



Should the US Supreme Court have an Ethics Code?

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Recent concerns about leaks of US Supreme Court decisions and Justice Clarence Thomas's refusal to recuse himself in a case that might involve connections to his wife, Virginia Thomas, have spurred calls for a code of ethics for US Supreme Court justices. Although the Judicial Conference of the United States promulgated a Code of Conduct for lower federal judges in 1973, Supreme Court justices have had to navigate ethical issues without a formal code. There are reports that the justices have considered adopting such a code. A bill introduced in the House of Representatives last year would require the Judicial Conference to adopt a code of conduct for the justices, while another House bill goes even further by having Congress impose such a code. The code presumably would resemble the Code of Conduct for lower federal judges, which admonishes justices to be fair, diligent, and impartial; to avoid extrajudicial activities inconsistent with the judicial office; to abstain from political activities.

An ethics code might help to enhance the Court's image, which has suffered in recent years from a growing perception that the Court is unduly political, although a code itself would do little or nothing to prevent justices from allowing partisan or political considerations to influence their votes and opinions. A code also might provide some assistance on ethical issues, particularly conflicts of interest, that are not clear-cut, although the justices already apparently consult the Code of Conduct for lower federal judges when they encounter ethical dilemmas. Chief Justice John G. Roberts in 2011 and Justice Elena Kagan in 2019 publicly averred that justices faithfully abide by the precepts of that code. Kagan explained at that time that the Court was seriously considering the adoption of an ethics code for itself.

As the Presidential Commission on the Supreme Court of the United States pointed out in its report a year ago, a "code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the justices voluntarily consult the Code." President Biden appointed the commission in response to widespread proposals for various reforms, including term limits, court packing, and curtailment of judicial review, which have gained traction in the wake of growing concerns about the politicization of the Court. A code of conduct was one of the measures the Presidential Commission studied, although its report did not take a position on whether there should be a code.

Any code would need to respect judicial independence. As Russell Wheeler, an authority on judicial ethics, stated in testimony to the Presidential Commission, "[r]egulating judicial conduct requires balancing the protection of independent judicial decision making while demanding some measure of public accountability by judges. Regulation must protect impartiality in judicial dispute resolution while allowing judges some engagement in the life of the community and the law. It must respect the need for transparency against judges' legitimate need for privacy."

The need for such a code is less compelling than may be apparent at first glance because Supreme Court justices are already subject to congressionally imposed ethical oversight to a considerable extent.

Supreme Court justices, along with other federal judges and high-ranking federal officials, are subject to ethical accountability to the extent they must provide annual financial disclosures of specific investments, including stocks, bonds, mutual funds, and real estate. Although the reporting forms require calculations of such investments only within broad ranges (for example, one hundred thousand to one million dollars and one million to five million dollars), the forms provide a sufficient basis for reasonably ascertaining conflicts of interest. The disclosure forms also require reporting investment income and income from other sources, including teaching and publications. The forms also even require reporting reimbursements for expenses such as travel, meals, and lodgings, typically paid when justices give speeches or teach. Congress recently strengthened the reporting requirements in the Courthouse Ethics and Transparency Law of 2022, enacted with overwhelming bipartisan support. The new legislation requires federal

judges to report securities trades of more than one thousand dollars within 45 days and requires the Administrative Office of the United States Courts to record this information on an online data basis.

Supreme Court justices likewise already have ethical accountability to the extent that they and other federal officials are prohibited by federal statute, 5 US C. §7351, from accepting gifts that might influence their official conduct. Justices also have agreed to abide by regulations of the Judicial Conference of the United States which similarly prohibit lower federal judges from accepting gifts that could influence their decisions.

Another important predicate for accountability is the inclusion of Supreme Court justices in the federal judicial recusal statute, 28 USC § 455, which requires any federal judge to recuse herself in "any proceeding in which his impartiality might reasonably be questioned," including cases in which a judge "a personal bias or prejudice concerning a party" or a financial interest or other stake in the outcome of a case. Recusal is a significant means of helping ensure the justices' integrity since it is not uncommon for justices to recuse themselves. Chief Justice Roberts, for example, has recused himself in at least nine cases because of financial interests. During its 2020-21 term, justices recused themselves 247 times on certiorari petitions, although only once on a case that the Court had agreed to hear. Justices recused themselves from cases nineteen times between 2015 and 2021. The most common reasons for recusal were previous service as an appellate judge or solicitor general, and financial conflicts involving ownership of publicly traded securities.

Recusal, however, is entirely voluntary for Supreme Court justices even though appellate courts may review recusal decisions by lower federal judges and set aside lower federal judicial decisions on the ground that a judge ought to have recused herself.

Even if Supreme Court justices were subject to an ethics code, recusal presumably would remain the principal means of avoiding or remedying violations. Instead of lobbying for a code of ethics to cover the Court, critics of the federal judiciary might invest their time trying to place more teeth in the recusal statute, particularly by developing a method for review of recusal decisions by Supreme Court justices. It is difficult, however, to think of a means of appealing a Supreme Court justice's refusal to recuse herself. Even review by a panel of lower federal judges and Supreme Court justices would be inconsistent with the Court's tradition of self-governance. Even a panel consisting only of Supreme Court justices would interfere with the long-standing independence of individual justices. Review by an outside executive or legislative body would unduly impede judicial independence and transgress separation of powers.

Advocates of heightened ethical standards for Supreme Court justices also might want to work to make justices subject to the Judicial Conduct and Disability Act of 1980, which permits lawsuits complaining that lower federal judges engaged in "conduct prejudicial to the effective and

expeditious administration...of the courts" or are unable to discharge their duties because of physical or mental disability.

Ethical conduct and the appearance of such conduct also might be enhanced if the justices, preferably on their own initiative, adopted rules requiring justices to state their reasons for recusal or refusal to recuse, even though the reasons often are obvious. As the Presidential Commission observed, "[s]tatements from the Justices explaining their reasons for recusal could enhance the transparency of the recusal process and build a 'common law' of recusal on the Court." On the other hand, the Presidential Commission pointed out that "requiring full discussion on every decision to recuse could be time-consuming and burdensome" and could "force Justices in some instances to divulge private matters – for example the medical condition of a family member."

The recusal statute and the laws mandating financial disclosures and regulating gifts substantially mitigate the need for any ethics code. If, however, the Court is to have a code of conduct, the Court itself should promulgate a code. Even though Congress properly authorized the Judicial Conference (composed of the Chief Justice of the United States Supreme and various lower federal judges) to prescribe the Code of Conduct for lower federal judges, congressional imposition of such a code on the Supreme Court, directly or through the Judicial Conference, would be more intrusive of separation of powers because the Supreme Court is more fully a co-equal branch of government with Congress than are the lower federal courts. Unlike the lower federal courts, which at least in theory are bound to apply Supreme Court precedent, the Supreme Court is the ultimate judicial arbiter of the meaning of the Constitution, which requires its independence from the other branches of government to be particularly inviolable. As the Presidential Commission observed, a code authored by Congress "would need to be careful to ensure that the code's demands did not encroach on the Court's constitutionally exclusive decisionmaking function." The commission also pointed out that "Congress has largely delegated procedural matters to the courts." It also aptly observed that "[a]n advantage of creating a new code drafted by the Justices is that the language of the code could be geared to the unique institutional setting of the Court. For example, the considerations involved in the recusal context might be different for the Justices, even though the statutory standards are the same as for other judges."

Likewise, participation of lower federal judges in the promulgation of a code for the Supreme Court would violate norms of judicial hierarchy and intrude on the Court's independence. As Justice Anthony M. Kennedy aptly observed in 2011, it would be "structurally unprecedented for district and circuit court judges to make rules that supreme court judges have to follow."

Whatever the merits of a Supreme Court ethics code might be, there is a practical reason why there is less justification for a code of judicial conduct for the Supreme Court than there is for a code for lower federal judges. Since there are nearly two thousand judges of the lower federal courts, there is a multitude of ethical issues that arise among so many judges, even to the extent

that they strive to be beyond reproach. It is, therefore, useful to have a uniform set of relatively bright-line rules to govern their conduct so that they can know in advance what is acceptable and unacceptable conduct and so that there can be a predicate for recusal, criticism by news media and the general public, and, in extreme situations, impeachment proceedings. Because, however, there are only nine Supreme Court justices, issues involving conduct will be much rarer and can be addressed accordingly on an ad hoc basis.

Indeed, Supreme Court justices have been the subject of surprisingly few allegations of personal or judicial misconduct. However, perhaps to some extent, their lapses have gone unnoticed because justices, at least until recently, have received less scrutiny from the news media than have prominent members of the judicial and legislative branches.

Financial scandals, for example, have been particularly rare. In 1923, there was a brief firestorm over Chief Justice William Howard Taft's acceptance of a \$10,000 annual annuity from the estate of Andrew Carnegie, which allegedly could have made Taft more sympathetic to oil companies, but the controversy quickly played itself out. The most significant episode of financial controversy occurred in 1969, when Abe Fortas resigned in the wake of the public disclosure of his acceptance of what was supposed to have been an annual retainer of \$20,000 from a private foundation which could have been a party to litigation before the Court, even though Fortas returned the money within months of receiving it and never received another retainer.

Sex scandals likewise have been practically non-existent. The only two notable instances of sexual accusations, which involved Clarence Thomas and Brett Kavanaugh, concerned alleged misconduct that arose before they were appointed to the Court. These accusations were extensively probed during their confirmation hearings and did not prevent their confirmations. Justice William O. Douglas's three divorces and his three marriages to far younger women raised many eyebrows during the 1960s, but these marriages transgressed no laws or ethics codes.

Many justices in the past engaged in two activities that today would raise serious ethical concerns insofar as they were close friends and/or advisors to presidents and promoted themselves overtly or covertly as presidential candidates. Between 1832 and 1956, at least one Supreme Court justice was an active presidential aspirant in approximately two-thirds of the election cycles. In 1868 and 1872, for example, Chief Justice Salmon P. Chase maneuvered for both the Republican and Democratic nominations for president. There is evidence that the presidential ambitions of at least some justices may have influenced their judicial decisions. Close associations with presidents are also rife with the potential for conflict of interest. Perhaps the most egregious example was Fortas, Lyndon B. Johnson's longtime personal attorney, who continued to communicate with Johnson, often several times a day, after Johnson appointed him to the Court. Fortas regularly advised Johnson on issues of public policy and even helped Johnson select bombing targets in Vietnam. In 2004, Justice Antonin Scalia generated widespread criticism for participating in a duck hunt with Vice President Richard Cheney and refusing to recuse himself from a case pending before the Court to which Cheney was a party.

Such conflicts of interest and transgression of separation of powers, however, have practically disappeared during the past half-century because presidents no longer appoint justices who have had significant political careers or who are close personal associates. Sandra Day O'Connor was the last justice who had held an important elective political office, and Earl Warren was the last justice who had been a major national political figure. Fortas was the last justice who was a close friend and advisor to a President. Although George W. Bush nominated White House Counsel Harriet Miers to the Court in 2006, concerns about her connection to the president were one reason Bush withdrew her nomination.

During recent years, however, the sharp increase in public speeches and media interviews by justices has increased the danger that justices might make extrajudicial statements which could impugn their partiality and erode public confidence in the Court. Public pronouncements by justices about controversial social and political issues have become much more common during recent years. Ruth Bader Ginsburg, for example, apologized in 2016 after she publicly expressed revulsion over the prospect of Donald J. Trump's election as president. A code might help to define and regulate extrajudicial speech.

The probity of the justices may be reflected in the fact that there have been no serious efforts to impeach a justice since the Senate acquitted Samuel Chase in 1805 after the House impeached him. Gerald R. Ford introduced a bill of impeachment against Douglas in 1970, mostly because Douglas had published a book suggesting that civil disobedience might be a legitimate response to growing federal intrusion on the rights of Americans, but the bill went nowhere and ultimately embarrassed Ford rather than the Court.

Even if the Court adopted a code, the ethical behavior of the justices is ultimately dependent upon their personal ethical compasses. The best way to ensure ethical conduct is for Presidents to carefully vet potential nominees and for the Senate and the public to scrupulously examine the integrity of nominees during confirmation hearings.

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