

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICA FIRST LEGAL FOUNDATION,
611 Pennsylvania Ave. SE #231
Washington, DC 20003,

Plaintiff

v.

JOHN G. ROBERTS, JR.,
*in his official capacity as Presiding Officer of
the Judicial Conference of the United States,*
1 First Street NE,
Washington, D.C. 20543.

ROBERT J. CONRAD,
*in his official capacity as Director of the
Administrative Office of the U.S. Courts,*
Administrative Office of the United States
Courts
One Columbus Circle, NE
Washington, D.C. 20544

Defendants.

Civil Action No.: 25-1232

FIRST AMENDED COMPLAINT

1. For several years, the media and enterprising lawmakers have launched an onslaught to destroy the impartiality and political neutrality of Article III courts and, particularly, the Supreme Court. Justices Thomas, Alito, and Kavanaugh have all faced political and physical threats because of the politicization and weaponization of the law. This lawfare has been led by Senator Sheldon Whitehouse and Representative Hank Johnson, relying upon an ideologically favorable legacy media,

to falsely accuse Justices Thomas and Alito of ethical improprieties. Their aim was simple: to chill the judicial independence of these Supreme Court Justices.

2. The Ethics in Government Act of 1978 first required Supreme Court Justices to make financial disclosures, yet it never required disclosures of personal hospitality unrelated to official business. But remarkably, the Administrative Office of the U.S. Courts (“Administrative Office”) has recently approved guidance changing the scope of exempt “personal hospitality” activities to be limited to “food, lodging, or entertainment.” The changes were drafted by committees within the Judicial Conference of the United States (“Judicial Conference” or “the Conference”), then approved and published by the Administrative Office in the Federal Register and eventually adopted by the Judicial Conference.

3. Not stopping there, Senator Sheldon Whitehouse and Representative Hank Johnson zealously accused Justice Thomas of acting willfully to violate the Ethics in Government Act and directed the U.S. Department of Justice to criminally investigate the matter. Similarly, Senator Whitehouse filed an ethics complaint against Justice Alito, accusing him of violating “several canons of judicial ethics.” Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, to the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States, Chairman, Judicial Conference of the Supreme Court of the United States, Director, Administrative Office (Sept. 4, 2023).

4. Numerous reviews by the Conference's Committee on Financial Disclosure have all led to the same result. The former chair, Honorable Bobby R. Baldock, his successor, Honorable Joseph H. McKinley, Jr., and former Secretary to the Conference, Honorable Thomas F. Hogan, have all issued determinations that the alleged errors and omissions by Justice Thomas were not willful. Yet despite the repeated and conclusive findings for over a decade, Senator Whitehouse and others have not given up their onslaught of attacks.

5. The Judicial Conference and the Administrative Office are central levers for Senator Whitehouse and Representative Johnson's lawfare enterprise. The Conference and the Administrative Office have actively accommodated oversight requests from these congressmen concerning their allegations against Justices Thomas and Alito. Under our constitutional tradition, accommodations with Congress are the province of the executive branch. The Judicial Conference and the Administrative Office are therefore executive agencies. Such agencies must be overseen by the President, not the courts. Judicial relief here not only preserves the separation of powers but also keeps the courts out of politics.

6. Plaintiff America First Legal Foundation ("AFL") brings this action against the Honorable John G. Roberts, Jr. and the Honorable Robert J. Conrad, in their official capacities as Presiding Officer of the Judicial Conference and Director of the Administrative Office, respectively, to compel compliance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

7. The federal judiciary is the system of courts. These courts are made up of judges who preside over cases and controversies. The executive branch, on the other hand, is responsible for taking care that the laws are faithfully executed and ensuring the proper functioning of the government. Federal courts rely on the executive branch for facility management and security. Federal judges, as officers of the courts, need resources to fulfill their constitutional obligations.

8. Courts definitively do not create agencies to exercise functions beyond resolving cases or controversies or administratively supporting those functions. But the Administrative Office of the U.S. Courts does exactly that. The Administrative Office is controlled by the Judicial Conference, headed by the Chief Justice of the United States Supreme Court, John Roberts. The Administrative Office is run by an officer appointed by—and subject to removal by—Chief Justice Roberts. 28 U.S.C. § 601.

9. Congress cannot constitutionally delegate to an officer improperly appointed pursuant to Article II powers exceeding those that are informative and investigative in nature. *Buckley v. Valeo*, 424 U.S. 1, 137–39 (1976).

10. The Judicial Conference’s duties are executive functions and must be supervised by executive officers who are appointed and accountable to other executive officers. *United States v. Arthrex, Inc.*, 594 U.S. 1, 6 (2021) (Officers who engage in executive functions and are not nominated by the President “must be directed and supervised by an officer who has been.”).

11. Thus, the Judicial Conference and Administrative Office exercise executive functions and are accordingly subject to FOIA. Accordingly, their refusal to comply with AFL's FOIA request is unlawful.

JURISDICTION AND VENUE

12. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Additionally, it may grant declaratory relief pursuant to 28 U.S.C. §§ 2201 et seq.

13. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

14. Plaintiff AFL is a nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans. AFL's mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media.

15. Defendant, John G. Roberts, Jr., in his official capacity as Presiding Officer of the Judicial Conference of the United States, is the head of an "agency" within the meaning of 5 U.S.C. § 552(f).

16. The Judicial Conference of the United States is located at 1 First Street NE, Washington, D.C. 20543.

17. The Judicial Conference is a policymaking body that oversees the Administrative Office and appoints and removes its directors.

18. Defendant, Robert J. Conrad, in his official capacity as Director of the Administrative Office of the U.S. Courts, is the head of an “agency” within the meaning of 5 U.S.C. § 552(f).

19. The Administrative Office of the U.S. Courts’ office is located at 1 Columbus Circle NE, Washington, D.C. 20002.

20. The Administrative Office has its own self-contained, organizational structure, composed of over 1,000 employees and numerous committees with distinct functions.

FACTS

21. Recently, the media and liberal lawmakers have sought to undermine the political independence of Article III Courts.

22. Upon information and belief, Senator Whitehouse and Representative Johnson communicated with staff from the Judicial Conference and the Administrative Office related to their allegations against Justices Thomas and Alito.

23. On July 30, 2024, AFL submitted FOIA requests to the Judicial Conference and the Administrative Office seeking records of communications between the agencies and Senator Whitehouse, Representative Johnson, or any member of their staff. *Exhibits 1, 2.*

24. On September 6, 2024, Ethan Torrey, Legal Counsel to the Supreme Court of the United States, responded to AFL’s request to the Judicial Conference. The response stated the agency’s belief that both the Judicial Conference and the Administrative Office are exempt from the FOIA. *Exhibit 3.*

25. On November 8, 2024, Andrew Grant, Financial Disclosure Committee Counsel to the Administrative Office, replied to AFL’s request to the Administrative Office. The response stated the agency’s belief that the Administrative Office is exempt from the FOIA. *Exhibit 4*.

26. AFL believes that these decisions are legal errors and that the Judicial Conference and the Administrative Office are subject to FOIA.

The Judicial Conference Is an Executive Agency Subject to FOIA

27. The FOIA incorporates the Administrative Procedure Act’s (“APA”) definition of “agency,” which means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the courts of the United States.” 5 U.S.C. §§ 551(1), 552(f)(1). Specifically included within its definition are “independent establishment[s],” §§ 104, 105, and “any independent regulatory agency[s].” § 552(f)(1).

28. The Judicial Conference is subject to the APA and the FOIA because it is: (1) an independent establishment, and (2) an independent executive agency. Unlike Article III institutions, which are intended to adjudicate, an executive agency holds inherent regulatory powers from which it formulates rules relating to its organization, procedures, or practice requirements. *Accord*. 5 U.S.C. § 552(a)(1).

29. The Judicial Conference is not a “court of the United States,” nor has it been ordained one by Congress. *See* 28 U.S.C. § 451.

30. The Conference’s ministerial duty to respond to congressional oversight exemplifies its status as an administrative body rather than a court of law. Congress

has asserted that it “created the Judicial Conference by statute, funds the Judicial Conference through appropriations, and enacted the ethics laws the Judicial Conference administers, and so has an obvious interest in overseeing these matters.” Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights & Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Robert Conrad, Director, Administrative Office (June 17, 2024).

31. The Judicial Conference’s organic statute prescribes the agency a variety of regulatory and administrative roles. 28 U.S.C. § 331. The Judicial Conference’s authority to promulgate and amend regulations makes it an independent regulatory agency, subjecting it to the FOIA. 5 U.S.C. § 552(f)(1).

32. The Judicial Conference has duties that are independent from the judiciary’s role in resolving cases or controversies, thus qualifying it as an independent establishment, and as such, an agency.

33. The Judicial Conference has the power to “prescribe and modify rules for the exercise of the authority provided in [28 U.S.C. §§ 351 et seq.],” which are required to be carried in effect by “[a]ll judicial officers and employees of the United States.” § 331.

34. The Judicial Conference is required to provide the public with notice and an opportunity to comment when proposing rules to be prescribed. 28 U.S.C. §§ 358(c), 2073. Moreover, proposed rules are required to be published in the Federal Register—

the official journal that documents rules made by agencies. *Procedures for the Judicial Conference’s Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*, as codified in *Guide to Judiciary Policy*, Vol. 1, § 440.20.40.

35. Notably, the Federal Register Act and the APA—acts requiring agencies to provide public notice and an opportunity to participate in policymaking—establish and outline the rulemaking process by which *Executive Branch agencies* issue legally binding rules. See 44 U.S.C. § 1501. Neither Congress nor courts publish their constitutional pronouncements in the Federal Register.

36. Further, the Judicial Conference’s organic statute authorizes the Conference to create standing committees, whose members are *appointed* by the Chief Justice, and are authorized to “hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority.” Compare 28 U.S.C. § 331 (2021), with Act of June 25, 1948, ch. 646, 62 Stat. 869, 907 (The original enactment of Title 28 of the United States Code did not provide the Judicial Conference with enumerated subpoena authorities. It was not until later statutory amendments that Congress expanded the agency’s executive powers to include issuing and enforcing subpoenas.).

37. The committees’ powers preclude the members from being mere employees; they must be officers. Accordingly, if the Chief Justice does indeed have this power to appoint officers, then he must be acting as an agency head, subjecting the Judicial Conference to the FOIA.

38. The Presiding Officer of the Conference is required to submit to Congress reports of proceedings and recommendations for legislation. 28 U.S.C. § 331. Congress has the authority to direct agencies and administrative officers or employees to report to the legislature, but judges are independent of any Congressional control save for impeachment. Directing the Chief Justice to take such action indicates the Judicial Conference acts as a federal agency.

39. The Presiding Officer of the Judicial Conference is a principal officer and is required to be presidentially appointed. The power to further appoint other executive officers of its subsidiary agency, the Administrative Office, reaffirms this fact. 28 U.S.C. § 601.

40. The Administrative Office's Director, to the extent he engages in executive powers with no superior other than the President, is a principal officer.

The Administrative Office Is an Executive Agency Subject to FOIA

41. As a subsidiary of the Judicial Conference, the Administrative Office is an independent establishment, making it an "agency." Its substantial performance of executive functions subjects it to the FOIA's requirements.

42. The Administrative Office is not a court. It has no judicial power, and its officers and employees are not acting as judges when acting pursuant to their Administrative Office roles. *See* 28 U.S.C. § 607 (expressly prohibiting all officers and employees of the Administrative Office from engaging directly or indirectly in the practice of law in any court of the United States). Further, unlike courts of the United

States that require judges to be removed by impeachment, the Director is appointed and removed by the Chief Justice. *Id.* § 601.

43. The Administrative Office has been responsive to congressional oversight. Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights & Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Robert Conrad, Director, Administrative Office (June 17, 2024); U.S. Congress, Senate Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2024*, report to accompany S. 2309, 118th Cong., 1st sess., July 13, 2023, S. Rep. 118-61, at 46. It is hornbook administrative law that only executive branch entities, not the courts, are subject to legislative oversight. Russell Wheeler, *Justice Thomas, Gift Reporting Rules, and What a Supreme Court Code of Conduct Would and Wouldn't Accomplish*, Brookings (May 1, 2023), <https://perma.cc/C7HQ-JHA5>. To hold that the Administrative Office is a court is tantamount to concluding that Congress has the power to superintend judges through its oversight power.

44. 28 U.S.C. § 601 plainly states that the Director of the Administrative Office is an officer of an executive agency. (“The Director and Deputy Director shall be deemed to be officers for purposes of title 5, United States Code.”); *see* 5 U.S.C. § 2104 (defining “officer” as an individual who is: (1) required by law to be appointed by the President, a court, *the head of an executive agency*, or the Secretary of a military department; (2) “engaged in the performance of a Federal function under

authority of law or an Executive act;” and (3) “subject to the supervision” of one of the previously listed authorities “or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.”). Thus, unlike judges who do not require executive supervision, the Director is required to be supervised while performing executive functions as the head of an executive agency.

45. The Administrative Office is an independent agency within the executive because it engages in executive functions.

46. The Director of the Administrative Office exercises core executive functions with vast discretion and autonomy.

47. The Director issues regulations implementing the Fair Chance to Compete for Jobs Act of 2019. 28 U.S.C. § 604(i)(5)(A) (“The regulations issued . . . shall be the same as substantive regulations promulgated by the Director of the Office of Personnel Management.”). That Act requires the Office of Personnel Management, the General Services Administration, and the Department of Defense—all executive agencies—to issue the same regulations.

48. The Director has complete discretion in fixing the compensation of, and appointing, inferior officers. 28 U.S.C. §§ 602, 604(a)(5), (16)(A).

49. Further, “[a]ll functions of other officers and employees of the Administrative Office and all functions of organizational units of the Administrative Office are vested in the Director,” and even more, “[t]he Director may delegate any of the Director’s functions, powers, duties, and authority . . . to such officers and employees” as he may choose. *Id.* § 602(d).

CLAIMS FOR RELIEF

Violation of FOIA, 5 U.S.C. § 552

50. AFL repeats and reincorporates the preceding paragraphs.

51. AFL properly requested records within the possession, custody, and control of the Defendants.

52. The Defendants have failed to produce the requested records, and statements have been made on their behalf that they will not do so.

53. Accordingly, AFL has exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(c)(i).

54. The Defendant has violated the FOIA by failing, within the prescribed time limit, to (i) reasonably search for records responsive to AFL's FOIA requests; (ii) provide a lawful reason for the withholding of any responsive records; and (iii) segregate exempt information in otherwise non-exempt responsive records.

PRAYER FOR RELIEF

AFL respectfully requests this Court:

i. Declare that the records sought by these requests, as described in the foregoing, must be disclosed under 5 U.S.C. § 552;

ii. Declare that the Defendants are subject to the FOIA as independent agencies within the executive branch;

iii. Order the Defendants to conduct searches immediately for all records responsive to AFL's FOIA requests and demonstrate that they employed search methods reasonably likely to lead to the discovery of responsive records;

- iv. Order the Defendants to produce by a date certain all non-exempt records responsive to AFL's FOIA requests;
- v. Award AFL attorney's fees and costs under 5 U.S.C. § 552(a)(4)(E); and
- vi. Grant AFL such other and further relief as this court deems proper.

April 22, 2025

Respectfully submitted,

/s/ William Scolinos

WILLIAM SCOLINOS (DC Bar No. 90023488)

DANIEL EPSTEIN (DC Bar No. 1009132)

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Counsel for America First Legal Foundation



July 30, 2024

VIA MAIL

The Honorable John G. Roberts, Jr.
Chief Justice of the United States
Chairman, Judicial Conference of the United States
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

Freedom of Information Act Request

Dear Chief Justice/Chairman Roberts,

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL promotes the rule of law in the United States, prevents executive overreach, ensures due process and equal protection for all Americans, and promotes knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (“FOIA”) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL has over 228,000 followers on Facebook, 251,000 followers on X, and our Founder and President has over 680,000 followers on X.

I. Background

The Ethics in Government Act of 1978 required Supreme Court Justices to make financial disclosures, yet it never required disclosures of personal hospitality unrelated to official business.¹ The Judicial Conference of the United States (“the Conference”) has recently revised the Judicial Conference regulations changing the scope of exempt “personal hospitality” activities to be limited to “food, lodging, or entertainment.”² The rules and its revisions were drafted by the Conference’s

¹ Public Information Office, Justice Clarence Thomas Public Statement, (available at <https://tinyurl.com/23jx9prw>).

² Letter from Roslynn R. Mauskopf, Director, Administrative Office of The United States Courts, to Sheldon Whitehouse, Chairman, Federal Courts, Oversight, Agency Action, and Federal Rights,

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320 South Madison Avenue
Monroe, Georgia 30655

committees, whose members were appointed by the Chief Justice.³ The Administrative Office then published the rules in the Federal Register, and the Judicial Conference later approved them.⁴ Once rules are approved, the Supreme Court promulgates them and the rules become law unless rejected by Congress.⁵

Notwithstanding the newly implemented rule, there has been an assault on America's two most conservative Justices, Clarence Thomas and Samuel Alito.⁶ To illustrate, Senator Sheldon Whitehouse and Representative Hank Johnson have zealously accused Justice Thomas of acting willfully to violate the Ethics in Government Act and have directed the U.S. Department of Justice to criminally investigate the matter.⁷ Numerous reviews by the Conference's Committee on Financial Disclosure have all led to the same result. The former chair, Honorable Bobby R. Baldock, his successor, Honorable Joseph H. McKinley, Jr., and former Secretary to the Conference, Honorable Thomas F. Hogan, have all issued determinations that the alleged errors and omissions by Justice Thomas were not willful.⁸ Yet despite the repeated and conclusive findings for over a decade, Senator Sheldon Whitehouse and others have not given up their onslaught of attacks.⁹ Similarly, Senator Whitehouse

Committee on the Judiciary United States Senate (March 23, 2023) (available at <https://tinyurl.com/2yewu8bv>).

³ Administrative Office of the U.S. Courts, *Understanding the Federal Courts*, USCOURTS.GOV, (available at 10, <https://tinyurl.com/mptft9na>) (last visited July 21, 2024).

⁴ *Id.*

⁵ *Id.*

⁶ See Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States (April 14, 2023) (available at <https://tinyurl.com/32rj8v4p>); see also Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, to John G. Roberts, Jr., Chairman, Judicial Conference of the United States (Sept. 4, 2023) (available at <https://tinyurl.com/yp7enmtc>); see also Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, to John G. Roberts, Jr., Chairman, Judicial Conference of the United States (Oct. 2, 2023) (available at <https://tinyurl.com/38smfbc>).

⁷ See Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Robert Conrad, Director, Administrative Office of The United States Courts (June 17, 2024) (available at <https://tinyurl.com/3ry2fhun>); see also Letter from Louise M. Slaughter, Member of Congress, and Earl Blumenauer, Member of Congress, to Brian M. Boynton, Principal Deputy Assistant Attorney General, Civil Division (May 1, 2024) (available at <https://tinyurl.com/ye29zttp>).

⁸ See Letter from Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States, to Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights (May 15, 2023) (available at <https://tinyurl.com/5888d7xs>); see also Letter from Thomas F. Hogan, Secretary, Judicial Conference of the United States, to Louise M. Slaughter, House of Representatives Member (Dec. 22, 2011) (available at 25, <https://tinyurl.com/5888d7xs>).

⁹ See Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Ron Wyden, Chairman, Senate Committee on

has filed an ethics complaint against Justice Alito accusing him of violating “several canons of judicial ethics.”¹⁰

II. Legal Principles

According to its website, “[t]he Administrative Office [of the United States Courts] is responsible for carrying out Judicial Conference policies. A primary responsibility of the Administrative Office is to provide staff support and counsel to the Judicial Conference and its committees.”¹¹ As such, the Administrative Office is effectually a subsidiary of the Conference.¹² Notably, the Director and Deputy Director of the Administrative Office “shall be deemed to be officers for purposes of title 5, United States Code.” The role given to the Chief Justice of the United States of appointing the “Director and Deputy Director” of the Administrative Office, the chief administrative officers of the federal courts, while also supervising the Judicial Conference reveals that the Chief Justice is supervising federal agencies. Moreover, the Conference’s creation of policies and the Administrative Office’s implementation of them establishes their roles as policymaking and enforcing agencies—independent from the Court’s adjudicatory function. Notwithstanding potential Constitutional constraints in a Supreme Court Justice having the power to appoint and remove a Title 5 (i.e., federal agency) officer, the fact that Congress established the head of the Administrative Office as a federal agency official makes plain that the Administrative Office and any overseeing agencies are subject to FOIA.

The Supreme Court has held, “[i]n our constitutional system, the executive power belongs to the President,” a power including that to supervise and remove agents wielding executive power in his stead.¹³ The Court further held, “While we have previously upheld limits on the President’s removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.”¹⁴ Relevant here, the Chief Justice’s sole power to appoint and remove the Director and Assistant Director

Finance, to Lee Ann Bennett, Acting Secretary, Judicial Conference of the United States (Feb. 7, 2024) (available at <https://tinyurl.com/23hr2ze3>).

¹⁰ Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights to Chief Justice John Roberts (Sept. 4, 2023) (available at 1, <https://tinyurl.com/y4y5kute>).

¹¹ See United States Courts, *Judicial Administration*, USCOURTS.GOV, <https://tinyurl.com/6cvwtpn2> (last visited July 15, 2024).

¹² James C. Duff, Administrative Office of the United States Courts Director, *Workplace Conduct Memorandum*, available at Appendix 1, <https://tinyurl.com/595dy953> (December 20, 2017) (explaining that Chief Justice Roberts asked the Director of the Administrative Office to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace).

¹³ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 238 (2020).

¹⁴ *Id.*

mirrors the cases that have been found to unconstitutionally violate the separation of powers doctrine.

Courts have the power to interpret and apply the law to resolve disputes between adversaries. They do not create law, which is the responsibility of Congress, nor do they enforce it, which is the responsibility of the President.¹⁵ “The founders of the nation considered an independent federal judiciary essential to ensure fairness and equal justice for all citizens of the United States.”¹⁶ Accordingly, the judicial branch is limited to deciding the constitutionality of federal laws and resolving other disputes over federal law.¹⁷ Under the Constitution, federal courts only exercise “judicial” powers through the resolution of cases or controversies.¹⁸ In light of this, Congress created “several executive branch agencies [to] assist the judiciary with its administrative operations.”¹⁹ Included in these agencies are the Judicial Conference and the Administrative Office of the U.S. Courts.

Notwithstanding the above contention, legal and prudential arguments show that the Conference is a federal agency subject to FOIA. The Conference is an independent regulatory agency with administrative duties over the judicial branch. The composition of its members, functions, and powers all indicate it is not a court of the United States, but a federal agency, and thus subject to FOIA.

A. Defining “agency”

Pursuant to FOIA, codified at 5 U.S.C. § 552, each agency shall make its records available to the public, regardless of whether it can be reviewed by another agency or belongs to the executive branch. “Agency” is given its meaning in 5 U.S.C. § 551, defined as “each authority of government of the United States . . . [excluding] the courts of the United States.” Relevant here, this includes any independent regulatory agencies.²⁰ As detailed below, because the Conference is a regulatory agency, it is within the scope of FOIA’s record disclosure requirements.

1. Independent regulatory agencies

FOIA’s definition of an agency includes regulatory agencies, so the pertinent question for purposes here is how “independent regulatory agency” is defined. These definitions for FOIA arise from the definitions set forth by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* A *rule* is “the whole or a part of an agency statement of general or particular applicability and future effect designed to

¹⁵ Administrative Office of the U.S. Courts, *Understanding the Federal Courts*, USCOURTS.GOV, <https://tinyurl.com/mptft9na> at 1–2 (last visited July 20, 2024).

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 2.

²⁰ 5 U.S.C. § 552(f)(1).

implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency;”²¹ *rulemaking* is the “agency process for formulating, amending, or repealing a rule” (both *rule and rulemaking, respectively*, constitute “regulation” or “regulatory” functions).²² Unlike Article III institutions, which are intended to adjudicate, a regulatory agency formulates rules relating to its organization, procedures, or practice requirements.

As relevant here, the Conference is statutorily tasked with exercising regulatory duties. According to 28 U.S.C. § 331, members advise the Conference on the needs of their court and “as to any matters in respect of which the administration of justice in the courts of the United States may be improved.” The statute further provides, “[t]he Conference shall make a comprehensive survey of the condition of business in the courts . . . and prepare plans for assignments of judges.”²³ It is important to note that Congress is responsible for determining how many judges there will be and where they will work; however, Congress gave the Conference and the Administrative Office the power to manage the courts. In turn, the Director delegated his power to the individual courts to deal with their own administrative matters, while the agencies oversee and supervise them.²⁴ The statute also prescribes the duty to “submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.”²⁵

Another notable power of the Conference is to “prescribe and modify rules for the exercise of the authority provided in [28 U.S.C. §§ 351 *et seq.*],” which pertains to filing complaints against judges for prejudicial conduct.²⁶ All orders of the Conference, or its standing committees, are to be carried in effect by “[a]ll judicial officers and employees of the United States.”²⁷ These rules are clearly regulatory in nature. Further, 28 U.S.C. § 331 explicitly provides that the “Judicial Conference shall review rules” prescribed under section 2071 of Title 28. In doing so, the Conference is engaging in an executive function—revision of administrative rules and regulations.

Finally, the Conference may convene “institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in the courts of the United States.”²⁸ The expenses of and attendance of judges to Conference meetings or events

²¹ 5 U.S.C. § 551(4).

²² 5 U.S.C. § 551(5).

²³ 28 U.S.C. § 331.

²⁴ Administrative Office of the U.S. Courts, *Understanding the Federal Courts*, USCOURTS.GOV, (available at 23, <https://tinyurl.com/mptft9na>) (last visited July 20, 2024).

²⁵ 28 U.S.C. § 331.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 28 U.S.C. § 334(a).

are paid from the applicable appropriation for the United States Judiciary, but “expenses connected with the preparation of the plans and agenda for the conference . . . shall be paid from applicable appropriations of the Department of Justice.”²⁹ Expenses paid by another branch’s appropriation show the Conference is not part of the Judiciary.

B. Publishing in the Federal Register

According to 28 U.S.C. § 358, the Conference “may prescribe such rules for the conduct of proceedings . . . including the processing of petitions for review.” However, the statute, echoing 5 U.S.C. § 553, plainly states, “Any rule prescribed under this section shall be made or amended only after giving appropriate public notice and an opportunity for comment.”³⁰ Similarly, the Conference is required to “prescribe and publish the procedures for the consideration of proposed rules.”³¹ The Conference’s committees review issues within their jurisdiction derived from the Conference itself and make policy recommendations to the Conference.³² Before any proposed rule change is published or hearings concerning the proposed rule take place, it is required to be published in the Federal Register, the official journal that documents the rules made by agencies.³³ Notably, the Federal Register Act and the Administrative Procedure Act—the acts requiring agencies to provide public notice and the opportunity to participate in policymaking—establish and outline the rulemaking process by which Executive Branch agencies issue legally binding rules.³⁴ Relevant here, the Conference and its committees are bound by the notice and public comment requirements before prescribing rules. The publications for the proposed rules are made into the Federal Register, consequently establishing the Conference itself as an executive agency.

C. Creating committees

The Conference is granted the power to exercise its authority as the Conference, or through a standing committee.³⁵ Unlike the President who has broad powers to create committees through executive order to assist in the execution and administration of the law, the Judiciary has no such power. Article I section 8, clause 18, grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” all powers vested by the Constitution. Congress’s creation of

²⁹ 28 U.S.C. § 334(d).

³⁰ 28 U.S.C. § 358(c).

³¹ 28 U.S.C. § 2073.

³² See United States Courts, *About the Judicial Conference*, USCOURTS.GOV, <https://tinyurl.com/muxjjypy> (last visited July 18, 2024).

³³ *Procedures for the Judicial Conference’s Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*, as codified in *Guide to Judiciary Policy*, Vol. 1, § 440.20.40.

³⁴ Raymond A. Mosley, Director of the Federal Register, *The Office of the Federal Register*, FEDERALREGISTER.GOV, available at <https://tinyurl.com/3styt4va>.

³⁵ 28 U.S.C. § 331.

the Judicial Conference and delegation of its power to establish committees highlights its primary purpose—implementation of the law—a power solely reserved to the executive branch. Because the Conference has the power to create committees to assist in the implementation of the law, it does not fall within the Judiciary.

Moreover, when the Conference establishes a standing committee, the Chief Justice appoints its members.³⁶ However, the President alone has the power to appoint officers of the United States.³⁷ Other powers of the Conference clearly belie any judicial function. The Conference’s organic statute authorizes the “Conference or the standing committee [to] hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority.”³⁸ The assumption that committee members are inferior officers and thus may be appointed by Courts of Law or Heads of Departments cannot stand for two reasons. First, the Conference is not a court of law as laid out in Article III, and second, to argue the Chief Justice acts in his capacity as the Department Head when appointing members would concede that the Conference is, in fact, not within the Judiciary and thus not exempt from the scope of FOIA. The power to create committees and appoint officers unequivocally points to the Conference’s exclusion from being a United States court.

D. Non-judicial duties

The Conference has numerous duties that plainly fall outside of Article III functions. First, the Conference is tasked with the duty of consulting with the Director of the United States Marshals Service regarding the security requirements for the judicial branch when “determining staffing levels, setting priorities for programs regarding judicial security, and allocating judicial security resources.”³⁹ Secondly, the Chief Justice—acting in his capacity as Presiding Officer of the Conference—is required to submit to Congress “an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.”⁴⁰ Additionally, the Chief Justice may request reports from the Attorney General.⁴¹ These functions are *ultra vires* of the Constitution’s requirement, affirmed through both history and practice, that the federal judicial power is expressly limited to cases and controversies.⁴² Here, the Conference is unquestionably given functions that relate to neither cases nor controversies—and such functions must reside with the other branches of the U.S. government. Moreover, Congress has the authority to direct agencies and

³⁶ *Id.*

³⁷ U.S. CONST. art. II, § 2, cl. 2.

³⁸ 28 U.S.C. § 331.

³⁹ *Id.*

⁴⁰ 28 U.S.C. § 331.

⁴¹ *Id.*

⁴² U.S. CONST. art. III, § 2.

administrative officers or employees to report to the legislature, but judges are independent of any congressional control save for impeachment. The fact that the Chief Justice of the Conference “shall” report to Congress is further indicative of its status as an administrative agency rather than an extension of the courts.

Additionally, the Conference carries on “a continuous study of the operation and effect of the general rules of practice and procedure” prescribed by the Supreme Court to lower courts.⁴³ Although the Supreme Court has the power to create rules governing the lower courts, it is not a power vested in the Conference. Any changes or additions the Conference deems desirable to promote “simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay” “shall be recommended” to the Supreme Court for its consideration and adoption.⁴⁴ The Conference merely acts as an administrative establishment and clearly is not part of the Court; otherwise, the Conference need not make recommendations and could implement the rules itself.

Any claim that the Conference is not an independent executive agency is both underinclusive and overinclusive. Consider the Supreme Court’s determination that Congress could validly delegate power to the Judiciary to promulgate sentencing guidelines through the United States Sentencing Commission.⁴⁵ Such delegation was upheld as constitutional on the grounds that the Article III judges who served on the Commission were subject to removal by the President.⁴⁶ In the case of the Judicial Conference, however, none of the Article III judges serving can be removed by the President signaling the overinclusive nature of the Conference under Supreme Court precedent mandating presidential oversight. Alternatively, consider how the Conference’s position that it is not an agency is underinclusive. History reveals the first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England; Justice Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France; and Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission.⁴⁷ The difference between these situations and the position of Chief Justice Roberts as the Conference head is that Ambassadors, Ministers, Secretaries, and Commissioners are all subject to FOIA.

E. Composition of the Conference

The Conference cannot be categorized as a “court of the United States” exempt from FOIA for an additional reason: judges serve lifetime appointments, but Conference

⁴³ 28 U.S.C. § 331.

⁴⁴ *Id.*

⁴⁵ *Mistretta v. United States*, 488 U.S. 383, 412 (1989).

⁴⁶ *Id.* at 384

⁴⁷ *Id.* at 398–99

officers do not. The Conference is composed of members who serve for terms no longer than five successive years.⁴⁸ The members may either be judges in regular active service or retired judges and are chosen by the district and circuit judges of the circuit they represent.⁴⁹ However, Article III judges have lifetime appointments and hold office during good behavior.⁵⁰ That the Conference is made up of retired judges and members for a limited time distinguishes it from being a court of law.

Moreover, “the courts of the United States” has been defined to mean “the Supreme Court of the United States, courts of appeals, district courts . . . and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.”⁵¹ Similarly, Article III provides that judicial power shall be vested in Courts as Congress ordains.⁵² As mentioned above, the Conference is not one of the aforementioned courts, nor has it been ordained one by Congress. Therefore, the Conference cannot possibly be included in FOIA’s exemption for “courts of the United States.”

Courts have established that “Once a unit is found to be an agency, [the] determination will not vary according to its specific function in each individual case.”⁵³ In other words, once considered an agency, performing non-advisory functions will not make it a non-agency.⁵⁴ Additionally, the U.S. Supreme Court has previously stated that “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution.”⁵⁵ The principle that Article III judges are independent from outer-branch interference is grounded in the Constitution and historical practices. Moreover, it is a hornbook matter of administrative law that only executive branch entities, not the courts, are subject to legislative oversight.⁵⁶ Notwithstanding these established principles, Congress asserts that it “created the Judicial Conference by statute, funds the Judicial Conference through appropriations, and enacted the ethics laws the Judicial Conference administers, and so has an obvious interest in overseeing these

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ U.S. CONST. art. III, § 1.

⁵¹ 28 U.S.C. § 451.

⁵² U.S. CONST. art. III, § 1.

⁵³ *Ryan v. Department of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980).

⁵⁴ *Id.* at 789.

⁵⁵ *Morrison v. Olson*, 487 U.S. 654, 677–79 (1988) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)) (explaining “one purpose of the broad prohibition upon the courts’ exercise of ‘executive or administrative duties of a nonjudicial nature,’ is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches”).

⁵⁶ Russell Wheeler, *Justice Thomas, gift reporting rules, and what a Supreme Court code of conduct would and wouldn’t accomplish*, BROOKINGS (May 1, 2023), <https://tinyurl.com/4dudrw4d>.

matters.”⁵⁷ The Conference’s ministerial duty to respond to congressional oversight exemplifies its status as an administrative body rather than a court of law.⁵⁸ The Conference supervises the administrative side—not the adjudicative side—of the judicial branch.⁵⁹ Thus, the Conference is subject to FOIA.

III. Requested Records

AFL respectfully requests, pursuant to 5 U.S.C. § 552, all records referring or relating to (1) Clarence Thomas or (2) Samuel Alito (including “Thomas” or “Alito”), and all communications with Senator Sheldon Whitehouse, Representative Hank Johnson, or any of their staff. The timeframe for these items is April 2023 through the date of processing.

IV. Production

To accelerate the release of responsive records, AFL welcomes production on an agreed-upon rolling basis. If possible, please provide responsive records in electronic format by email. Alternatively, please provide responsive records in native format or PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

V. Conclusion

If you have any questions about our request or believe further discussions regarding search and processing would facilitate the more efficient production of requested records, please contact me at FOIA@aflegal.org.

Thank you in advance for your cooperation.

Sincerely yours,

/s/ Daniel Z. Epstein

Daniel Z. Epstein

America First Legal Foundation

⁵⁷ See Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Robert Conrad, Director, Administrative Office of the United States Courts (June 17, 2024) (available at <https://tinyurl.com/3ry2fhun>).

⁵⁸ See Part II.D., *infra*; accord Letter from United States Senate, to Robin L. Rosenberg, Chair, Advisory Committee of Civil Rules, Judicial Conference (July 10, 2023) (available at <https://tinyurl.com/u3udvc8b>); see also Letter from United States Senate, to Bob Conrad, Secretary, Judicial Conference (March 29, 2024) (available at <https://tinyurl.com/26yzzja4>).

⁵⁹ Sheldon Whitehouse, The Scheme 28: The Judicial Conference, WHITEHOUSE.SENATE.GOV, <https://tinyurl.com/wkzbrms9>, (last visited July 13, 2024).



July 30, 2024

VIA MAIL

The Honorable Robert J. Conrad
Judicial Conference Secretary
Administrative Office of the United States Courts Director
One Columbus Circle, NE
Washington, DC 20544

Administrative Office of the United States Courts
Financial Disclosure Office, Room G-330
One Columbus Circle, NE
Washington, DC 20544

Freedom of Information Act Request

Dear Judge Conrad,

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL promotes the rule of law in the United States, prevents executive overreach, ensures due process and equal protection for all Americans, and promotes knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (“FOIA”) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL has over 228,000 followers on Facebook, 251,000 followers on X, and our Founder and President has over 680,000 followers on X.

I. Background

The Ethics in Government Act of 1978 required Supreme Court Justices to make financial disclosures, yet it never required disclosures of personal hospitality unrelated to official business.¹ The Administrative Office of the United States Courts (“AO”) has recently approved guidance changing the scope of exempt “personal

¹ Public Information Office, Justice Clarence Thomas Public Statement, (available at <https://tinyurl.com/23jx9prw>).

611 Pennsylvania Ave SE #231
Washington, DC 20003

320 South Madison Avenue
Monroe, Georgia 30655

hospitality” activities to be limited to “food, lodging, or entertainment.”² The changes were drafted by Judicial Conference committees, then approved and published by the AO in the Federal Register, and eventually adopted by the Judicial Conference.³

Notwithstanding this fact, there has been an assault on America’s two most conservative Justices, Clarence Thomas and Samuel Alito. Senator Sheldon Whitehouse and Representative Hank Johnson have accused Justice Thomas of acting willfully to violate the Ethics in Government Act and have directed the U.S. Department of Justice to criminally investigate the matter.⁴ Similarly, Senator Whitehouse has filed an ethics complaint against Justice Alito accusing him of violating “several canons of judicial ethics.”⁵ Despite numerous determinations, including one from former AO Director Honorable Thomas F. Hogan, that Justice Thomas’s alleged errors and omissions were not willful, Senator Whitehouse and others have not given up their onslaught of attacks.⁶

II. Legal Principles

Pursuant to FOIA, codified at 5 U.S.C. § 552, each agency shall make its records available to the public. “Agency” is given its meaning in 5 U.S.C. § 551, defined as “each authority of government of the United States . . . [excluding] the courts of the United States.” This includes any executive department, military department, Government owned or controlled corporation, establishments in the executive branch, and relevant here, any independent regulatory agencies.⁷ The AO is an independent regulatory agency due to its functions, particularly: (1) supervising all administrative matters; (2) preparing and transmitting statistical data and reports; (3) submitting

² Letter from Roslynn R. Mauskopf, Director, Administrative Office of the United States Courts, to Sheldon Whitehouse, Chairman, Federal Courts, Oversight, Agency Action, and Federal Rights, Committee on the Judiciary United States Senate (March 23, 2023) (available at <https://tinyurl.com/2yewu8bv>); see Judicial Conference Committee on Rules of Practice and Procedure, *Advisory Committee on Civil Rules*, FEDERALREGISTER.GOV, (available at 20, <https://tinyurl.com/4d86ha5m>) (March 29, 2022).

³ Administrative Office of the U.S. Courts, *Understanding the Federal Courts*, USCOURTS.GOV, (available at 10, <https://tinyurl.com/mptft9na>) (last visited July 21, 2024).

⁴ See Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Robert Conrad, Director, Administrative Office of the United States Courts (June 17, 2024) (available at <https://tinyurl.com/3ry2fhun>); see also Letter from Louise M. Slaughter, Member of Congress, and Earl Blumenauer, Member of Congress, to Brian M. Boynton, Principal Deputy Assistant Attorney General, Civil Division (May 1, 2024) (available at <https://tinyurl.com/ye29zttp>).

⁵ Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights to Chief Justice John Roberts (Sept. 4, 2023) (available at 1, <https://tinyurl.com/y4y5kute>).

⁶ See Letter from Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States, to Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights (May 15, 2023) (available at <https://tinyurl.com/5888d7xs>); see also Letter from Thomas F. Hogan, Secretary, Judicial Conference of the United States, to Louise M. Slaughter, House of Representatives Member (Dec. 22, 2011) (available at 25, <https://tinyurl.com/5888d7xs>).

⁷ 5 U.S.C. § 552(f)(1).

to Congress and the Attorney General copies of reports, data, and recommendations; (4) disbursing appropriations and other funds for maintenance and operation; (5) establishing programs for certification and utilization of interpreters and special interpretation services; (6) regulating and paying annuities; and most notably, (7) making, promulgating, issuing, rescinding, and amending rules and regulations as may be necessary to carry out functions, powers, duties, and authorities, and also publishing them in the Federal Register.⁸ As the AO implements and executes Judicial Conference policies, as well as federal statutes and regulations, it cannot be a court of the United States.⁹

Courts have established that “Once a unit is found to be an agency, [the] determination will not vary according to its specific function in each individual case.”¹⁰ In other words, once considered an agency, performing non-advisory functions will not make it a non-agency.¹¹ In this context, the AO is clearly deemed an agency, and performing certain functions will not make it a “court of the U.S.” that is exempt from FOIA.

Additionally, the U.S. Supreme Court has previously stated that “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution.”¹² Because the AO unquestionably has administrative duties, it is not under what Article III would consider a court of the United States.

Moreover, “The courts of the United States” has been defined to mean “the Supreme Court of the United States, courts of appeals, district courts . . . and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.”¹³ Similarly, Article III provides that judicial power shall be vested in Courts as Congress ordains, and Judges shall hold their Offices during good behavior.¹⁴ The AO is clearly not a court vested with any judicial power or with judges entitled to hold office. Further, all officers and employees of the AO are expressly prohibited from engaging directly or indirectly in the practice of law in any court of the United States.¹⁵ Unlike courts of the United States that require judges to be removed by impeachment, the Director and Deputy Director are appointed and

⁸ 28 U.S.C. § 604.

⁹ Federal Register, *Administrative Office of United States Courts*, FEDERALREGISTER.GOV, <https://tinyurl.com/zd7yebpn> (last visited July 20, 2024).

¹⁰ *Ryan v. Department of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980).

¹¹ *Id.* at 789.

¹² *Morrison v. Olson*, 487 U.S. 654, 677–79 (1988) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)) (explaining “one purpose of the broad prohibition upon the courts’ exercise of ‘executive or administrative duties of a nonjudicial nature,’ is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches”).

¹³ 28 U.S.C. § 451.

¹⁴ U.S. CONST. art. III, § 1.

¹⁵ 28 U.S.C. § 607.

removed by the Chief Justice.¹⁶ It should also be noted that the AO has been responsive to congressional oversight.¹⁷ It is a hornbook matter of administrative law that only executive branch entities, not the courts, are subject to legislative oversight.¹⁸ The AO is not a court of the United States and its employees are not judges. It is, therefore, not exempt from FOIA.

Finally, as a matter of the plain text and ordinary meaning of the organic statute creating the AO, 28 U.S.C. § 601, the Director and Deputy Director of the AO are “officers for purposes of title 5, United States Code.” FOIA, the Privacy Act, and the Administrative Procedure Act—statutes regulating what executive agencies do—can all be found within Title 5 of the U.S. Code.

III. Requested Records

AFL respectfully requests, pursuant to 5 U.S.C. § 552, all records referring or relating to (1) Clarence Thomas or (2) Samuel Alito (including “Thomas” or “Alito”), and all communications with Senator Sheldon Whitehouse, Representative Hank Johnson, or any of their staff. The timeframe for these items is April 2023 through the date of processing.

IV. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

V. Conclusion

If you have any questions about our request or believe further discussions regarding search and processing would facilitate the more efficient production of requested records, please contact me at FOIA@aflegal.org. Thank you in advance for your cooperation.

Sincerely yours,

/s/ Daniel Z. Epstein

America First Legal Foundation

¹⁶ 28 U.S.C. § 601.

¹⁷ Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Henry C. Johnson, Jr., Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, to Robert Conrad, Director, Administrative Office of the United States Courts (June 17, 2024) (available at <https://tinyurl.com/3ry2fhun>).

¹⁸ Russell Wheeler, *Justice Thomas, Gift Reporting Rules, and What a Supreme Court Code of Conduct Would and Wouldn't Accomplish*, BROOKINGS (May 1, 2023), <https://tinyurl.com/4dudrw4d>.

Supreme Court of the United States
Washington, D. C. 20543

THE LEGAL OFFICE

September 6, 2024

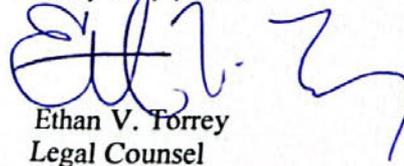
Daniel Z. Epstein
America First Legal Foundation
611 Pennsylvania Avenue, S.E. #231
Washington, DC 20003

Dear Mr. Epstein:

I am writing in response to your letter to Chief Justice Roberts dated July 30, 2024. Your letter asserts that the Administrative Office of the United States Courts and the Judicial Conference of the United States are "executive agenc[ies]" subject to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). *See* Letter at 6, 7 ("the Judicial Conference . . . does not fall within the Judiciary."). It seeks information from those entities relating to Justices Thomas and Alito and all correspondence with Senator Sheldon Whitehouse or Representative Henry "Hank" Johnson and their respective staffs since April 2023.

The Administrative Office of the United States Courts and the Judicial Conference of the United States are not subject to FOIA. *See, e.g., Banks v. Dep't of Justice*, 538 F.Supp.2d 228, 231-32 (D.D.C. 2008) (dismissing FOIA suit against the Administrative Office of the U.S. Courts, explaining that "[t]he phrase 'courts of the United States' is interpreted such that this exemption applies to the entire judicial branch of government. . . . [T]he Administrative Office of the United States is an arm of the federal courts and therefore is not subject to FOIA."). *Accordingly, we will not be providing records in response to your request.*

Very truly yours,



Ethan V. Torrey
Legal Counsel

(202) 479-3282



WILLIAM S. MEYERS
General Counsel

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

LAURINA M. SPOLIDORO
Deputy General Counsel

WASHINGTON, D.C. 20544

ANDREW P. GRANT
Financial Disclosure Committee Counsel

November 8, 2024

Mr. Daniel Z. Epstein
America First Legal
611 Pennsylvania Ave SE #231
Washington, DC 20003

Dear Mr. Epstein:

This is in response to your July 30, 2024, Freedom of Information Act request to Judge Robert J. Conrad, Jr., in his capacity as Secretary of the Judicial Conference of the United States Courts, and the Office of Financial Disclosure of the Administrative Office of the U.S. Courts (AO). Your letter seeks, pursuant to 5 U.S.C. § 552:

- a. "all records referring or relating to (1) Clarence Thomas or (2) Samuel Alito (including 'Thomas' and 'Alito')...."; and
- b. "all communications with Senator Sheldon Whitehouse and Representative Hank Johnson, or any of their staff."

For the reasons set forth below, we respectfully decline to conduct a review for or to produce any potentially responsive documents identified according to a, above. However, as a courtesy, we have enclosed certain of the documents identified according to subparagraph b. above.

The Freedom of Information Act (FOIA) only applies to the executive branch; it does not apply to the judicial or legislative branches of the federal government, and we go into greater detail on that below. However, the AO is sometimes in a position to consider releasing particular documents on a discretionary basis. After consideration of your request, we are providing you with copies of some congressional correspondence that appears responsive to your inquiry.

FOIA in the Judiciary

FOIA does not apply to the judiciary. See 5 U.S.C. § 551(1)(b) ("agency" means each authority of the Government of the United States, whether or not it is within or

Mr. Daniel Z. Epstein

Page 2

subject to review by another agency but does not include—(B) the courts of the United States”). FOIA further defines an “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]” 5 U.S.C. § 552(f)(1). Federal courts have consistently upheld the limitation of FOIA to the executive branch. See *Mayo v. GPO*, 9 F.3d 1450, 1451 (9th Cir. 1993) (explaining that “[j]ust as [FOIA] in excluding ‘the courts of the United States,’ 5 U.S.C. § 551(1)(B), excludes not only the courts themselves but the entire judicial branch, so the entire legislative branch has been exempted from [FOIA].”

Furthermore, the comparison of the AO to an executive branch agency to distinguish it as separate from the judiciary is not supported by caselaw. See *Banks v. Dep’t of Just.*, 538 F. Supp. 2d 228, 232 (D.D.C. 2008) (“Likewise, the Administrative Office of the United States Courts is an arm of the federal courts and therefore is not subject to FOIA and the Privacy Act.”); *Martinez v. Admin. Off. of United States Cts.*, No. 22-50227, 2023 WL 2474218, at *2 (5th Cir. Mar. 13, 2023) (“Because the AOUSC is not required to respond to FOIA requests, Martinez cannot show that his right to the issuance of a writ of mandamus is ‘clear and indisputable.’ See *Hollingsworth*, 558 U.S. at 190. Therefore, the amended complaint fails to state a claim, even when liberally construed. See *Butler v. Porter*, 999 F.3d 287, 292 (5th Cir. 2021).”).

Finally, even if FOIA applied to the judiciary or the AO, a cursory evaluation of the statutory FOIA Exemptions would appear to indicate that most or all of the documents you’ve requested would not be releasable. Given the breadth of your request, such documents would likely be shielded from release under several of the statutory FOIA Exemptions applicable to the executive branch. These might include Exemption 2 (information related solely to the internal personnel rules and practices of an agency), Exemption 5 (privileged communications within or between agencies, including deliberative process), and Exemption 6 (personal privacy of an individual).

In consideration of our efforts to enhance transparency and further the public interest, we are enclosing [17] items of correspondence with congressional committees, based on individualized determinations that each item is appropriate to provide.

Sincerely,



Andrew P. Grant
Financial Disclosure Committee Counsel

Enclosure

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLEAR FORM

AMERICA FIRST LEGAL FOUNDATION

Plaintiff

v.

JOHN G. ROBERTS, JR., in his official capacity as

Defendant

Civil Action No. 25-1232

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

JOHN G. ROBERTS, JR.,
in his official capacity as Presiding Officer of the Judicial Conference of the
United States,
1 First Street NE,
Washington, D.C. 20543.

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

William Scolinos
(301) 965-0179
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Avenue SE #231
Washington, DC 20003
William.Scolinos@aflegal.org

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 25-1232

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset

Civil Action No. 25-1232

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLEAR FORM

AMERICA FIRST LEGAL FOUNDATION

Plaintiff

v.

JOHN G. ROBERTS, JR., in his official capacity as

Defendant

)
)
)
)
)
)
)
)
)
)

Civil Action No. 25-1232

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
Pamela Bondi, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

William Scolinos
(301) 965-0179
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Avenue SE #231
Washington, DC 20003
William.Scolinos@aflegal.org

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 25-1232

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

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Additional information regarding attempted service, etc:

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Reset

<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input checked="" type="radio"/> I. FOIA/Privacy Act <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran’s Benefits <input type="checkbox"/> 160 Stockholder’s Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi-district Litigation
 7 Appeal to District Judge from Mag. Judge
 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 Violation of the Freedom of Information Act, 5 U.S.C. 552.

VII. REQUESTED IN COMPLAINT	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ _____	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
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VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form
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DATE: 4/22/2025	SIGNATURE OF ATTORNEY OF RECORD: /s/ William Scolinos
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.