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THE SUPREME COURT'S FIDUCIARY DUTY TO FORGO GIFTS*

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FIDUCIARY GOVERNMENT (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim, & Paul B. Miller Eds., Cambridge University Press, 2018)

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Introduction

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous."

--Deuteronomy 16:19 (Moses' instruction to Israel's tribal judges)

On February 13, 2016, Supreme Court Justice Antonin Scalia was found dead at the Cibolo Creek Ranch, a 30,000 acre resort overlooking a lake in a remote part of southwestern Texas.[1] As details about the upscale resort trickled out,[2] a frenzy of speculation about the reason for Scalia's trip to the Ranch and the identity of Scalia's host erupted. The trip turned out to be a gathering of hunting aficionados; the owner of the resort, John B. Poindexter, a member of the

[1] Zoe Tillman, *Scalia's Death at Private Ranch Highlights Tensions Over Justices' Travel*, NAT'L L.J. (Feb. 18, 2016).

[2] Scalia was staying in a 1,100 square foot, $700 per night room overlooking a lake. Mark Berman & Christopher Ingraham, *'Supreme Court Justices are Rock Stars.' Who Pays When Justices Travel the World?*, WASH. POST (Feb. 19, 2016).

International Order of St. Hubertus,[3] was known to host similar events a few times a year.[4] Neither Scalia, who was an avid hunter, nor the other guests of the resort, were charged for room and board.[5]

In all likelihood, the gifts of room and board conferred by Poindexter to Scalia would have been exempt from reporting under the Ethics Reform Act of 1989, which does not require the disclosure of "food, lodging or entertainment received as personal hospitality of an individual." In addition, as detailed below, the conferral of such gifts likely would have been permitted by the federal gift regulations, which expressly permit "social hospitality based on personal relationships," as well as gifts from relatives or friends under some circumstances.[6]

Yet the fact that a Justice could freely accept high value gifts from friends and acquaintances remains troubling. According to news reports, while Poindexter did not have a case in the Supreme Court's docket in 2016, he (indirectly) had one in 2015.[7] One naturally wonders how Scalia - were he still alive - might have received a future lawsuit filed or defended

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[3] The International Order of St. Hubertus is an organization of hunters. Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016).

[4] Mark Berman & Jerry Markon, *Why Justice Scalia Was Staying For Free at a Texas Resort*, WASH. POST (Feb. 17, 2016).

[5] Berman & Ingraham, *supra* note 2.

[6] *See infra* text accompanying notes 19 to 65.

[7] *See infra* text accompanying note 45.

by Poindexter after such a lavish display of generosity. Moreover, because extravagant gifts are more likely to be bestowed by large organizations and wealthy individuals, one wonders whether the Supreme Court could truly be impartial in cases pitting large organizations or wealthy individuals against ordinary individuals. Indeed, the Justices' receipt of high value gifts raises questions not only about their integrity and impartiality, but also threatens to undermine the high levels of trust that citizens necessarily place in the Supreme Court.

In this chapter, I call for fiduciary limits on Supreme Court Justices' acceptance of gifts. Due to space constraints, I limit my discussion to the specific problem of high value gifts of merchandise and hospitality conferred to individual Justices by friends, acquaintances, and organizations. I don't address the related topics of outside earned income, investment income, honoraria or outside employment,[8] or the Justices' participation in politically partisan events or political fundraisers,[9] although such topics raise similar concerns about public trust and judicial impartiality.

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[8] *See* Judicial Conference Regulations on Outside Earned Income, Honoraria, and Employment, in 2 GUIDE TO JUDICIARY POLICY, CH. 10 (last revised Dec. 14, 2010), http://www.uscourts.gov/sites/default/files/vol02c-ch10.pdf.

[9] *See, e.g.*, James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 NO. 2 PROF. LAW. 10 (2012); Eric Lichtbau, *Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases*, N.Y. TIMES (Jan. 19, 2011); Jonathan Turley, *The Price of Scalia's Political Stardom*, WASH. POST (Jan. 23, 2011);

In Part I, I briefly review the patchwork of civil and criminal statutes and regulations that could potentially apply to gifts of merchandise and hospitality that may be conferred to the Justices. I conclude that these laws and regulations leave large loopholes through which many high value gifts—even from litigants who appear regularly before the court—may be permitted and, possibly, remain undisclosed.

In Part II, I consider the question of whether the Justices should be regarded as fiduciaries. First, I argue that, rather than searching for factors or elements constitutive of a fiduciary relationship, a better approach may be to identify the reasons why certain relationships are recognized as fiduciary. Second, I argue that the reasons for recognizing fiduciary status in any given instance are necessarily entwined with the purpose of fiduciary law itself and that the purpose of fiduciary law is to protect and promote those socially valuable relations that ordinarily require a high level of trust to serve the purposes of the relation. Hence, fiduciary obligations are imposed on those relations as a means of cultivating high levels of trust deemed so important to the functioning of those relations. Third, I argue that recognizing the Justices as fiduciaries is consistent with the purpose of fiduciary law.

In Part III, I make the case that a fiduciary duty to forgo gifts should be imposed on the Justices. I argue that trustworthiness in some fiduciary contexts requires the fiduciary to refrain from using her entrusted position for self-regarding gain and that a rule against accepting gifts

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Josh Gerstein, *Gorsuch Speech at Trump Hotel Attracts Protests*, POLITICO (Sept. 28, 2017).

is consistent with this standard of trustworthiness. Then I argue that in light of the higher levels of trust necessary to sustain the relation between the Supreme Court and the citizens subject to its jurisdiction, the law should impose on the Justices a fiduciary duty to forgo gifts. Last, I explain how the duty to forgo gifts might be more precisely defined.

To be clear, the gifting problem that I have identified is not a partisan issue, as Justices appointed by both Democratic and Republican presidents have been reported to accept high value gifts. For example, in 2011, Justice Sonia Sotomayor disclosed a $1,400 gift of fine china from “the Butler family” and a $6,000 “translucent composite print” from one Robert Weingarten.[10] In 2012, Justice Ruth Bader Ginsburg received a $2,500 gift bag from Glamour Magazine, which bestowed her a Woman of the Year award.[11] In 2001, at an awards gala, Justice Clarence Thomas accepted a bust of Abraham Lincoln, cast in 1914 by the neo-classical sculptor Adolph Alexander Weinman and valued at $15,000, from the conservative think-tank and frequent filer of amicus briefs, the American Enterprise Institute.[12]

I. The Current State of Regulation

[10] Berman & Ingraham, *supra* note 2.

[11] *Id*.

[12] *See infra* note 43.

In this Part, I review the federal civil and criminal statutes and regulations that could potentially apply to gifts of merchandise and hospitality conferred on individual Justices. I conclude that these laws inadequately proscribe or mandate disclosure of such gifts.

A. Federal Criminal Bribery and Gratuities Statutes

A public official's acceptance of a high value gift of merchandise or hospitality raises the specter of corruption. Therefore, an analysis of gift-giving would not be complete without a brief review of the federal criminal laws proscribing bribery and unlawful gratuities.

The federal bribery statute prohibits public officials—defined as including any "officer or employee or person acting for on behalf of the United States, or any department, agency or branch of Government thereof"[13]—from "corruptly" soliciting or receiving "anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act."[14] The lesser offense of unlawful gratuities prohibits public officials from soliciting or receiving "anything of value personally for or because of any official

[13] 18 U.S.C. § 201(a)(1) (2016).

[14] *Id*. § 201(b)(2).

act performed or to be performed by such official or person."[15] Both crimes require some link between the benefit accruing to the public official and an "official act"[16] of the public official.

For bribery, an actual, bilateral agreement to exchange a benefit for an official act is not required; rather the benefit need only be given (or received) with an intent to influence (or to be influenced regarding) the official act. In other words, "A bribe can occur even if it is intended only by the briber or only by the recipient."[17] For an unlawful gratuity, an intent to influence (or be influenced regarding) an official act is not required; however, the benefit must have been conferred in contemplation of a past or future official act.[18]

[15] *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 405-06 (1999) (construing "for or because of an official act" as requiring a link between the gift and a particular official act).

[16] The term "official act" means "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). *See* McDonnell v. United States, 136 S. Ct. 2355, 2371-72 (2016) (clarifying the meaning of "official act").

[17] Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 820 (1984).

[18] *Id*. at 796-97.

A gift of merchandise or hospitality, such as Scalia's Cibolo Creek Ranch stay, would ordinarily not trigger the federal crimes of bribery and unlawful gratuities. No one has suggested that Poindexter intended to influence any future official act of Scalia with the gift or that Scalia intended to be so influenced. Likewise, no one has suggested that Poindexter conferred the gift because of an official act already performed or to be performed by Scalia. Indeed, most gifts received by the Justices are unlikely to fall under the purview of these statutes.

B. Substantive Gift Regulations

Might a gift of merchandise or hospitality run afoul of the federal government's extensive conflict-of-interest laws? The Ethics Reform Act of 1989[19] broadly prohibits members, officers or employees of all three branches of the federal government, including the Supreme Court Justices,[20] from receiving "anything of value from a person (1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting

[19] The Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended at scattered sections of Titles 2, 5, 10, 18, 22, 26, 28, 31, 42, and 50 U.S.C. and 5 U.S.C. app.). For a good overview of the government ethics structure, see Mark A. Adams, Jeremy W. Barber & Hildy Herrera, *Ethics in Government*, 30 AM. CRIM. L. REV. 617 (1993).

[20] *See* Adams et al., *supra* note 19, at 622 (noting that the Justices are classified as officers of the judicial branch); 5 U.S.C. app. 4 § 109(10) (2016).

activities regulated by, the individual's employing entity; or (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties."[21] To flesh out this broad standard, the Act authorized the supervising ethics office of each branch of government to promulgate detailed gifts regulations applicable to its branch and to create "such reasonable exceptions as may be appropriate."[22] The designated supervising ethics office for the judicial branch is the Judicial Conference of the United States,[23] the congressionally created policymaking arm of the federal judiciary.[24]

On May 18, 1990, the Judicial Conference adopted its Regulations on Gifts pursuant to the Ethics Reform Act.[25] Tracking the language of the statute, the regulations broadly prohibit judicial officers and employees from soliciting or accepting (i) a gift from any person "who is

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[21] 5 U.S.C. § 7353(a) (2016).

[22] *Id*. at § 7353(b)(1).

[23] 5 U.S.C. § 7353(d)(1)(C) (2016); *see generally* Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 482 (2014).

[24] *See generally* JOHN G. ROBERTS JR., UNITED STATES SUPREME COURT, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[25] Judicial Conference Regulations on Gifts, *in* 2 GUIDE TO JUDICIARY POLICY CH. 6 (last revised Dec. 14, 2010), http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/judicial-conference-regulations-gifts.

seeking official action from or doing business with the court or other entity served by the judicial officer or employee”[26] or (ii) a gift “from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer’s or employee’s official duties.”[27] Despite this broadly worded principle, a close analysis of the implementing regulations suggests that federal judges, including the Justices, have ample room to accept significant gifts of merchandise or hospitality from friends and acquaintances. There also appears to be no meaningful impediment to the Cibolo Creek Ranch gift to Scalia.

First, some of the categorical exclusions from the definition of “gift” are troubling in their vagueness and breadth. Although “gift” is defined broadly as “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value,”[28] the regulations exclude from this definition instances of “social hospitality based on personal

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[26] The regulations note that where the “provisions in the regulations refer to persons seeking official action from or doing business with a judge’s court, . . . [a] judge’s court encompasses, in the case of an appellate judge, any case coming before the court in which the judge personally participates in the decision of the court; in the case of a trial court, the judge’s court encompasses only cases on the particular judge’s docket and not cases before another judge of the same court.” *Id.* § 620.65(b).

[27] *Id.* §§ 620.30, 620.35(a).

[28] *Id.* § 620.25.

relationships."[29] Because "social hospitality" is not further specified, generous gifts of hospitality in the form of food and lodging, such as a stay at the Cibolo Creek Ranch, may be deemed a *non-gift* and thus not restricted in any way. Because the definition of "personal relationships" does *not* exclude litigants who will appear or regularly appear before the court, Justices may theoretically accept generous gifts of social hospitality even from litigants, so long as there is some basis for claiming a "personal relationship" to such litigant. Stated simply, there seems to be no meaningful limit, other than the aforementioned criminal laws, to the acceptance of social hospitality from friends or acquaintances, regardless of the position or litigation posture of such friend or acquaintance.

Second, even if the benefit qualifies as a "gift" and the donor is "seeking official action from or doing business with the court,"[30] it may nonetheless be accepted, "notwithstanding this general [prohibition]," so long as the gift falls under one of many potentially broad exceptions.[31] For example, § 620.35(b)(4) permits the acceptance of gifts "from a relative or friend, if the relative's or friend's appearance or interest in a matter would [not] in any event *require* that the officer or employee take no official action with respect to the matter, *or* if the gift is made in connection with a special occasion, such as a wedding, anniversary, or birthday,

[29] *Id*. § 620.25(a).

[30] For the meaning of this phrase, see *supra* note 26.

[31] *Id*. § 620.25(a), (b).

and the gift is fairly commensurate with the occasion and the relationship[.]"[32] Two concerns with this particular exception from the gift prohibition warrant mention.

First, the latter part of the exception that permits gifts from relatives or friends bestowed in connection with "a special occasion" vaguely requires that the gift be "fairly commensurate with the occasion and the relationship[.]" Therefore, if for example the occasion in question is truly special (such as a 50th wedding anniversary), this exception could be read to authorize the acceptance of high value gifts from friends, notwithstanding the possibility that such friend may be "seeking official action from . . . the court."[33]

Second, the earlier part of the exception that allows certain gifts from relatives and friends could be interpreted to authorize *all* gifts from *friends*, even if the friend is "seeking official action from or doing business with the court."[34] Such an interpretation is possible because this part of the exception is conditioned only on the absence of a requirement to recuse. Accordingly, the scope of this exception depends on the scope of the *mandatory* elements of the federal disqualification standard. As will be explained, the mandatory recusal provisions do not operate in practice to meaningfully restrict gifts from friends.

[32] *Id*. § 620.35(b)(4) (emphasis added).

[33] *Id*. § 620.25(a), (b)(4).

[34] For the meaning of this phrase, see *supra* note 26. Because the federal disqualification statute mandates recusal in *specific* circumstances involving relatives, this part of the exception could not be used to (similarly) permit all gifts from relatives..

The primary federal disqualification statute, 28 U.S.C. § 455,[35] directs all federal judges (including the Justices) to recuse themselves from a proceeding "in which the judge's impartiality might reasonably be questioned."[36] While this vague standard could plausibly be interpreted to require recusal where a friend is, or closely connected to, a litigant, no such interpretation is guaranteed. For example, in 2004, Justice Scalia explained his controversial decision to sit on *Cheney v. U.S. District Court for the District of Columbia*,[37] despite the fact that Scalia and Vice President (and litigant) Dick Cheney, being personal friends, had vacationed together shortly after the Supreme Court agreed to hear the case, and despite the fact that Scalia had accepted from Cheney a gift of transportation on Air Force Two.[38] In his memorandum, Scalia asserted: "While friendship is a ground for recusal of a Justice where the personal fortune or personal freedom of the friend is at issue, it has traditionally *not* been a

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[35] For a similar disqualification standard, see CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2014); *see also* 28 U.S.C. §§ 47, 144 & 2106; Wheeler, *supra* note 23, at 488.

[36] 28 U.S.C. § 455(a) (2016) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

[37] 541 U.S. 913 (2004).

[38] Scalia made a spirited defense, arguing that the flight was basically a non-gift. *Id.* at 920-21.

ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer."[39] Having concluded that his impartiality might not reasonably be questioned, Scalia proceeded to sit on his friend's case.

The statute also provides a nonexhaustive and nonwaivable list of circumstances in which recusal is required.[40] The list of circumstances identifies the situation in which the judge "has a personal bias or prejudice concerning a party."[41] While, again, this provision *could* be construed to require recusal where a friend is, or is closely connected to, a litigant, no such interpretation is guaranteed. Perhaps most troubling, there is no express mention anywhere in the statute of *friendship* as a basis for disqualification. While the statute highlights *familial* and *financial* ties as requiring recusal in certain circumstances, it is silent on whether friendship alone could ever require recusal. As a result, a judge could conclude that, notwithstanding the fact that a friend is "seeking official action from or doing business with the court,"[42] he may freely accept all gifts from him.

To take another example of a potentially far-reaching exception, § 620.35(b)(1) exempts gifts "made incident to a public testimonial and [that] is fairly commensurate with the occasion." This exception may have enabled Justice Thomas to accept a $15,000 bust of

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[39] *Id.* at 916.

[40] 28 U.S.C. § 455(b) (2016).

[41] *Id*. § 455(b)(1).

[42] For the meaning of this phrase, *see supra* note 26.

Abraham Lincoln from the American Enterprise Institute at an awards gala, even though the Institute frequently files amicus briefs with the Supreme Court.[43] Thomas has resolutely refused to recuse himself in cases in which the American Enterprise Institute participated.[44]

The potential narrowness of the gift prohibition and the breadth of the exceptions should be concerning. As news reports about Scalia's Cibolo Creek Ranch visit detailed, while Poindexter did not have a case in the Supreme Court's docket in 2016, he did have one in 2015. Poindexter indirectly owns the MIC Group, which was a defendant in an age discrimination lawsuit filed by a former employee who unsuccessfully petitioned the Supreme Court in 2015.[45] One naturally wonders how Scalia—were he still alive—might have approached a future lawsuit filed or defended by Poindexter after such a lavish display of generosity. Moreover, because extravagant gifts are more likely to be bestowed by large organizations and

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[43] *See* Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES (June 18, 2011); Ian Milhiser, *Clarence Thomas Decided Three Cases Where AEI Filed a Brief After AEI Gave Him A $15,000 Gift*, THINK PROGRESS (June 21, 2011).

[44] Noah M. Schubert, *Replacement Justice on the United States Supreme Court: The Use of Temporary Justices To Resolve the Recusal Conundrum*, 46 U.S.F. L. REV. 215, 230 (2011).

[45] Poindexter owns J.B. Poindexter & Co., a manufacturing firm based in Houston with more than 4,000 employees. Lipton, *supra* note 3; James Hinga v. MIC Group, LLC, 136 S.Ct. 246 (2015) (petition denied).

wealthy individuals, one wonders whether the Supreme Court could truly be impartial in cases pitting large organizations or wealthy individuals against ordinary individuals. As Professor Stephen Gillers articulated the concern, "People worry at those kinds of things; there's a creation of access on the part of people with an interest in the courts, and that is unfair."[46]

Finally, it isn't entirely clear whether the gift regulations adopted by the Judicial Conference pursuant to the Ethics Reform Act can even be enforced against the Justices. Although the general statutory gift rule explicitly applies to the entire federal judiciary, including the members of the Supreme Court,[47] the specific Judicial Conference gift regulations by their terms only apply to the lower federal courts.[48] In his *2011 Year-End Report on the Federal Judiciary*, Chief Justice John Roberts clarified that the Judicial Conference "is an instrument for the management of the lower courts" and thus "its committees have no mandate to prescribe rules or standards for any other body[,]" presumably including the Supreme Court.[49] Roberts also implied that Congress may even lack the authority to regulate

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[46] Berman & Markon, *supra* note 4.

[47] *See* 5 U.S.C. app. 4 § 109(10) (2016).

[48] 2 GUIDE TO JUDICIARY POLICY § 620.20 (2010).

[49] ROBERTS, *supra* note 24, at 4. Moreover, the official commentary of the Judicial Conference's gift regulations states, "[T]he Judicial Conference has delegated its administrative and enforcement authority under the [Ethics Reform] Act for officers and employees of the Supreme Court of the United States to the Chief Justice of the United

the Supreme Court's ethics in the first place. Observing that the Constitution, and not Congress, created the Supreme Court,[50] Roberts remarked, "The [Supreme] Court has never addressed whether Congress may impose those requirements [relating to financial reporting and receipt of gifts and outside earned income] on the Supreme Court. The Justices nevertheless comply with those provisions."[51] On the other hand, there is persuasive academic commentary arguing that Congress "has broad constitutional authority [under the Necessary and Proper Clause] to regulate the Justices' ethical conduct, just as it has exercised control over other vital aspects of the Court's administration, such as the Court's size, quorum requirement, oath of office, and the dates of its sessions."[52]

C. Financial Disclosure

Even if the substantive gift regulations may be inadequate, one might take some comfort in the fact that the federal financial reporting requirements require the disclosure of significant gifts. Theoretically, financial disclosure could empower the media to spotlight objectionable

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States." Hence, under the regulations, only the Chief Justice can enforce any ethical regulations against the Supreme Court Justices. 2 GUIDE TO JUDICIARY POLICY § 620.65(a) (2010).

[50] ROBERTS, *supra* note 24, at 4.

[51] *Id.* at 6.

[52] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 443 (2013).

gift-giving practices for the public, which would enable public shaming to exert a deterrent effect on individual Justices' misbehavior. Also, financial disclosure might be able to play an important role in informing litigants about potential conflicts of interests posed by the receipt of gifts, which could then afford them an opportunity to request judicial disqualification.

Under the Ethics Reform Act, all high-salaried federal officers and employees of the three branches of government, including Supreme Court Justices, are required in May of each year to file annual financial reports covering aspects of their finances and gifts received in the previous calendar year.[53] Federal judges, including the Justices, file these reports with their clerks of the court and with the Judicial Conference Financial Disclosure Committee,[54] and these reports are made available for physical inspection at the Administrative Office of the U.S. Courts in Washington, D.C.[55]

Covered persons are required to report gifts, including gifts of "transportation, lodging, food, or entertainment" (including reimbursements therefor)[56] that exceed $390 in value

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[53] *See* 5 U.S.C. app. 4 §§ 101-11 (defining the requirement); *id.* § 109(10) (defining "judicial officer").

[54] Wheeler, *supra* note 23, at 486.

[55] *Id*.

[56] Judges must also disclose on their courts' websites the educational programs that they participated in where they have received reimbursement from sponsors who are nongovernmental organizations. *See* Wheeler, *supra* note 23, at 486; U.S. Courts, Privately

received from any source other than a relative of the reporting individual.[57] However, gifts consisting of "food, lodging or entertainment received as personal hospitality of an individual" are exempt from reporting.[58] The statute defines "personal hospitality of any individual" as "hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family."[59]

Because the Cibolo Creek Ranch might have been billed as the *home* of Poindexter, even though it is also used for commercial purposes, it's possible that Scalia's entire visit - except for the charter flight to Texas (which was reportedly not gifted by Poindexter)[60] - would have

Funded Seminars Disclosure System, http://www.uscourts.gov/RulesAndPolicies/PrivateSeminarDisclosure.aspx.

[57] 5 U.S.C. app. 4 § 102(a)(2)(A), (B) (2016) (establishing the rule and cross-referencing 5 U.S.C. § 7342(a)(5) of the Foreign Gifts and Decorations Act); 5 U.S.C. § 7342(a)(5)(A) (2016) (providing that the Administrator of General Services shall prescribe the "minimal value" threshold that triggers the reporting requirement every three years); 5 C.F.R. §§ 2634.304, 2634.907 (2017), 2017 WL 2154448 (raising the "minimal value" to $390 for the three-year period 2017-2019).

[58] 5 U.S.C. app. 4 § 102(a)(2)(A) (2016).

[59] *Id.* § 109(14).

[60] Berman & Markon, *supra* note 4.

been exempt from financial reporting by coming within the personal hospitality exception. If so, this loophole would seem to stretch the meaning of personal hospitality in two ways. First, it would have the effect of classifying certain benefits that are ordinarily purchasable on the market and thus have a readily ascertainable market value as personal hospitality. Second, it would have the effect of allowing certain lavish gifts to qualify as personal hospitality, even though the personal hospitality exception may have been intended to cover more mundane gestures of hospitality, such as a dinner invitation to a person's home.[61]

As important as the financial disclosure requirements are, they have their limitations. First, while physical copies of the reports are made publicly available for inspection, they are not posted on the federal judiciary website.[62] Second, the filing deadline for reporting expenses incurred during the prior year is May, resulting in potentially long delays for the reporting of certain gifts, which could detrimentally impact the ability of litigants to exercise their right to request recusal in a timely manner. Third, there is no easy way to police disclosures to ensure that they are made in every case of a significant gift or payment. Although the Ethics Reform Act authorizes the Attorney General to bring a civil action against any individual who

[61] *Cf.* Berman & Ingraham, *supra* note 2 (citing Ronald Rotunda's distinction between lavish demonstrations of hospitality and ordinary personal hospitality).

[62] That said, government watchdog organizations are known to make copies and upload them onto their websites.

"knowingly and willfully" fails to file required information,[63] it is unclear whether the Judicial Conference has ever referred a judicial officer or employee to the Attorney General.[64] Moreover, the Judicial Conference does not even have jurisdiction over the Justices. As a result, the public must invariably rely on the media and government watchdog organizations to catch instances of nondisclosure. For example, Justice Thomas amended his financial disclosure forms in 2011 to report his spouse's $686,589 income earned during a five-year period from the Heritage Foundation (a political think-tank which occasionally files amicus briefs with the Supreme Court) only after a watchdog group complained about his omissions.[65] Fourth, as pointed out by Chief Justice Roberts, it is an open question whether the financial reporting requirements are enforceable against the Justices.[66]

D. Judicial Disqualification

Gifts may not be so troublesome if we have a robust judicial recusal procedure to act as a backstop. While a vigorous recusal process cannot eliminate general public perception about

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[63] 5 U.S.C. § 104 (2016).

[64] *Cf.* Wheeler, *supra* note 23, at 486 (reporting that, after informal inquiries, the author learned of no instance in which a covered person has been referred to the Attorney General).

[65] Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, L.A. TIMES (Jan. 22, 2011).

[66] *See supra* text accompanying notes 47-52.

the coziness between judicial and economic elites or guarantee the perfect impartiality of the sitting Justices, the public could at least rest assured that a Justice who accepts a significant gift from a donor would properly recuse herself in a case involving the donor. Unfortunately, despite repeated congressional reform efforts to broaden the recusal standards, federal judicial recusal has remained problematic. As Professor Amanda Frost has observed, every attempt by Congress to broaden federal disqualification standards is followed by narrowing interpretations by federal judges applying the standards to themselves.[67] Furthermore, she has noted:

> As a general matter, the recusal process is usually not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision. Most importantly, the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself, even though that judge has an obvious personal stake in the matter.[68]

These problems don't disappear in the Supreme Court context; in fact, there are additional reasons to be concerned. Although the main federal judicial disqualification standard, 28 U.S.C. § 455, applies to the entire federal judiciary, including the Supreme Court,[69] a chasm between the recusal practices of the Supreme Court and the lower federal courts has

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[67] Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV., 531, 534 (2005).

[68] *Id*. at 536.

[69] *See supra* note 36 (quoting statute). By contrast, 28 U.S.C. § 144, does not cover the appellate courts and the Supreme Court.

developed.[70] In contrast to the lower courts, where a party can appeal a judge's recusal decision to a higher court or seek en banc review, there is no appeal from or review of a Justice's recusal decision.[71] Although there is nothing that formally prohibits a litigant from asking the whole Supreme Court to review an individual Justice's refusal to recuse herself, no litigant has ever done so;[72] moreover, the Supreme Court has a policy of not reviewing an individual Justice's recusal decision.[73] And, despite Congress's apparent intent to abolish the duty-to-sit doctrine,[74]

[70] *See, e.g.*, Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 155 (2004) (describing the "chasm"); Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore: *Did Some Justices Vote Illegally?* 16 GEO. J. LEGAL ETHICS 375, 428 n. 304 (2003) (describing the "gap").

[71] *See* Frost, *supra* note 52, at 450 (noting the absence of written rules governing Supreme Court recusal procedures).

[72] *Id*.

[73] ROBERTS, *supra* note 24, at 9 ("[T]he Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case.").

[74] *See* H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (expressing intent to abolish "duty to sit" doctrine); *see also* Frost, *supra* note 67, at 541 (defining the "duty to sit" doctrine as an "obligation to remain on any case to which they had been assigned absent statutory grounds for recusal.").

a doctrine which judges have historically used to justify their non-recusal in close cases, seven of the Justices have publicly affirmed their adherence to the doctrine under certain circumstances.[75] As those seven Justices explained, they should not recuse themselves "out of an excess of caution" because "[e]ven one unnecessary recusal impairs the functioning of the Court."[76] Similarly, Chief Justice Roberts separately pointed out that when a Justice recuses him or herself, there is no one to replace him or her: "A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid a controversy."[77] Finally, it remains an open question whether the federal disqualification statutes can even be enforced against the Justices. As Roberts clarified, "As in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested."[78]

In sum, the federal statutes and regulations that could potentially apply to gifts of merchandise and hospitality conferred to the Justices leave large loopholes through which many high value gifts would be permitted and, possibly, go undisclosed. Based on the above analysis, in all likelihood, the gift of the Cibolo Creek Ranch vacation to Scalia would have gone unreported. Perhaps more troubling, it isn't clear whether and how the relevant rules and regulations, as inadequate as they may be, can even be enforced against the Justices.

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[75] *Id*. at 549 (describing the Supreme Court's 1993 *Statement of Recusal Policy*).

[76] *Id*. (quoting the *Statement*).

[77] ROBERTS, *supra* note 24, at 9.

[78] *Id*. at 7.

II. The Fiduciary Status of Supreme Court Justices

In this Part, I consider whether the Supreme Court Justices should be regarded as fiduciaries. I answer the question in the affirmative and conclude that recognizing the Justices as fiduciaries is consistent with the purpose of fiduciary law.

A. What Is a Fiduciary?

Given the absence of judicial precedent on point, the question whether the Justices should be regarded as fiduciaries is a novel one. As I have previously explained, courts have routinely determined the fiduciary status of once novel instances by relying on forms of analogical reasoning, instead of deploying a widely accepted, precise, and rule-like definition. They have either *explicitly* compared the defendant's situation to instances where fiduciary status is well established or have *implicitly* done so by invoking a list of generalized factors elicited from similar instances.[79] This approach has the advantage of being intuitive but, without more, it has its limitations. As Professor Tamar Frankel observed, the common use of analogies is "uninstructive, because the courts do not explain *why* some similarities . . . are relevant and others not."[80] Similarly, Judge Richard Posner opined that analogies are ultimately rhetorical acts that can be justified only by looking to some underlying policy or purpose of the law that

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[79] Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 868-69 (2013).

[80] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 805 (1983) (emphasis added).

is to be applied and extended.[81] These views underscore the necessity of understanding and identifying the *reasons* why courts might choose to extend the fiduciary status to a particular individual or entity. Rather than searching for factors or elements constitutive of a fiduciary relationship, perhaps a better approach is to identify the *reasons* why courts may recognize certain relationships as fiduciary.

B. The Purpose of Fiduciary Law

The reasons for recognizing fiduciary status in any given instance are necessarily entwined with the purpose of fiduciary law itself. And the purpose of fiduciary law must be grounded principally in what makes fiduciary relationships distinctive of other relationships governed mainly by other areas of civil obligation, such as contract or tort.[82] In my view, the primary object of fiduciary law is to protect and promote those socially valuable relations that ordinarily require high levels of trust to serve the purposes of the relation—that is, those relations in which

[81] Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 768 (2006) (reviewing LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005)).

[82] Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 932-33 (2011). To be sure, some courts regard the breach of fiduciary obligation as sounding in tort.

it can be said that the *optimal* level of trust is high.[83] By "trust," I mean the "state of mind that enables its possessor to be willing to make herself vulnerable to another—that is, to rely on another despite a positive risk that the other will act in a way that can harm the truster."[84]

The high level of trust characteristic of many fiduciary relations is often necessitated by particular features of the relation that leave at least one of the parties to the relation peculiarly vulnerable to the other; at the same time, such features tend to make it impracticable for the vulnerable party to mitigate her vulnerability through meaningful forms of self-help, such as monitoring. These features may include, for example, the asymmetrical knowledge and expertise between the parties (such as in the lawyer-client relationship) that make it difficult for the vulnerable party to even identify deficiencies in the other's performance or an endemic collective action problem (such as in the director-shareholder relationship) that impedes members of a group from holding their representatives to account. While the presence of any of these features is not essential to form a fiduciary relation, they tend to be common among fiduciary relations because they typically explain the need and hence the purpose of entering into the fiduciary relation in the first place. Also, in many fiduciary relations, an individual (the beneficiary) must yield her own interests to another's (the fiduciary's) discretion in order to

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[83] *Cf.* Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1720 (2006) (highlighting the law's role in optimizing interpersonal trust and observing the problem of both overtrusting and undertrusting).

[84] *See id.* at 1724 (describing the consensus definition of "trust").

fulfill the purposes of the relation.[85] This act of reliance is ordinarily accompanied by a high degree of trust reposed in the fiduciary, and it renders the beneficiary vulnerable to the fiduciary's discretionary power.

Individuals generally hesitate to rely on others and subject themselves to heightened vulnerability unless they have good reasons for doing so. Courts can furnish would-be beneficiaries with objective reasons to rely on the fiduciary's discretion, notwithstanding low levels of trust. As Matthew Harding has explained, courts can provide beneficiaries with a robust legal guarantee, backed by a sanction,[86] that the fiduciary's actions will conform to the minimum requirements of trustworthiness.[87] Once the beneficiary has relied on the fiduciary, the fiduciary is obliged by law to act consistently with what trustworthiness minimally requires.

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[85] *See* Matthew Harding, *Manifesting Trust*, 29 OXFORD J. LEG. STUD. 245, 253 (2009). There is some disagreement as to whether *discretionary authority* is a universal attribute of fiduciary relationships. *See* Arthur B. Laby, *Book Review*, 35 L. & PHIL. 123 (2015). That said, all fiduciary relationships seem to involve some form of choice on the part of the fiduciary.

[86] The common remedy of a fiduciary breach is the disgorgement of ill-gotten gains. *See* Iris Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-stripping Rule*, 28 OXFORD J. LEG. STUD. 763 (2008).

[87] *See* Matthew Harding, *Trust and Fiduciary Law*, 33 OXFORD J. LEG. STUD. 81, 98 (2012).

Importantly, the beneficiary's reliance affords the fiduciary a concrete *opportunity* to prove trustworthy. If the fiduciary takes up this opportunity and actually demonstrates trustworthiness, then the beneficiary now has tangible reasons to repose deeper levels of trust and continue to rely, potentially setting in motion a beneficial cycle of trust and trustworthiness characteristic of enduring and successful fiduciary relationships.[88]

By providing this guarantee of trustworthiness, fiduciary law—through its proscriptive rules and, in some jurisdictions, prescriptive standards[89]—helps to narrow the gap between actual trust and requisite trust and encourages the formation of fiduciary relations. By ameliorating this common trust deficit, fiduciary law plays a key role in protecting and promoting the integrity of those social and economic relations that are generally seen as welfare-enhancing.[90]

C. The Supreme Court as Fiduciary

In my view, the Supreme Court as a whole and its individual Justices are fiduciaries to the citizens subject to the Court's jurisdiction, the primary beneficiaries of the relation. This

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[88] *Id.* at 99.

[89] *See* Paul B. Miller, *Dimensions of Fiduciary Loyalty*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds., forthcoming 2018) (observing jurisdictional variation).

[90] *See* Sung Hui Kim, *Fiduciary Principles and Corruption, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., forthcoming).

conclusion is consistent with and advances fiduciary law's purpose to protect and promote socially valuable relations that ordinarily require high levels of trust to satisfy the purposes of the relation. Notwithstanding popular cynicism about government, the relation between the Supreme Court and citizens, like all public fiduciary relations, is welfare-enhancing and generally regarded as socially valuable, if not essential. But in what sense can we say that high levels of trust are necessary to fulfill the purposes of the relation?

The purposes of the Supreme Court-citizen relation are well-known and have been enshrined in the U.S. Constitution and other founding-era documents. As the federal court of last resort, the Court is the final arbiter of a significant subset of cases and controversies that will invariably affect the legal and practical interests of all citizens. The Court also serves as an important protector of civil liberties by acting as a primary constraint on the power of the other two branches of the federal government and on the power of state governments. By exercising these functions, the Court promotes the rule of law for the benefit of all citizens.

In order to serve the foregoing purposes, citizens as a group must invariably yield their interests to the Court's discretion. While such reliance leaves citizens especially vulnerable to the Court, citizens have limited ability to mitigate their vulnerability through self-help. Lacking time and expertise, citizens cannot easily assess how the Court's opinions and actions will impact their legal and practical interests. Being numerous and geographically dispersed, citizens face collective action problems in making their views known to the Justices either directly, through amicus briefs, or indirectly, through their elected representatives. Because citizens can do little to limit their peculiar vulnerability, citizens must necessarily repose high levels of trust in the Court. Recognizing the Supreme Court Justices as fiduciaries would appear consistent with fiduciary law's purpose to protect and promote this socially valuable relation.

Although recognizing Supreme Court Justices as fiduciaries is without judicial precedent, there has long been a tradition of subjecting judges to fiduciary-like standards, albeit in the relatively extreme context of judicial impeachments. As Ethan Leib and his colleagues have shown in their fiduciary account of judging, the fiduciary standard has been consistently applied to judges in both pre- and post-Revolutionary impeachment proceedings.[91] For example, one of the most explicit modern references to the fiduciary principle occurred in 1936 during the Senate removal proceeding of Judge Halsted Ritter. In that proceeding, Senator William McAdoo (D-CA) directly quoted the fiduciary standard embraced in the famous case of *Meinhard v. Salmon*.[92] Senator McAdoo argued that judges should abide by "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[93]

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[91] Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 715-717 (2013).

[92] 249 N.E. 545 (N.Y. 1928).

[93] E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1044, n.137 (1975) (quoting Senator McAdoo).

Also, recognizing citizens as the primary beneficiaries of the Supreme Court's fiduciary obligation is consistent with the explicit oath taken by each Justice to "faithfully and impartially discharge and perform all the duties incumbent" on them "under the Constitution and laws of the United States."[94] This pledge of loyalty to the Constitution reflects the founding-era principle that all institutions of government exist solely to benefit the people and founding-era writings that conceptualized government offices as holding citizens' interests in a public trust, constrained by fiduciary standards.[95] It is also generally consistent with judicial rhetoric characterizing public offices as public trusts[96] and a plethora of judicial opinions holding both

[94] 28 U.S.C. § 453 (2012).

[95] *See, e.g.*, Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 466-68 (2010).

[96] *See, e.g.*, Trist v. Child, 88 U.S. 441, 450 (1874) ("The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good."); Providence Tool Co. v. Norris, 69 U.S. 45, 55 (1864) ("These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee."); Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Cir. 1967) ("It is a living tenet of our society and not mere rhetoric that a public office is a public trust.").

elected and appointed public officials accountable for breaching their fiduciary obligations owed to their respective federal, state, or municipal governments and to the citizens subject to their jurisdiction.[97]

That said, just because citizens may be the ultimate beneficiaries of the Supreme Court's fiduciary obligations does not mean that the Justices are agents per se and thus must comply with the majoritarian preferences of the people. While Justices are public servants, their primary responsibility is to uphold the Constitution and other laws. In performing this circumscribed role, the Justices are entitled to rely upon the fact that they are part of a wider network of public fiduciaries—including the officers and institutions of the Executive and Legislative Branches—which collectively are designed to incorporate public preferences and promote the public welfare.[98]

In sum, the high levels of trust needed to sustain the socially valuable relation between the Supreme Court and the citizens subject to its jurisdiction justify recognizing the Supreme Court and the individual Justices as fiduciaries subject to a fiduciary obligation. Doing so is also consistent with the tradition of imposing fiduciary standards on federal judges in the impeachment context, the judicial oath taken by each Justice, the judicial rhetoric casting

[97] *See* Kim, *Legislator Insider Trading*, *supra* note 79, at 877-80, 889-90 (for cases holding public fiduciaries liable).

[98] *See* Criddle, *supra* note 95, at 473.

public offices as public trusts, and the many judicial opinions holding both elected and appointed public officials accountable for breaching their fiduciary obligations.

III. The Fiduciary Duty to Forgo Gifts

In this Part, I make the case that a fiduciary duty to forgo gifts should be imposed on the Justices as a means of securing the higher levels of trust necessary to sustain the relation between the Supreme Court and the citizens subject to its jurisdiction.

A. What Trustworthiness May Require

As recounted above, Harding has argued that courts can promote trust in fiduciary relations by providing beneficiaries with a guarantee that the fiduciary's actions will conform to the minimum requirements of trustworthiness. Hence, the question naturally arises: what constitutes trustworthiness under the common law of fiduciary obligation?

Fiduciary law is characterized by a number of different proscriptive and prescriptive standards of loyalty applicable to different fiduciary contexts. The most prominent of the proscriptive standards are the no-conflict and no-profit rules. These rules prohibit fiduciaries from placing themselves in situations of unauthorized conflicts of interests and from receiving unauthorized profits in connection with the fiduciary relationship.[99] While the specific purpose and nature of these rules has long been debated, many fiduciary law scholars believe that these

[99] Academics debate whether these are two separate rules or that the no-profit rule is subsumed within the no-conflict principle. I subscribe to the latter view but, for simplicity's sake, will refer to these as two separate rules per convention.

rules serve a prophylactic function—that is, the rules are intended to prevent an undesired outcome.[100] As further explained by Lionel Smith, "[p]erhaps the most frequently heard explanation for the prophylactic rules [the no-conflict and no-profit rules] is that they are designed to prevent fiduciaries from being *tempted*."[101] But what precisely do these rules aim to prevent? Temptation from what?

The proscriptive rules are designed to prevent the fiduciary *from being tempted into taking advantage of the beneficiary*. As Harding has explained, a fiduciary takes advantage of her beneficiary when, in deciding what to make of an opportunity that is available to her only qua fiduciary, she apprehends that her beneficiary's interests favor choosing *x* and "that her own interests weigh in favour of *y* and deliberately chooses *y* over *x*."[102] This rationale incorporates the social expectation that the fiduciary ought to make choices on behalf of her beneficiary with a view to benefitting the beneficiary, and that all other considerations, including

[100] *See* Gareth Jones, *Unjust Enrichment and the Fiduciary's Duty of Loyalty*, 84 L.Q. REV. 472, 474 (1968); Lionel Smith, *Deterrence, Prophylaxis and Punishment in Fiduciary Obligations*, 7 J. EQUITY 87 (2013).

[101] Lionel Smith, *The Motive, Not the Deed*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53, 60 (Joshua Getzler ed., 2003) (emphasis added).

[102] Harding, *supra* note 87, at 94.

considerations relating to self-interest and perceived obligations to family (and, perhaps, close colleagues),[103] should never taint the fiduciary's deliberation.[104]

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[103] While most U.S. jurisdictions regard conflicts of interests involving relatives as presumptively suspect, there is some ambivalence toward conflicts of interests involving friendships. *See* Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 911 (2011) (noting, with respect to Delaware corporate law's treatment of directorial independence, that "[s]ocial ties, even close ones, have generally (though not quite always) not been enough [to find lack of independence]" and citing sources).

[104] Some commentators have disputed the conventional judicial wisdom that traditional fiduciary gain-based remedies achieve complete deterrence. *See, e.g.*, Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1017 (2017). While the gain-based remedy *alone* would fail to deter the economically rational fiduciary, complete deterrence may be accomplished by failing to offset extraneous costs incurred by the fiduciary, such as the defendant's litigation costs (including reputational losses) and the opportunity costs of the breach. That said, such deterrence may be "fragile" in light of the fact that there may be hidden or psychic *benefits* from a fiduciary breach that are also not fully considered by courts. *See* Bert I. Huang, *The Equipoise Effect*, 116 COLUM. L. REV. 1595, 1630-32 (2016).

While the objective of preventing the fiduciary from being tempted into taking advantage of the beneficiary is broadly consistent with the case law, courts often articulate the precise rationale as emphasizing, a bit more narrowly, the dangers of self-interested intentions—namely, that the fiduciary must not be *tempted into using the fiduciary position to seek her own advantage*. For example, in *Regal (Hastings) Ltd. v. Gulliver,* the court warned of the "temptation to seek [one's] own advantage" when it strictly applied the no-profit rule.[105] In *Guth v. Loft,*[106] Delaware's seminal corporate opportunities case, the court explained the purpose of the no-profit rule as being grounded in the "wise public policy that, for the purpose of removing all *temptation*, extinguishes the possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation."[107] In *Diamond v. Oreamuno*,[108] a case in which the defendants exploited confidential information "acquired by them solely by virtue of their positions"[109] through insider trading, the New York state court observed—more subtly—that the no-profit rule[110] was designed "'to *prevent* [wrongs], by removing from agents and trustees

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[105] Regal (Hastings) Ltd. v. Gulliver, [1967] 2 AC 134, 154 (HL) (per Lord Wright).

[106] 5 A.2d 503 (Del. Ch. 1939).

[107] *Id.* at 510 (emphasis added).

[108] 248 N.E.2d 910 (N.Y. 1969).

[109] *Id.* at 911.

[110] The court referred to the rule "that prohibits a trustee or agent from extracting secret profits from his position of trust." *Id.* at 912 (citations omitted).

all *inducement* to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.'"[111] Whether articulated as preventing the fiduciary *from being tempted into taking advantage of the beneficiary* or preventing the fiduciary *from being tempted into using the fiduciary position to seek her own advantage,* the rationale seems to be prophylaxis.[112]

But what type of conduct presents enough of a "temptation" risk such that it is deemed out of bounds? Importantly, the application of the proscriptive rules has *not* been confined to prohibiting conduct that merely takes advantage of, or harms, the beneficiary. After all, *avoiding the temptation* to seek one's own advantage is necessarily broader than merely not taking advantage of the beneficiary. Rather, the fiduciary must avoid placing herself in a situation that raises the *specter* of self-interested conduct. Consistent with the rationale of preventing the fiduciary from being tempted into seeking her own advantage, courts have occasionally interpreted the proscriptive rules to prohibit fiduciaries from using their positions (in sometimes creative ways) to financially enrich themselves, even when the risk of loss to

[111] *Id.* at 912 (emphasis added) (citations omitted).

[112] Not all legal scholars subscribe to the view that the fiduciary duty of loyalty is principally grounded in a prophylactic rationale. *See, e.g.*, EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016); Criddle, *supra* note 104; Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L. REV. 969 (2013).

the beneficiary *in the specific context* was remote. Close analysis of these cases reveals that courts were proscribing the mere use of the fiduciary's entrusted position for self-regarding gain, evincing what I have elsewhere referred to as an "anti-corruption norm" in fiduciary law.[113]

For example, in *Reading v. Attorney-General*, the court found a British Medical Corps army sergeant liable for using, without permission, his uniform to assist the illegal activities of a third party, even though those activities were completely unrelated to and thus did not impair his Medical Corps tasks.[114] In *United States v. Drumm*, the court found a USDA poultry inspector liable for moonlighting in a private consulting capacity, in violation of USDA policy, even though his private consulting duties did not undermine any of his USDA duties.[115] In *Snepp v. United States*, the court found a former CIA agent liable for publishing (post-

[113] *See* Kim, *Legislator Insider Trading*, *supra* note 79, at 892-908; Sung Hui Kim, *Fiduciary Law's Anti-Corruption Norm*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds., 2018); Kim, *supra* note 90. By "self-regarding gain," I mean gain that is "supererogatory—neither part of the explicit compensation allocated to the individual nor culturally viewed as an acceptable or unavoidable perquisite of the role." *Id*.

[114] *See* Reading v. Attorney-General [1951] A.C. 507 (Eng.); Reading v. The King, [1948] 2 K.B. 268 (Eng.) (prior history).

[115] 329 F.2d 109 (1st Cir. 1964).

retirement) a book without submitting it for prepublication review, in violation of CIA policy, even though the book contained no classified information and there was no demonstrable harm to the CIA.[116] In *Diamond v. Oreamuno*, the court found corporate insiders liable for unauthorized insider trading, even though they had not deprived their company of concrete gains, as the company had not engaged in contemporaneous trading.[117] In *Irving Trust Co. v. Deutsch,*[118] the appellate court found corporate directors liable for wrongfully taking a corporate opportunity, despite the district court's factual finding that the corporation was not financially capable of exploiting the opportunity.[119]

The foregoing cases, all decided on fiduciary duty grounds, seem to reflect the view that it is not enough just to reassure the beneficiary that the fiduciary has taken steps to avoid or minimize harm to the beneficiary. Rather, trustworthiness in *some* fiduciary contexts requires the fiduciary to refrain from conduct that itself may not take advantage of the beneficiary but by virtue of its nexus to the fiduciary position arouses the suspicion of doing so. As suggested by these cases, this more onerous standard of trustworthiness can translate into a specific

[116] 444 U.S. 507 (1980).

[117] *See* Diamond v. Oreamuno, 248 N.E.2d 910 (N.Y. 1969). *But see* Freeman v. Decio, 584 F.2d 186, 196 (7th Cir. 1978) (no liability); Schein v. Chasen, 313 So. 2d 739, 749 (Fla. 1975) (same).

[118] 73 F.2d 121 (2d Cir. 1934).

[119] *Id*. at 124.

obligation to forswear any self-serving conduct that itself may not pose a discernible risk of harm to the beneficiary but is either *in close proximity to* or *in the general class of* conduct that may pose such a risk. In short, trustworthiness may require the fiduciary to refrain from personally benefitting from her position in any manner not authorized by the beneficiary.

Taken to its logical conclusion, this standard of trustworthiness could extend to ban unauthorized gifts conferred *by reason of* one's fiduciary position. So long as there is a causal nexus between the fiduciary position and the gift—that is, the gift would not have been conferred *but for* the fiduciary position, the solicitation or acceptance of a gift without the assent of one's beneficiary would seem in close proximity to the type of conduct proscribed in the foregoing cases. Moreover, as the social science on gift-giving practices confirms, a ban on gifts seems consistent with the prophylactic rationale of the no-conflict and no-profit rules—namely, that of avoiding the temptation to take advantage of the beneficiary (or to seek one's own advantage).

Contrary to popular belief that gifts are merely innocuous expressions of altruism, gifts can serve as powerful tools of influence in the context of an individual's social networks. The principal way in which gifts exert this type of influence is through what social scientists have identified as the *norm of reciprocity*, a social norm that obliges donees to repay, in kind, favors, gifts and invitations received from donors.[120] As evolutionary biologists, paleoanthropologists, sociologists, and psychologists have observed and theorized, the norm of reciprocity operates by unleashing (in the donee) feelings of indebtedness, akin to guilt, that can only dissipate when the gift or favor is returned. These feelings explain how the norm can take on a moralistic character: the urge to reciprocate may be experienced more as an imperative rather than a choice.[121] Like most social norms, the norm of reciprocity, is socially regulated and reinforced through social consequences. Adherents of the norm should gain or maintain prestige among members of their social networks while norm violators or "cheaters" who do not repay favors should suffer reputational costs. Those costs include being labeled as a "moocher," "leech," or "ingrate," or, worse, result in social ostracization.[122] So great are the psychological costs of

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[120] *See, e.g.*, ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 20-51 (4th ed., 2001); Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXP. SOC. PSYCHOL. 627 (1971).

[121] Mark A. Whatley et al., *The Effect of a Favor On Public and Private Compliance: How Internalized Is the Norm of Reciprocity?*, 21 BASIC & APPLIED SOC. PSYCHOL. 251, 252 (1999).

[122] CIALDINI, *supra* note 120, at 34; Whatley, *supra* note 121, at 252-53; *see also* RICHARD E. LEAKEY & ROGER LEWIN, PEOPLE OF THE LAKE: MANKIND AND ITS BEGINNINGS 191 (1978).

feeling indebted and being shamed for not reciprocating that people occasionally reject gifts that they feel they cannot repay.[123]

Therefore, by accepting a gift, the fiduciary effectively places herself under a psychic obligation to repay the gift in kind. To the extent that the gift is so valuable that it would be difficult to repay with an ordinary return-favor or gift, the fiduciary will be tempted to use her fiduciary powers to repay the gift. And to the extent that the repayment ends up directly or indirectly benefitting either the original donor or the fiduciary at the expense of the beneficiary,[124] the fiduciary has taken advantage of the beneficiary *by reason of* the fiduciary position. As a result, a ban on gifts would seem to go a long way in foreclosing this temptation.

At first blush, the potential breadth of this exacting standard of trustworthiness is striking. After all, so long as a nexus to the fiduciary position can be established, the liberty interests of fiduciaries may be overridden by the putative need of beneficiaries for greater reassurance. Yet, this standard seems consistent with various black-letter pronouncements. For example, the *Restatement of Agency* holds that an agent is prohibited from acquiring "a material benefit from a third party in connection with transactions conducted or other actions taken on behalf

[123] CIALDINI, *supra* note 120, at 34.

[124] Even if the fiduciary is not directly materially benefited from repaying the gift, by maintaining the cycle of lucrative gift exchanges that proceed into the indefinite future, the fiduciary arguably benefits from the continued cultivation of her social status among her peer networks.

of the principal or *otherwise through the agent's use of the agent's position,*"[125] suggesting that the mere nexus to the fiduciary position suffices to trigger the no-profit rule. Also, the *Restatement of Agency* elsewhere notes, "An agent has a fiduciary duty to act loyally for the principal's benefit in *all* matters *connected with* the agency relationship,"[126] again indicating that the mere nexus to the fiduciary relationship is sufficient. This standard is also consistent with the *Restatement of Trusts*, which holds that the duty of a trustee is "to administer the trust *solely* in the interest of the beneficiary."[127] Accordingly, if the trustee is exploiting (without authorization) resources or opportunities made available through the fiduciary relation to pursue ends other than those of the beneficiary, he is not acting in the sole interest of the beneficiary and thus contravening the ostensible purposes and underlying promises of the fiduciary relation. In applying this more rigorous standard of trustworthiness, courts seem to be making the judgment that, in some contexts, something more is required to preserve the integrity of certain private and public fiduciary relations, presumably in situations where trust seems especially fragile or crucial to sustain the relation.

B. Why the Supreme Court Should Forgo Gifts

Above I've argued that forgoing gifts is generally consistent with what trustworthiness requires in *some* fiduciary contexts. But why should such a heightened obligation of

[125] RESTATEMENT (THIRD) OF AGENCY § 9.02 (AM. LAW INST. 2006) (emphasis added).

[126] *Id*. § 8.01 (emphasis added).

[127] RESTATEMENT (FIRST) OF TRUSTS §§ 170 (AM. LAW INST. 1935) (emphasis added)

trustworthiness be specifically placed on the Supreme Court? As I've posited in Part II, fiduciary law exists to protect those socially valuable relations that ordinarily require high levels of trust in order to fulfill the purposes of the relation. In my view, even higher levels of trust are needed to sustain the relation between the Supreme Court and citizens, as compared to conventional fiduciary relationships. If so, it seems reasonable to impose on Justices an even higher obligation to reassure beneficiaries by embracing the general principle that gifts should be refused. In particular, three features of the Supreme Court-citizen fiduciary relation suggest that higher levels of trust are needed.

First, to state the obvious, the Supreme Court exercises substantially greater power and discretion than what is enjoyed by conventional fiduciaries. The Supreme Court, like members of Congress and the President, stands at the helm of its respective branch of the federal government and thus retains enormous power and influence over the legal and practical interests of all citizens.

Second, citizen-beneficiaries are considerably more vulnerable than conventional beneficiaries for a number of reasons. Unlike many conventional beneficiaries, citizens have only indirect influence over the selection of their fiduciary Justices, who are appointed by the President and confirmed by the Senate. And while citizens are ill-equipped (as are conventional beneficiaries) to assess the performance of their fiduciaries, citizens can only observe the actions of their fiduciary Justices at a distance and only with the imperfect assistance of still distant intermediaries, such as the media and judicial watchdog organizations. Even if citizens become dissatisfied with the performance of individual Justices, citizens have limited and indirect channels to redress their grievances. They have no direct authority over the Supreme Court and thus cannot compel Justices to vote in any particular way. Indeed, Justices are often said to fulfill an important countermajoritarian role and are supposed to countermand the preferences of the majority of citizens when such preferences run afoul of constitutional principles. Even in extreme cases, the Justices, as with all Article III judges, can only be removed for cause and can only be removed by Congress. Also, unlike most conventional beneficiaries, citizens ordinarily cannot exit the relation, which creates a state of even higher vulnerability.

Third, unlike conventional beneficiaries who are ordinarily in a position to approve or veto the fiduciary's actions, citizen beneficiaries cannot meaningfully consent to actions by the Justices, nor can they realistically opt out of gift-conflicted adjudication. As Paul Finn has observed, in the private domain, disclosure to and consent by a beneficiary can immunize a fiduciary from what would otherwise constitute a breach of duty; however, in the public domain, consent from large collectives is inherently difficult to secure.[128] Moreover, to the extent that gifts are disclosed by the Justices, they are disclosed only *after* the gift has been made, which dispels the notion that citizens can consent to or otherwise authorize the gift through silence. Also, as noted above, there is no guarantee that disclosure will be made in

[128] Paul Finn, *The Forgotten "Trust": The People and the State*, *in* EQUITY: ISSUES AND TRENDS 150 (Malcolm Cope ed., 1995).

every case of a significant gift.[129] Hence, it is simply not reasonable to assume that citizens have acquiesced in or consented to gifts accepted by the Justices.

In sum, the great power entrusted to the Supreme Court and the citizenry's vulnerability to that power, coupled with citizens' inability to meaningfully consent to the Justices' actions, result in high levels of trust being reposed in the Supreme Court. The power entrusted to the Supreme Court is far greater than that exercised by ordinary fiduciaries, who are subject to fiduciary duties under private law, which necessitates an even higher level of trust. This higher level of trust justifies holding the Supreme Court to a higher standard of conduct than that which applies to most fiduciaries. That higher standard of conduct should include a general obligation to forgo gifts. In my assessment, the acceptance by individual Justices of personal gifts of high value is likely to be interpreted by citizens as being untrustworthy and thus likely to erode public trust.[130] Thus, a more expansive reading of the proscriptive rules to ban gifts to the Justices seems reasonable.

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[129] *See supra* text accompanying notes 63-64.

[130] As Gillers noted, "I am worried about the public perception of gratitude, even if there is no effect on your behavior. And the greater the luxury, the greater risk of public suspicion." Lipton, *supra* note 3.

C. How the Duty Might Be Defined

Of course, the devil is always in the details, so how should this ban be defined and enforced? Due to space constraints, I must leave the task of precisely defining the contours of the duty to forgo gifts and the means by which it might be enforced, which are issues that implicate constitutional concerns, for another day. However, I will attempt to sketch out the outlines of a potentially workable definition.

First, the duty to forgo gifts should strike a balance between foreclosing temptation and retaining the flexibility to advance any mission deemed central to the Supreme Court. Hence, it makes sense to carve out from the scope of the ban those gifts that are *necessary* to discharging the Court's core responsibilities. Aside from the obvious responsibility of adjudication, one could articulate, for example, an *educational* mission of the Court—such as the responsibility to educate the public and the legal profession about the value of the rule of law. To the extent that there is consensus about such an educational mission, one could exempt certain gifts bestowed in connection with important law school- or bar-related functions.[131] For example, the Judicial Conference gift regulations already exempt "the gift [which] consists of

[131] There may be countervailing reasons why there should be no exception for advancing an educational mission. For example, law schools and bar associations may have vested interests in litigation that may be adjudicated by the Supreme Court. *See, e.g.*, Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73 (2010) (describing the vested interests of the organized bar).

an invitation and travel expenses, including the cost of transportation, lodging, and meals . . . to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice."[132]

Second, for reasons principally relating to administrability, some sort of de minimis exception for gifts of trivial value seems reasonable. Current Judicial Conference regulations already exempt "greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation,"[133] and modest items of food and refreshments that are not offered as part of a meal.[134] Although individuals are not immune to pressures to reciprocate low value gifts, low value gifts generally pose less risk that the fiduciary position would be used to reciprocate. Moreover, low value gifts are less likely to draw significant public condemnation.

Third, the duty should be mandatory and not leave to the individual Justices the decision of whether to forgo a gift. A mandatory prohibition would mitigate some of the predictable psychological costs linked to rejecting gifts.[135] After all, it should be far easier to decline a gift

[132] 2 GUIDE TO JUDICIARY POLICY § 620.35(b)(3) (2010).

[133] *Id.* § 620.25(b) (2010).

[134] *Id.* § 620.25(c) (2010).

[135] Anthropological and psychological studies confirm that the norm of reciprocity is bolstered by the felt social obligation to receive. *See, e.g.*, CIALDINI, *supra* note 120, at 31;

because one is *required to do so* than because one *chooses to do so.* Also, a mandatory prohibition would lessen the risk of self-deception[136] and "naive cynicism," the psychological tendency to believe that one is less prone to bias than others.[137] Indeed, self-deception and naive cynicism may have played a role in some of the controversial decisions of Justices *not* to recuse themselves under the Court's voluntary recusal policy.[138] Of course, a mandatory duty raises difficult enforcement issues and potentially implicates constitutional separation-of-powers concerns.

Fourth, to the extent practicable, the duty should carve out gifts that have no nexus to the fiduciary position—that is, gifts bestowed for reasons other than the fact that the recipient happens to be a Supreme Court Justice. For example, the regulations already exclude opportunities and benefits that have been made available for reasons other than one's judicial status, e.g., "loans from banks and other financial institutions on terms that are available based on factors other than judicial status."[139] That said, because this element is likely to be contested,

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MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (1967).

[136] Samet, *supra* note 64.

[137] *See* Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 135, n.39 (2011).

[138] *See* Frost, *supra* note 67; Neumann, *supra* note 70; Roberts, *supra* note 70.

[139] *Id*. § 620.25(b)-(c).

it may be prudent to draw an overinclusive bright-line rule that prohibits a wider range of gifts than those conferred strictly by reason of the fiduciary position. For example, the ethics rules applicable to members of Congress place strict caps on the value of gifts from personal friends (but no limits on gifts from relatives).[140] (By contrast, as discussed above, the Judicial Conference regulations are significantly more liberal, restricting gifts from friends only to the extent that the friend's interest in a matter would *require* the judge's recusal.[141])

Of course, one could choose to craft a fairly narrow ban on gifts that would principally address the concern that gifts from potential litigants or amici (and their respective affiliates) may create a conflict of interest that could improperly sway the Justices into deciding cases in their donors' favor. Such a ban could reach gifts received from any person or entity with a direct or indirect stake in either pending litigation or litigation that frequently arises in front of federal courts. If, for example, an individual is affiliated with a think-tank that routinely files amicus briefs to the Supreme Court, gifts from that individual or think-tank may presumptively be covered by the ban. The problem with crafting such a narrow ban is that it's not easy to predict whether one will become involved in litigation that frequently arises before the federal

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[140] 5 U.S.C. § 7353; RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 146 (2009).

[141] 2 GUIDE TO JUDICIARY POLICY § 620.35(b)(4) (2010) (emphasis added); *see also supra* text accompanying notes 31-42.

courts. Also, a less robust ban may insufficiently protect and promote the high levels of trust needed to preserve citizens' faith in government.

One complication arises from the fact that fiduciary standards have been traditionally imposed and enforced by courts and there is no court with the authority to specify and enforce standards against the Supreme Court. Therefore, alternative extra-judicial means of articulating and enforcing a gift prohibition that covers the Justices must be considered. For example, Congress could act to impose an ethics code, which includes a detailed gift prohibition and specifies disciplinary procedures and remedies,[142] on the Justices. While doing so certainly raises separation of powers and judicial independence issues, I am persuaded by the academic commentary that concludes that Congress has the broad (but not unlimited) constitutional authority to regulate the ethical conduct of the Justices.[143] I am also persuaded that in light of

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[142] *See* Frost, *supra* note 52, 463-75 (exploring the constitutionality of potential disciplinary remedies, including temporary suspensions, financial penalties and impeachment for serious breaches).

[143] *See, e.g.,* Frost, *supra* note 52; Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation*, 78 IND. L.J. 153, 160 (2003) ("[T]he judicial independence the Constitution gives to the third branch is counterbalanced by powers the Constitution delegates to the first branch to promote judicial accountability.").

these constitutional concerns, the best course of action would be for the Justices to adopt and enforce their own ethics code, one that incorporates a robust fiduciary duty to forgo gifts.[144]

Conclusion

The Supreme Court should embrace a fiduciary duty to forgo gifts. The obligation to forgo gifts is premised on the notion that the Justices are fiduciaries to the citizen-beneficiaries subject to the Supreme Court's jurisdiction and that refusing gifts is crucial to protecting the high levels of trust reposed in the Court by citizens. The acceptance of high value gifts by the Justices contributes to the corrosive public perception that elites have special access to the Justices at a time when citizens' trust in the Court has been low. Indeed, since 2010, less than 50% of Americans have approved of the Supreme Court's handling of its responsibilities, and—as of September 2017—*only* 18% of Americans reported having a "great deal" of "trust and confidence" in the judicial branch headed by the Supreme Court.[145] As Senator Elizabeth Warren, who co-sponsored a bill in 2017 to require the Supreme Court to adopt a code of ethics, wrote, "As the nation's highest court, the Supreme Court has an even greater duty to set the

[144] *Cf*. Frost, *supra* note 52, at 448 ("Thus, the best course of action going forward would be to convince the Court that it should take the lead in regulating the ethical conduct of its members to protect its own reputation, which would diminish the need for Congress to do so.").

[145] Poll, *Supreme Court*, GALLUP 1-3 (2016), http://news.gallup.com/poll/4732/supreme-court.aspx.

example for courts around the country and demonstrate that its decisions are based on a fair and unbiased assessment of the facts and the law, and not personal biases or their own financial interests."[146]

[146] Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO (Nov. 1, 2017); *see also* S. 835, 115th Cong. (2017) (bill to require the Supreme Court of the United States to promulgate a code of ethics); H.R. 1960, 114th Cong. (2017) (House bill).