great to welcome you to We the People.

[00:01:12] Daniel Hemel: Thanks for having me on.

[00:01:13] Jeffrey Rosen: Daniel Epps is Treiman Professor of Law at Washington University School of Law. He writes at the intersection of constitutional law and theory, federal courts and criminal law and procedure. He co-wrote with Ganesh Sitaraman an article in 2018, suggesting various proposals to restructure the Supreme Court and he currently co-hosts Divided Argument with Professor William Baude. Dan, it's wonderful to welcome you to We the People.

[00:01:37] Daniel Epps: Thanks, Jeff. Happy to be here.

[00:01:39] Jeffrey Rosen: Dan let's start with you, if we may? What are the major proposals to reform the Supreme Court as embodied in the Sheldon Whitehouse bill that's passed the Senate Judiciary Committee?

[00:01:54] Daniel Epps: Sure. And just to back up on that a little bit, obviously there have been a lot of ethics controversies involving the justices recently. In terms of the current framework governing Supreme Court ethics, there are disclosure requirements under the Ethics in Government Act that the justices are supposed to follow and that limit their outside income and they do file these financial disclosures.

[00:02:17] Daniel Epps: In terms of actual rules of ethics, there are not binding ethical rules other than a statutory requirement that a justice disqualify him or herself in any case in which they, you know, cannot be considered impartial. The Whitehouse bill and just full disclosure I did work briefly for Senator Whitehouse during the confirmation hearings for now Justice Amy Coney Barrett.

[00:02:42] Daniel Epps: But his bill would really create more teeth in terms of ethical requirements for the court. It requires the court within a 180 days of being enacted, were it ever to be enacted, to actually issue a code of conduct, and it provides an appellate process for an investigative process for those complaints alleging that there have been an ethical violation.

[00:03:10] Daniel Epps: It provides a process for those to be investigated and adjudicated, and it takes the decision making away at least at the first step from each individual justice. 'Cause under the current system, someone will raise some concern and that justice will just say, "Well, you know, this concern has been raised. I don't agree with it. I'm not gonna recuse in this case."

[00:03:30] Daniel Epps: Or, you know, "Here's my decision." And there's no one standing above and outside of the court who can tell the justices what to do. This proposal at least would create an investigation panel that would not be, you know, the justice him or herself that would then potentially go investigate and make some kind of findings and bring them back to the court.

[00:03:52] Daniel Epps: So, we would make it a little bit harder, I think to sort of completely ignore complaints that people think have some potential merit.

[00:04:02] Jeffrey Rosen: Tell us more about the Whitehouse bill and its proposal of an investigative panel. Who's on the panel, and does that raise in your mind any separation of powers concerns?

[00:04:11] Daniel Epps: So, as I understand it, and I'm not an expert on this bill, but as I have read the text the court has to refer the complaint to a panel and the panel's composed of five judges selected randomly from among the chief judge of each circuit of the United States. So, these are circuit court, the chief judges of the United States Courts of Appeals.

[00:04:32] Jeffrey Rosen: And broadly what are your thoughts about creating an enforcement mechanism composed of lower court judges, rather than the Supreme Court itself?

[00:04:41] Daniel Epps: Well, it's obviously a little tricky in the sense that in our judicial system the court is supposed to be at the top of judicial hierarchy and this is sort of subverting that a little bit. And it's putting lower court judges in kind of a weird position of having to investigate their own bosses.

[00:05:03] Daniel Epps: I think if you were looking for some way to create some kind of process to have these kinds of complaints, concerns investigated adjudicated and so forth, you do need to come up with something like this, and this maybe is the best option among the kind of non-ideal options. And I do think that the chief judges of the circuit are going to be motivated to at least look like they're not completely blowing off their responsibilities.

[00:05:35] Daniel Epps: But it does nonetheless put them in an awkward position. You know, there are certainly going to be separation of powers concerns raised about how is this kind of interfering, first of all, is this kind of interfering too much in the overall conduct of the judicial branch, and is it sort of trying to subvert the Supreme Court's rule within the judicial hierarchy?

[00:05:57] Daniel Epps: I think that we're dealing a little bit with in terms of unchartered territory although I'd say in general Congress does clearly have reasonably brought power to kind of structure the federal judiciary. And the question is whether this goes too far. Now it doesn't give these judges the power to, you know, do something obviously unconstitutional like remove Supreme Court justices or just has then do this kind of fact finding gives them the ability to hold hearings and so forth.

[00:06:27] Daniel Epps: So, I don't think it's obviously over the line, but it's gonna be a more complicated conversation to get into the details.

[00:06:35] Jeffrey Rosen: Daniel Hemel, as Dan Epps says, the question of whether lower court judges should review the decisions by the Supreme Court is the trickiest part of the proposal. A proposal in 2011 by Representative Christopher Murphy, the Supreme Court Transparency and Disclosure Act, left it up to the judicial conference about whether or not to empower lower court judges or the justices themselves to review recusal decisions. That bill would have said that the judicial conference should establish a process by which recusal is reviewed by other justices or judges of a court of the United States, a group that includes retired justices and senior judges. Discuss this debate about whether or not to empower lower court judges to review the decisions by the Supreme Court, whether or not allowing the justices themselves to review their decisions might work, and how you come down here.

[00:07:30] Daniel Hemel: I think the Whitehouse bill proposes a clever mechanism for imposing some degree of accountability on Supreme Court ethics decisions. I'm skeptical that it addresses any of the serious concerns about the Supreme Court's power in American life. But it at least symbolically expresses the idea that the justices are not above the law.

[00:07:54] Daniel Hemel: The choice of chief judges I think there are who is chief judge of a particular circuit at a particular time is pretty close to random. These are not selected by their peers for their judicial excellence. It really is a product of being the right age at the right time and I think we will, once this process is in place see some partisan use of it to kick justices off cases where we really don't think that the conflict affects their ultimate decision making but there may be on paper a conflict.

[00:08:27] Daniel Hemel: So, if this process were in place, I'm quite confident that someone would initiate a proceeding to get Justice Brown Jackson off of the Harvard Affirmative Action

case, because she was on the Harvard Board of Overseers. Now I think there are zero people who believe that Justice Brown Jackson's position on the Harvard Board of Overseers affected her view of affirmative action but if you were to look at this from a sort of neutral principle, should she have recused herself in the parallel North Carolina case that raise the same issues as the Harvard case, well, maybe, right?

[00:09:00] Daniel Hemel: And we'll see a lot of that where because the court is so closely divided knocking one justice off leads to predictable ideological consequences.

[00:09:10] Jeffrey Rosen: Dan Epps, as Daniel Hemel says, this question of strategic recusal motions is definitely a sticking point for the justices themselves and for others. To what degree would empowering the court itself, rather than lower court judges to review recusal requests, address this question? Can you imagine a mechanism that left the decision to review recusal requests within the court itself, and might that address some of the separation of powers concerns?

[00:09:35] Daniel Epps: So, there's two questions. One is who does the investigation and makes the report? And then the question is who actually has the ability to make the decision about whether the judge should be disqualified. As I understand the Whitehouse bill, the first part of the investigation is done by lower court judges and then the disqualification... the ultimate decision has to be made by the court as a whole.

[00:10:00] Daniel Epps: I think that does ameliorate some potential separation of powers concerns. I don't, you know, I'm skeptical of how much that's gonna give it in the way of teeth because the justices, they're very collegial. It is a surprisingly collegial court. At least it was when I worked there. Daniel, you know, may agree or disagree, you know, given how much they disagree about and the sort of profound things they disagree about, they do seem to get along reasonably well.

[00:10:32] Daniel Epps: I think it's probably been a little tenser in recent years, but, you know, they all recognize they're gonna be working with each other for the rest of their lives, and I think there's a real tendency to kind of just go along. And I think on something like this, on recusal issues, I am skeptical that the justices are going to be really wanting to be put in the position of telling their own colleagues that they think that they're not impartial.

[00:10:59] Daniel Epps: So, I think the question really comes down to do we think that having it conducted this way creates a sort of better appearance of legitimacy, and there's value to that. You know, to the extent that there's concern that people have lost confidence in the court they think it's being bought off. Then maybe that makes it look better. Maybe that's better. I'm skeptical that it would make a huge difference in how cases actually come out.

[00:11:24] Jeffrey Rosen: Daniel Hemel discuss this question of the justices' reluctance to review the decisions of their own colleagues. Would putting the decision squarely in the hands of the justices themselves rather than lower court judges work or not given that reluctance? And it seems like the nub of the separation of powers objections comes from empowering lower court

judges to make recommendations or review the decisions of the justices. Would those be alleviated by putting the decision squarely in the hands of the justices or not?

[00:11:56] Daniel Hemel: I think in order to determine what the best approach is, we have to ask what the ethics reform is trying to do. If the idea is to at least bring to the public the ethical conflicts that are potentially facing the justices then the Whitehouse mechanism of having the issues essentially litigated at the lower court level and then decided at the Supreme Court level strikes me as wise because then assuming that, and I think this would be clearly the case under the bill the public would have access to the circuit judge's report.

[00:12:33] Daniel Hemel: We'd know about ethical concerns that in the past have been submerged. Right, so we now know that in US v. Microsoft there was a debate between Justice Stevens and Chief Justice Rehnquist about whether Chief Justice Rehnquist had to recuse himself because his son did antitrust work for Microsoft as a lawyer in private practice. We're learning about this two decades after the fact when Justice Stevens papers become public.

[00:13:01] Daniel Hemel: So, if what we want is the public to have a better understanding of conflicts facing the justices then getting the circuit judges report out there and then having the ultimate decision rest in the Supreme Court, strikes me as a pretty good idea. If the concern is actually about justices like being bought off and I don't really think that that is the concern, or I don't know anyone who believes that a justice has sold their vote.

[00:13:29] Daniel Hemel: But if that were the perspective that you were coming from then maybe you would be concerned about the ultimate decision laying in the hands of the justices.

[00:13:38] Jeffrey Rosen: Dan Epps Justice Alito has suggested that Congress requiring the court to adopt ethics reform would raise separation of powers concerns and indeed would be unconstitutional. Can you spell out his argument and does it turn on empowering lower court judges to review recusal decisions, which in Justice Alito view would disrupt the idea that the Supreme Court is places in a hierarchy above inferior courts and therefore lower federal judges should not have the power to discipline the justices?

[00:14:12] Daniel Epps: I think his view, he obviously didn't write it in a legal opinion. He, to my knowledge, he's only expressed that view in an interview with the Wall Street Journal. He seems to be advancing a much broader principle than that and rather than just saying, "Well, there's this specific problem with this bill," he's says "I know this is a controversial view, but I'm willing to say it, no provision in the constitution gives them, Congress, the authority to regulate the Supreme Court. Period."

[00:14:39] Daniel Epps: He says, "Congress did not create the Supreme Court, the constitution did." so as I understand what he's saying, he basically seems to think that Congress can have no role in regulating the court at all which I would like to see fleshed out a little bit more. I don't think that that seems not consistent with a couple of hundred years of precedent when, you know, Congress passes all sorts of legislation that affects the justices, regulates their outside income, for example. Is that unconstitutional?

[00:15:12] Daniel Epps: And so, I think that were this actually to come before the court say I have no doubt that the arguments would be refined. But Justice Alito seems to be coming at this from just a pretty bold view, which I haven't seen articulated and explained, that this is just categorically off limits.

[00:15:33] Jeffrey Rosen: Daniel Hemel, can you flesh out Justice Alito's view as you understand it? And do you agree with it or not?

[00:15:39] Daniel Hemel: I'm not an Alito whisperer, I don't have access to his thought processes. Article III creates the Supreme Court it allows Congress to regulate the Supreme Court's jurisdiction in some cases, but not others. Maybe there's a sort of hardcore application of Expressio unius est exclusio alterius. To say one thing is to exclude another. Congress has the power to regulate some aspects of the way the Supreme Court operates, but the constitution says nothing about ethics.

[00:16:10] Daniel Hemel: Now this would seem to also make the Ethics in Government Act unconstitutional and just kind of it's been lingering since the 1970s out there unconstitutionally, and that might be implicit in Alito's view. I find Alito's view extraordinarily unattractive from how we would want to construct a tripartite system of government. And I think ethics reform will accomplish relatively little of great importance, but if all it accomplishes is to make it darn clear that Congress has the ability to regulate the court in reasonable ways like this, then I would consider that a win for the ethics reform effort.

[00:16:49] Daniel Hemel: Like stamping out this Alito view that the Supreme Court is above the law is reason enough to pursue the Whitehouse legislation.

[00:16:57] Jeffrey Rosen: That's an interesting suggestion, that Justice Alito's view would call into question the constitutionality of the Ethics of Government Act. That act requires most high level federal officials in all three branches to file annual reports where they publicly disclose aspects of their finances, including their outside income and it applies to all federal judges, including the Supreme Court. Dan Epps, do you agree that Justice Alito's view might call that act's application to the Supreme Court into question? And can you tell our listeners whether Justice Alito's view is shared by any other justices or not?

[00:17:29] Daniel Epps: So, I think Daniel is absolutely right about that. It also if his reasoning is correct, I would think that it would also suggest that act is unconstitutional as applied to the executive branch and to the President at least, because the constitution also creates the presidency and Congress doesn't create the presidency.

[00:17:49] Daniel Epps: And so by the same token if the fact that the constitution creates an office means that Congress has no ability to regulate that at all, I assume the same reasoning would apply. Is it shared? I don't know. I know that Justice Kagan made some public remarks somewhat after, a little bit after Justice Alito made those comments, that indicated suggested she did not agree with his view.

[00:18:12] Daniel Epps: I have no idea how widely it is shared. I do think I'd say two things, one is that the justices traditionally are quite protective of their own prerogatives and get, you

know, really get their feathers ruffled when they see other branches is really encroaching on what they believe to be their turf. And so, it is a situation where I wouldn't expect the justices just to roll over immediately. Although the kind of political dynamics of that would matter.

[00:18:41] Daniel Epps: I think it also would matter a lot what the kind of partisan dynamics of these kind of reforms look like. Right now, in part because of how people politically feel about the court, this is a very party line issue, right? It's Democrats who are saying the court is corrupt and illegitimate and all these other things and are pushing, in addition to other kinds of reforms, pushing for ethics reforms. And it's Republicans who are saying, court's great, doesn't need to be meddled with, this is just Democrats looking for a pretext.

[00:19:14] Daniel Epps: And so, to the extent that it were ever to happen, if it were to happen as a sort of pure party line thing, I think that significantly raises the likelihood that you might see the court itself ideologically breaking down whether they believe this is something that was permissible or not. I'm not saying that's the entirety of their decision making, but I do think that the political valence of these kinds of things matters when push comes to shove.

[00:19:39] Jeffrey Rosen: Daniel Hemel, Professor Laurence Tribe and Judge Michael Luttig has suggested that Congress has the ability to impose ethics reform directly on the court, for example by making the code of conduct for United States judges binding on the Supreme Court to the same extent as it applies to circuit and district court judges, but that it- it does not have the power to require the court to adopt its own ethics rules, 'cause that would violate separation of powers. What do you think of that suggestion and is that widely shared or not?

[00:20:16] Daniel Hemel: Certainly when Professor Tribe and Judge Luttig two brilliant constitutional minds from different ideological perspectives come together and say something as though through and nuanced as that I am loathe to criticize. These are unresolved issues and when we're debating what the constitution requires there's the question what is the best view of the constitution require, and then there's the separate question of what would the nine justices on the Supreme Court say that the constitution requires?

[00:20:49] Daniel Hemel: If we're engaged in the second exercise and predicting how the law would come out the Tribe/Luttig view Congress can write the rules but it can't just pass the buck to the Supreme Court to write the rules, actually strikes me as something that I could imagine the nine justices getting behind. And if they could strike down the Whitehouse bill and say, "It's not that we can't be bound by ethics rules, it's just that you've got to do the work."

[00:21:15] Jeffrey Rosen: Exactly. Dan Epps if Congress did adopt that suggestion and decide to do the work, let's try to identify the bill that has the most chance of being accepted by the justices and adopted by the court. We've talked about the question of whether justices or lower court judges should review recusal decisions, is it right that the most acceptable bill would put that ultimate decision in the hands of the justices, and would do little more than the Murphy bill in 2011 originally did, which is formally apply the code of conduct to justices in a way that they voluntarily suggested they're willing to embrace on their own? Help sketch out what the moderate sort of compromise bill would look like.

[00:22:03] Daniel Epps: So, I think probably that latter suggestion of just saying that these rules that the justices basically say, "Yeah, we more or less try to follow those." that those actually are binding. I mean I do think that there might be some appropriate tweaks in terms of what rules should look like for the justices versus lower court judges for a couple of reasons.

[00:22:29] Daniel Epps: I mean one is that the consequences of a recusal in the Supreme Court are much more significant. Justice Scalia wrote an opinion in response to calls for him to recuse himself from a case involving Vice President Cheney with whom he had engaged in a social duck hunting trip. And one of the things he notes that I think is important and useful there, which is that because there is no one else who can just step in to fill the shoes of a justice who's recused a recusal vote decision is effectively just granting a vote to the party that won below, right?

[00:23:06] Daniel Epps: It says the same equivalent of doing that. And so maybe, you know, we need to be more sensitive to that and be slightly less willing to err on the side of recusal. They're kind of high officials in a way that- that individual judges aren't. They get visited by foreign dignitaries people bring them gifts, they're called upon to travel internationally maybe in ways that lower court judges aren't. And so, I think the rules could acknowledge some of those nuances.

[00:23:33] Daniel Epps: I don't even know exactly what they would look like, but I think that would probably be the least controversial. I think that it does definitely get a lot more complicated when you're talking about actual recusal decisions. I think that's much likely to be controversial, and I do think something about a lot of these recent ethical brouhahas is it can be very hard to really, even the people that are concerned about it, to explain exactly like what the problem is in terms of particular cases.

[00:24:07] Daniel Epps: Sometimes we can say, okay, well, this donor, this person who provided the gift has this connection to this party and that party, you know, got this favorable decision, or whatever. But a lot of times the sort of air of corruption is a little bit more defused and it's hard to translate into any particular argument that a justice should require from any particular case at all. And I think that is, you know, one of the things that is maybe more controversial about the Whitehouse bill is that it expands the category somewhat of the kinds of cases where recusal is required. And I think that would be extremely controversial.

[00:24:51] Jeffrey Rosen: Daniel Hemel, Dan Epps suggests that perhaps a moderate reform proposal would need to be more sensitive and willing to err on the side of recusal, and also acknowledge nuances about the kinds of folks that justices can meet with, but that the Whitehouse bill does the opposite and ramps up the categories for recusal. Do you agree that it might make more sense to be more forgiving in the case of recusal when it comes for the Supreme Court, and that could be a way of reaching a moderate compromise?

[00:25:19] Daniel Hemel: If the goal is to pass legislation yes, then the Whitehouse bill would need to be moderated in order to be passed. But I'm not sure if Senator Whitehouse's goal here is to get through the Senate a bill that can muster, you know, 60 votes to break a filibuster. He's also trying to make a statement about the legitimacy of the court. And he opposes decisions that

the Supreme Court has made and ethics is a useful cajole for attacking the court when what you're really attacking is Dobbs and Ruen and other controversial decisions of the court.

[00:25:58] Daniel Hemel: I think both sides here have politicized the ethics issues. Liberals are using ethics reform to pursue criticisms of the court that are really founded in substantive objections to the court's decisions. And Conservatives and Republicans are stonewalling sensible ethics changes because they view those as emanating from a substantive disagreement. So both sides are sort of transparently playing politics with ethics and transparency so this makes me quite skeptical that as long as there's divided control over Congress, or at least not a filibuster approved majority in the Senate that we'll see anything get through.

[00:26:41] Daniel Hemel: If I were advising the Supreme Court, I would say I would pursue voluntary reform right now, because it does look bad that the Supreme Court is not bound by a code of ethics. That's something that ordinary Americans understand as icky and there's a reason why Liberals are using the ethics issue to attack the court because it's a way of attacking the court on what seem like nonpartisan, non-ideological grounds, when really your objections to the court are partisan and ideological. And to be clear, those are partisan and ideological objections to the court that I share but I think we should just call a spade a spade and talk about what's going on.

[00:27:20] Jeffrey Rosen: Dan Epps sketch out what the moderate bill that could conceivably get bipartisan support would look like just in a little more detail. You said that it could have slightly more nuanced or relaxed standards for recusal, and then would the enforcement mechanism be squarely in the hands of the court itself, and would there be any other elements to the bill that's mostly likely to get bipartisan support?

[00:27:47] Daniel Epps: So, I will say at the outset that I think that given the way this issue has evolved, I think it's basically impossible to imagine there will be bipartisan consensus for any kind of ethics reform, because anything that happens I think would now be perceived as a victory, even a small one, for Democrats. And an acknowledgement that come of the recent controversies that maybe Democrats were right about them.

[00:28:14] Daniel Epps: I find it very hard to believe there are 10 or so senators in the Republican caucus who would be willing to make that concession and to, you know, give Democrats what they see as a victory. But I think the likelihood the less it requires and the more it just sort of contains some vague gauzy principles I guess the more likely it is to succeed.

[00:28:43] Daniel Epps: I mean it certainly would have to remove some of the more controversial parts of the Whitehouse bill. So, the Whitehouse bill has this- this section about anti-corruption provisions that requires recusal where the justice or judge knows that a party to the proceeding or an affiliate of a party to the proceeding made any lobbying contact as defined in Section Three of the Lobbying Disclosure Act, or spent substantial funds in support of the nomination confirmation or appointment.

[00:29:11] Daniel Epps: And I think that what he's trying to get at is, well, if there's a party that's contributed to the Federal Society or the Federal Society's involved or one of Leonard

Leo's kind of dark money groups has been involved and kind of paying for ads supporting the confirmation, the justice should have to be recused. And that just goes down a very complicated rabbit hole that Republicans are absolutely not gonna be willing to go down.

[00:29:37] Jeffrey Rosen: Daniel Hemel you mentioned voluntary reform, and- and the court is grappling with this question. Sketch out the elements of a voluntary reform that the court itself might adopt that's mostly likely to get wide support, and what sort of recusal standards would that look like? Would it involve embracing the code of conduct wholesale, or a diluted version of it? And what would the enforcement mechanism be?

[00:30:01] Daniel Hemel: The court has already moved in some direction toward voluntary reform by expanding the scope of personal hospitality disclosures that, or the judicial conference has expanded the scope of personal hospitality disclosures that justices are forced to make. So, we've seen from Justice Thomas recently more extensive disclosures in the summer of 2023 than we saw beforehand.

[00:30:26] Daniel Hemel: We can imagine a situation where there's a- a more formal process for justices issuing public opinions or public statements about disclosure like we've seen some justices do voluntarily in the past. Scalia's letter on the Cheney conflict would be one illustration. And the Supreme Court says that it is bound by the lower court code or it considers itself bound by the lower court code of judicial conduct, but it said this basically in like attachments to letters to the Senate Judiciary Committee.

[00:31:03] Daniel Hemel: So, we could imagine a more formal statement from the court to that affect. Beyond that I think it's unlikely that the justices would empower lower court judges to cast a judgment on whether a particular justice would be recused in a particular case. I would advise them to, but I don't think that they would adopt a Whitehouse type mechanism for at least getting a non-binding report out written by maybe it's a senior associate justice or a senior chief justice.

[00:31:35] Daniel Hemel: Maybe it's circuit court judges. So that some of the back and forth between justices on recusal that we see in the papers you know, years later actually comes to the fore today. But I don't think it will have teeth if it's coming from the justices themselves.

[00:31:53] Jeffrey Rosen: Dan Epps, what do you think a voluntary reform proposal that could plausibly get consensus among the justices might look like? Da- Daniel Hemel has suggested first a more formal process for issuing public statements about disclosure, and second, a more formal statement by the court that it's bound by the lower court code of conduct. Do you agree with those suggestions? And are there any others you think the justices might plausibly converge around?

[00:32:19] Daniel Epps: So, I think we might have seen them converge as much as they're going to converge, 'cause obviously we've been told you know, that some of these discussions have already taken place. I think it was Justice Kagan maybe a year or so ago sort of mentioned that they've discussing the issue, I think Chief Justice Roberts has said they've been discussing the issue.

[00:32:40] Daniel Epps: And then what we got was this attachment to a letter to Senator Durbin, Chairman of the Senate Judiciary Committee, sort of saying, "Look, I'm not gonna come testify, but here's some stuff we're thinking about." but it doesn't go, a ton beyond sort of saying, "Yeah, we try to follow those rules, we look to them," and so forth. They seem to have become a little bit more forthcoming in the wake of that about explaining their recusal decisions and so forth.

[00:33:15] Daniel Epps: But I don't know if there's more room to bargain here, because again, because this issue now has this partisan valance I think that it's probably gonna divide the court on ideological grounds. And it's gonna be seen by some of them and certainly Justice Alito is in kind of fight mode as a concession to the critics and some of the, like Justice Alito, and I presume Justice Thomas, think that this criticism is totally unfounded and unfair. And so, I don't know whether we're likely to see more than that.

[00:33:49] Jeffrey Rosen: Daniel Hemel remind me once more what the current recusal procedures within the court the. We've talked about some historic discussions among the justices, but what happens when a recusal request is submitted? Does the justice just review it him or herself, or does it go to the full court? And is there any appetite among the current justices about ramping up the internal recusal review procedures or not?

[00:34:15] Daniel Hemel: Daniel, correct me if I'm wrong, but right now it lies in the discretion of each justice and each, really each chambers has a different procedure for figuring out in the thousands of cert petitions each year whether a justice is recused. And for some justices that procedure is gonna be pretty simple, because there are relatively few potential conflicts.

[00:34:39] Daniel Hemel: For Justice Kagan in her earlier years on the court when she previously served as Solicitor General it involved a lot of research to make sure that she hadn't signed off on some appeal from a district court decision in some prior iteration of this case. But right now we essentially have nine recusal procedures.

[00:35:01] Jeffrey Rosen: And Dan Epps, is there any appetite within the court for ramping up those internal review procedures? And what would it look like? Would a contested decision be reviewed by the entire court, or how could the court ramp it up if it wanted to?

[00:35:17] Daniel Epps: Well, I guess there's two things. I mean one is just in terms of the sort of ordinary recusals, there have been a number of cases in recent years where it's turned down after the fact that a justice, voted on a cert petition in a company that the justice actually owns stock in. Things like that have happened a bunch of times. I don't think people really think that it was corruption, I think that there's 7,000, 8,000 cert petitions filed every year and some of the things get missed because the procedures are imperfect.

[00:35:48] Daniel Epps: I think it might make a ton of sense to have a slightly better more mechanical process within the court to the extent that as Daniel noted a lot of it is just kind of each individual chambers kind of trying to figure this stuff out on its own. Maybe having a better set of procedures in place to kind of really identify those conflicts. I don't see there being appetite for a change, a meaningful change in the substance of the standard.

[00:36:15] Daniel Epps: And I think it would be hard to kind of articulate exactly what that change would look like, even if people are concerned about justices taking fancy gifts. Again, it can be hard to translate those kind of general ethical concerns into a specific recusal decisions.

[00:36:35] Jeffrey Rosen: And what do you think about the possibility of having the whole court review recusal decisions?

[00:36:40] Daniel Epps: I think that is unlikely to make a difference. I could imagine them saying the fact that they say the whole court is reviewing it doesn't really mean anything if the posteriori is automatically deferred to their colleagues. Maybe they could all agree that they would just say going forward that the whole court was reviewing them, but nonetheless the court would always act as a rubber stamp. I don't think that they're likely to want to put themselves in a position of second guessing their colleagues on matters like this. It just doesn't seem like the right place for them to be burning their capital with their own colleagues.

[00:37:18] Jeffrey Rosen: Daniel Hemel, do you agree that there really isn't much appetite within the court for having the justices second guess their colleagues? And in that sense, is the only plausible area for internal voluntary review to formally embrace the code of conduct and ensure that recusal decisions are more transparent?

[00:37:34] Daniel Hemel: Yeah, and transparency could be a meaningful reform. And in terms of appetite for this, Chief Justice Roberts and I think several other members care deeply about the court's legitimacy, public confidence in the court, the court's popularity. I can imagine a world in which we do see more robust transparency measures because the court wants to raise itself in the public's esteem.

[00:38:00] Daniel Hemel: But I don't think we can envision nor- nor do I think we would really want Supreme Court recusal being a sort of game of Survivor where eight justices could vote one justice off the island because of some stock or mutual fund ownership, or some affiliation with a university.

[00:38:18] Jeffrey Rosen: Dan Epps, would the courts formally binding itself to the code of conduct and being more transparent help? Is that something that is worth the reform minded justices are pushing for, or not?

[00:38:31] Daniel Epps: I guess it depends on what you mean by help. I mean I think that I share a premise that Daniel identified earlier in the discussion, which is that a huge amount of what's really going on here is a big swath of our political system in our country is really unhappy with the substantive decisions that the court is making. And that maybe really what's explaining all of this discussion about ethics and it's all not really about ethics.

[00:39:00] Daniel Epps: I do think that, taking some steps you know, would be good in the sense that it would tell people the justices are listening and, you know, maybe take a little bit of the heat off of their backs. But I also very much agree with what Daniel said, that having a few of these episodes where we have to remind the justices that the rules apply to them, they're not above the law and that the, you know, it does actually matter what the American public thinks about them, I think that's all to the good.

[00:39:30] Jeffrey Rosen: Daniel, as we wrap up, you've expressed skepticism that the court's legitimacy turns on ethics reforms. Tell us about that skepticism and whether you think that there's anything the court should do to address the legitimacy concerns or not.

[00:39:46] Daniel Hemel: So public confidence in the Supreme Court is definitely down, but public confidence in all American institutions is down. The Supreme Court is right now, if you look at the Gallup confidence ratings it does better than any of the other branches. So, I don't think the court is facing a legitimacy crisis, I don't think there's really serious talk among the leaders of either party. Well, we'll see, Trump may be an exception to this.

[00:40:11] Daniel Hemel: But President Biden is not seriously talking about flagrantly defying the court. That would be quite an unpopular thing for him to do. Even within the Democrats if he were to try. I think the role of ethics reform here, it's largely to bolster the appearance that the court is neutral, that these are umpires who aren't swayed by who, I guess aren't swayed by anything. It's an appearance of neutrality that probably neither Dan or I really believes that there is any sort of possibility of the justices being umpires that the search for neutral principles in law is really a search in vain.

[00:40:52] Daniel Hemel: So, these ethics reforms are meant to build up what is ultimately like a fiction that the justices are just these persons in robes without ideological and partisan views. So, at the end of the day what's ethics reform doing? You know, it looks bad that the Supreme Court isn't bound by a code of ethics and maybe that confidence ratings goes up a few points once we have ethics reform. But we'll still have pro-choicers who are really, really, really upset by the outcome and Dobbs, and we'll still have same sex marriage opponents who are really, really upset about the outcome in Obergefell, and that's gonna drive attitudes toward the court, rather than whether people recuse themselves in cases in which they have \$2,000 of stock in a company.

[00:41:42] Jeffrey Rosen: Well, it's time for closing thoughts in this thoughtful debate, which really has helped us to understand the contours of the choices the court faces when it comes to ethics reform. Dan Epps how do you think that the court itself might most constructively address questions involving ethics in the Supreme Court?

[00:42:01] Daniel Epps: So I do think that doing something to indicate that they're listening and hearing the criticism is good, and I do think that they have done some of that already in terms of the attachment to the letter to Senator Durbin in terms of the updates to financial disclosures that Justice Thomas has made indicating and trying to explain why he disclosed differently and how he's gonna disclose differently in the future.

[00:42:28] Daniel Epps: So, I think those kinds of things would be good. I think maybe rather than doing it responsively maybe just coming out in the next year with a kind of statement on the website that says, you know, "Look, we thought about this, here's what we see is the problem, here's what we're gonna do differently, here's why we're not gonna do other things differently, and just take it or leave it."

[00:42:51] Daniel Epps: I think that the court would look better for the court to not be in this constant defensive posture responding to other things, but just to be out there and saying, "Look, here's what we're gonna do."

[00:43:02] Jeffrey Rosen: And Daniel Hemel, last word in this great discussion to you, how do you think the court might most constructively address questions involving ethics and the Supreme Court?

[00:43:11] Daniel Hemel: I agree with Dan that the Supreme Court coming out and making an affirmative statement explaining what it's gonna do and what it's not gonna do would be wise. We've seen the court budge on other issues of transparency in the last few years so like live-streaming audio of Supreme Court oral arguments. That was a big change and I think most court watchers believe that it was a change for the better, even though 20 years ago it seemed almost unimaginable. So internally driven Supreme Court reform can raise the court's esteem in the eyes of lawyers and lay people even if it doesn't fundamentally change the court's position in American life.

[00:43:51] Jeffrey Rosen: Thank you so much Dan Epps and Daniel Hemel for our thoughtful, nonpartisan and really illuminating discussion about ethics in the Supreme Court. Dan, Daniel, thank you so much for joining.

[00:44:03] Daniel Epps: Thanks Jeff.

[00:44:03] Daniel Hemel: Thanks.

[00:44:06] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Lana Ulrich, Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Sign up for the newsletter at constitutioncenter.org/connect and always remember whether you wake or sleep, that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the dedication to civil constitutional dialogue with people from around the country who are inspired by our nonpartisan mission. You could support that mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including the podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.