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Above Reproach? The U.S. Supreme Court's Ethical Issues

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Abstract

With society scrutinizing the American criminal justice system, a standard of ethics becomes ever so important for law enforcement officials, members of the bench, and correctional personnel. Creating a code of conduct not only benefits the individual players in the criminal justice system but it also protects the integrity of each institution. Unfortunately, one of the most important judicial branches in the criminal justice system, the United States Supreme Court, does not have, nor follow an ethical code of conduct. This creates a problem for criminal justice practitioners, the media, and society. This article examines the current requirements for a sitting Supreme Court Justice when facing an ethical dilemma and addresses the steps a Justice should take. The Justices have responded by questioning the need for a code of conduct and have challenged recently proposed legislation to address ethical concerns raised by the media as it has investigated the actions and behaviors of the Justices on the High Court. Addressing the critical issue of enforcement, the authors support the oversight of an Inspector General to address ethical issues facing the members of the U.S. Supreme Court.

Keywords: ethics; supreme court; judicial branch; law

Introduction

The United States Supreme Court, created under Article III of the United States Constitution, is the highest court in the land – the final arbiter of legal debates about the meanings and implementations of U.S. laws. As the third branch of government, the judicial branch operates as the co-equal to both the executive and legislative branches. To ensure that no branch would become too powerful, each of the three branches is designed to act as a "check and balance" against the other two branches. To further that goal, Congress has long established ethical codes of behavior for members of the executive branch and for federal court judges. In turn, the Department of Justice (executive branch) and the federal courts which consist of the District Courts, the Court of Appeals, and the U.S. Supreme Court (judicial branch), police members of Congress.

Since the U.S. Supreme Court is made up of nine Justices, it takes a majority vote of five Justices to decide the outcome of a case thus making their rulings the final interpretation of the law. Good or bad, depending on your view, their decisions can dramatically affect individuals and change the trajectory of democracy. Given this enormous power, members of the U.S. Supreme Court are expected to be among the best and brightest legal minds the United States can offer. In addition, the members of the Supreme Court are expected to possess impeccable integrity and serve as models of ethical behavior for judges in the lower federal courts and in state courts. Therein lies the problem. Unlike legal counsel who follow the American Bar Association's Code of Ethics or federal/state judges who follow the Code of Conduct for United States Judges, the U.S. Supreme Court Justices do not adhere to these codes nor follow any code of ethics (Bombay, 2016).

Over the years, and as early as the 1800s, legal experts and investigative journalists have questioned the behavior of some of these Justices (see Jones, 2023; Camera, 2023; Freedman, 2004). The types of behaviors that are deemed unethical are conflicts of interest regarding a case argued to the Supreme Court (see Tucker, 2023), personal associations with legislators and lobbyists (see Freedman, 2004), and failure to adhere to financial disclosure requirements as mandated by law (see Ponsor, 2023; Donegan, 2023).

This article discusses the ethical breaches of past and current members of the U.S. Supreme Court and the current debate about whether the Supreme Court should be bound by its own code of ethics. This debate begs the question of whether such a code should be legislated by the United States Congress, or whether such a code should be adopted by the Justices themselves. Whether a code of conduct is imposed by the legislative branch or by the judicial branch, the more difficult question is how to enforce any code of conduct for Justices sitting on the highest court in the land.

Codes of Ethics in the American Criminal Justice System

In the American criminal justice system, the individuals who comprise the police, the courts, and correctional systems are required to maintain ethical standards with respect to their positions. For example, police officers typically follow the International Association of Chiefs of Police Law Enforcement Code of Ethics. This code of ethics was established in 1957 and has become the primary standard for law enforcement officers to follow in their mission and commitment to the public they serve (IACP, 2023).

For those operating our prisons and jails, the American Correctional Association outlines a code of ethics. This code requires correctional officers to commit to "unfailing honesty, respect for the dignity and individuality of human beings and a commitment to professional and compassionate service" (American Correctional Association, 1994).

For those practicing law, a standard of ethics was originally created in the 1908 Canons of Professional Ethics, a guide to practicing law in the U.S. Since then, the American Bar Association (ABA) has established a code of ethics standards with the introduction of the 1969 Model Code of Professional Responsibility followed by the 1983 Model Rules of Professional Conduct. Today, the ABA continues to make modifications and changes to the Model Code to ensure that lawyers are maintaining ethical standards in the profession.

Those elected or appointed to the bench have a specific set of rules related to ethical conduct. In 1922, Congress established the Conference of Senior Circuit Judges where federal judges would convene and discuss judicial business and advise Congress on significant matters related to the administration of justice (Federal Judicial Center, n.d.-a). By 1948, Congress renamed the Conference of Senior Circuit Judges to the Judicial Conference of the United States. Then, in 1973, the Judicial Conference adopted the Judicial Code of Conduct for United States Judges which outlined administrative and policy issues regarding the federal judiciary. The Judicial Conference also makes recommendations to Congress regarding laws that affect the judicial branch (Federal Judicial Center, n.d.-a).

Presiding over the Judicial Conference is the Chief Justice of the United States Supreme Court. The Judicial Conference includes the chief judges of the judicial circuits, a district judge from each regional judicial circuit, and the Chief Judge of the Court of International Trade. The judges that adhere to the Judicial Code of Conduct are "circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, magistrate judges, the Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces" (United States Courts, 2023b). In addition, virtually every state has adopted some version of this model code of ethics for state judges (American Bar Association, 2023). The Judicial Code also "provides guidance on their performance of official duties and engagement in a variety of outside activities" (United States Courts, 2023b). In other words, this Code provides ethical canons regarding a jurist's conduct on and off the bench. The canons require that judges should avoid "even the appearance of impropriety" and refrain from engaging in political activities (United States Courts, 2023b). Like the ABA's Code of Ethics, the Judicial Conference has made changes over the years to the Judicial Code of Conduct to further guide and strengthen a judge's ethos. However, the one court that does not follow the Judicial Code of Conduct for United States Judges despite presiding over it is the U.S. Supreme Court.

Current View of the Supreme Court

When an individual is appointed and approved to become a U.S. Supreme Court Justice, the public has reasonable expectations that this jurist has superior knowledge of the law, a profound understanding of the Constitution, and a strong ethical code. However, public opinion of late has not been favorable for the Court. In a recently conducted Gallup Poll (Jones, 2021), the approval rating of the U.S. Supreme Court is at a new all-time low (see also Associated Press, 2023).

As the approval ratings of the U.S. Supreme Court drop, reports in the media focus on the Justices' failures to make the mandated financial disclosures of sources of income, failure to recuse themselves in cases where there is a conflict of interest (as required by law), and other misconduct. Past and present members of the U.S. Supreme Court (on all sides of the ideological spectrum) have been accused of lapses of ethical judgement over the years.

Financial Disclosure

In 1978, the Ethics in Government Act (EIGA) was passed after the Watergate scandal demonstrated the need for both transparency and accountability by government officials. The Act applies to most federal public officials, including members of the judiciary. Under this Act, all members of the federal judiciary, including the nine Justices on the U.S. Supreme Court, are required to complete and file financial disclosure statements every year. These disclosure statements must include sources of income, gifts, liabilities, and financial transactions. The purpose of these disclosure statements is to provide assurance that our public officials and members of the judicial branch are acting in the public interest and not their own. Most recently, these financial disclosure requirements have been strengthened and enhanced by the Courthouse Ethics and Transparency Act of 2022.

Unfortunately, the U.S. Supreme Court Justices do not always comply. Past and current Justices have sometimes failed to meet these mandatory financial disclosure requirements. These failures to disclose sources of financial incomes foster the notion that the Justices are "being bought" or at least influenced by individuals, or special interest groups, to get a favorable judicial ruling. Thus, the public reasonably believes that money is the root of corruption and has the power to influence judicial outcomes, even when those outcomes are contrary to the jurist's ethos.

Implications of improprieties by U.S. Supreme Court Justices have been asserted for years. For example, in a Special Report conducted by Fix the Court (2015), it was noted that three current Justices voted 68% of the time in favor of companies and large corporations with which they shared a common interest, such as owning stocks in the organization.

To avoid even the appearance of impropriety, public officials, elected or appointed to public office, have divested themselves of financial interests that could be perceived as being a conflict of interest. For example, former President Jimmy Carter notably put his family's peanut farm into a blind trust once he was elected to the White House to further distance himself from the appearance of financial gain (Frank, 2023). In the most recent financial disclosure report, Chief Justice John Roberts reported that he did not accept any gifts or write a book to benefit himself financially (Fix the Court, 2023b). Fellow Supreme Court Justice Sonia Sotomayor received approximately $150,000 in book royalties promoted by her staff. (Bruggemann, 2023). As of the writing of this article, Justices Clarence Thomas and Samuel Alito have not submitted their financial documents but have asked for extensions. This delay has caused media outlets to question the integrity of the Justices and further speculate about Thomas' financial ties to a Texas billionaire and Alito's all-expense paid trips (Bruggemann, 2023).

Recusal/Conflicts of Interest

When a judge, prosecutor, or juror knows or has a personal connection with individuals in the dispute, there is the possibility for a conflict of interest. This connection can impede those individuals from performing their legal duties. To help judges decide whether to recuse themselves from a case, the Office of Government Ethics (OGE), created by the EIGA, provides guidance, but not enforcement, to those seeking clarification of their ethical obligations under the Act. In addition, Title 28 of the United States Code Section 455 (28 U.S. Code § 455) requires all federal judges, including those on the U.S. Supreme Court to recuse themselves under certain circumstances. The Act requires that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" (see 28 U.S. Code § 455). However, despite this articulation, each Supreme Court Justice decides for themselves whether they are eligible to hear a case in which they might have a personal bias or interest. For example, former Justice Anthony Scalia decided against recusal in the case of *Cheney vs. United States District* in which then-vice president Dick Cheney was being challenged by the Sierra Club for violating the Federal Advisory Committee Act for not making all documents public (Mears, 2004). The issue of Justice Scalia remaining on the bench to hear this case and refusing to recuse himself was deemed by many as a conflict of interest because Justice Scalia went on a week-long hunting trip with Cheney in the months before the trial (Mears, 2004).

A second federal law, Title 28 of the United States Code Section 144 (28 U.S.C. §144), provides a mechanism for a party to file a motion for recusal. The litigant must file a supporting affidavit alleging bias or prejudice on the part of the assigned judge. The Act requires the recusal of that judge. However, this Act applies only to District Courts. As Sir Edward Coke, a 17thcentury British barrister, judge, and politician once said, "no man may be a judge in his own case" (Gibeaut, 2012). This expression was reiterated again in the case of *In re Murchison, 349 U.S. 133 (1955).* Despite the acknowledgment of this expression, U.S. Supreme Court Justices are the sole arbiters of whether recusal is appropriate in any given case.

Misconduct

The Judicial Conduct and Disability Act of 1980 provides a mechanism for receiving and investigating allegations of misconduct by federal judges. The Act addresses complaints that allege "conduct prejudicial to the effective and expeditious administration of the business of the courts" or circumstances under which a federal judge "has become, by reason of a mental or physical disability, unable to discharge all the duties" of the judicial office (United States Courts, 2023c). This law may not be used to object to an unfavorable ruling or a ruling to which the litigant does not agree. However, the law may be used to address prejudicial behavior and mental incompetence.

Probably the most famous instance of ethical misconduct by a sitting U.S. Supreme Court Justice involved Abe Fortas. Justice Fortas was nominated and confirmed to the U.S. Supreme Court in 1965. With the retirement of Chief Justice Earl Warren, Justice Fortas was nominated as his replacement. During the Senate confirmation hearings, it was revealed that Justice Fortas had an inappropriately close relationship with the President, attending White House staff meetings and sharing with the President some of the Court's deliberations. In addition, it was revealed that Justice Fortas' summer teaching salary was paid, not by American University for whom he taught, but by clients of his former law firm who had the potential for matters before the Supreme Court. For these reasons, he was denied elevation to the position of Chief Justice. Justice Fortas remained on the Supreme Court, but a year later it was revealed that he accepted $20,000 from the Wolfson Foundation (whose founder had been indicted for securities fraud). Justice Fortas returned the money, but he was forced to resign from the U.S. Supreme Court because of the scandal (see Glass, 2008; MacKenzie, 2023).

Ironically, the Judicial Conduct and Disability Act of 1980 does not apply to the nine Justices who sit on the U.S. Supreme Court. Prior to becoming a U.S. Supreme Court Justice, Brett Kavanaugh was nominated and confirmed to the United States Court of Appeals for the D.C. Circuit in 2006. He was then nominated to the U.S. Supreme Court, filling the seat vacated by the retiring Justice Anthony Kennedy in 2018. His confirmation hearings before the United States Senate Judiciary Committee were contentious, and at times, combative. During this process, scores of ethical complaints were filed against Judge Kavanaugh. The investigation of these complaints was assigned to the Tenth Circuit Judicial Council. That Council dismissed all of the complaints without a hearing on the merits. The Council did so because Justice Kavanaugh, now elevated to the U.S. Supreme Court, was no longer subject to the Judicial Conduct and Disability Act (Totenburg, 2018).

Most recently, investigative journalists and certain members of Congress have raised specific concerns about the ethics and behaviors of members of the U.S. Supreme Court. Such allegations include eight out of the nine current U.S. Supreme Court Justices as well as former U.S. Supreme Court Justices (Fix the Court, 2022). Those concerns include, inter alia:

- The failure of some Justices to recuse themselves in cases where they or their family members or associates may have a personal or financial interest (Wehle, 2022; Schonfeld, 2023; Fix the Court, 2016).
- The acceptance of lavish gifts and vacations from wealthy political donors and from those who have business before the High Court (Engleberg & Eisinger, 2023; Lipton, 2016).
- Failure to disclose sources of income and financial transactions (Fix the Court, 2023).
- Paid speaking endeavors before partisan and political organizations (Williams, 2017).
- Inappropriate and injudicious public comments about politicians and matters before the court (Taylor, 2016).

Defending the Court

As disturbing information about the ethical lapses and injudicious behavior of members of the U.S. Supreme Court came into light in the past few years, Chief Justice Roberts' position was to defend the Court and the Justices. He asserted that the U.S. Supreme Court did not need a code of ethical conduct. In his 2011 Year-End Report on the Federal Judiciary, Chief Justice Roberts asserted that the Justices on the High Court refer to a variety of sources for guidance regarding ethical issues and therefore had "no reason" to adopt its own code of ethical conduct (Supreme Court of the United States, 2011). The Chief Justice even questioned whether Congress has the authority to impose any ethical rules or codes of conduct on the Supreme Court, citing the imperative of a "separation of powers" under the United States Constitution.

In 2012, Senator Patrick Leahy and others on the United States Senate Judiciary Committee wrote a letter to Chief Justice Roberts asking him to have the U.S. Supreme Court adopt the same Code of Ethics that binds the lower federal courts (Barnes, 2012). The Chief Justice declined (Mears, 2012). More recently, however, media coverage and public exposure of these serious issues has caused a change in his position. When asked to testify before the United States Senate Judiciary Committee, Chief Justice Roberts declined, but asserted that all nine Justices had recently signed on to a "Statement on Ethics Principles and Practices" (VanSickle, 2023). However, this Statement is generalized in nature and does not provide specific canons to which the Justices must adhere. Most recently Justice Samuel Alito weighed in on the possibility of Congress legislating a binding code of ethics. He stated to a

reporter at the *Wall Street Journal* "I know this is a controversial view, but I'm willing to say it. No provision in the Constitution gives them the authority to regulate the Supreme Court — period" (Rivkin & Taranto, 2023). This suggests strong resistance by at least one Justice to any Congressionally created code of ethics that would bind the nine Justices to a code of ethics.

Congressional Authority

So, can Congress mandate that the U.S. Supreme Court adhere to a code of ethics? Article I Section 8 of the United States Constitution authorizes Congress to "constitute Tribunals inferior to the Supreme Court" (see U.S. Const. art. 1, § 8, n.d.). In addition, that same Section states that Congress has the power and authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof" (see U.S. Const. art. 1, § 8, n.d.). Furthermore, it was the Judiciary Act of 1789 that established a Supreme Court which originally consisted of six Justices (National Archives, n.d.). Over the years, the number of Justices sitting on the Supreme Court has varied from a low of five to a high of ten Justices. However, after the Civil War, that number was set at nine (United States Courts, 2023a). It seems that Congress has significant authority over the constitution of the U.S. Supreme Court.

In addition, Article III of the United States Constitution establishes the federal judicial branch. Section 1 states, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" (see U.S. Const. art. 3, § 1). This section of Article III gives Congress the power to create federal courts. Moreover, it gives Congress the right to increase or decrease the number of Justices on the U.S. Supreme Court.

Congress also has constitutional authority to delineate those cases over which the U.S. Supreme Court has authority. Specifically, Article III, Section 2 states, "in all other Cases beforementioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exception, and under such Regulations as the Congress shall make" (see U.S. Const. art. 3, § 2).

Congress has long overseen and allocated money to fund the U.S. Supreme Court (American Bar Association, 2023). In addition, Congress has passed laws that affect the jurisdiction of the Supreme Court (Congressional Research Service, 2018). A law that has been in force for more than 70 years requires federal judges, including the members of the U.S. Supreme Court, to recuse themselves under certain circumstances. The Ethics in Government Act of 1978 requires these same judges and Justices to disclose their financial holdings and income (Ethics in Government Act, n.d.). More recently Congress passed the Courthouse Ethics and Transparency Act of 2022 to require increased transparency in securities transactions for all federal judicial officers. Congress also has the authority to impeach and remove federal judges for bad behavior (Federal Judicial Center, n.d.-b).

Proposed Legislation

Recently, legislation has been proposed to address the concerns of ethical problems with the U.S. Supreme Court. The Supreme Court Ethics, Recusal and Transparence Act (SCERT) was proposed in 2022 and re-introduced in 2023. This legislation is broad and covers many concerns raised by experts and scholars who study ethical behavior. The Act would do the following:

"Create Code of Conduct and Develop a Process for Enforcement

- Require the Supreme Court to adopt a code of conduct within 180 days.
- Require the Supreme Court to publish its code of conduct and any other rules or procedures related to ethics, financial disclosure, and judicial misconduct.
- Require the Supreme Court to create a transparent process for the public to submit ethics complaints against the justices, and for a random panel of chief judges from the lower courts to investigate and make recommendations based on those complaints.

Improve Hospitality and Financial Disclosures

- Require the Supreme Court to adopt rules requiring disclosure rules for gifts, travel, and income received by justices and law clerks that are at least as rigorous as the House and Senate disclosure rules.
- Require greater disclosure of *amicus curiae* funding.
- Require parties and *amici curiae* before the Supreme Court to disclose any recent gifts, travel, or reimbursements they've given to a justice.
- Require parties and *amici curiae* before the Supreme Court to disclose any lobbying or money they spent promoting a justice's confirmation to the Court.

Strengthen Recusal Requirements

- Create new recusal requirements governing gifts, income, or reimbursements given to judges.
- Create new recusal requirements governing a party's lobbying or spending money to campaign for a judge's confirmation.

- Ensure that requests for a judge to recuse are reviewed by a panel of randomly selected, impartial judges, or by the rest of the justices at the Supreme Court.
- Require written notification and explanations of recusal decisions.
- Require the judiciary to develop rules explaining when a judge's connection to an *amicus curiae* brief might require recusal; and
- Require the Federal Judicial Center to study and report to Congress every two years on the extent to which the judiciary is complying with recusal requirements" (Whitehouse, 2023).

The Thorny Question of Enforcement – Who Should Do It?

The Inspector General Act of 1978 established independent and objective units to address waste, fraud, and abuse within 12 federal agencies. These inspector generals are tasked with conducting audits and investigating incidents of waste, fraud, abuse, and malfeasance. Central to their creation and function are the requirements that they be wholly nonpartisan, objective, and independent. Because of the success of government oversight, there are now 72 statutory inspector generals in the federal government (Council of the Inspectors General on the Integrity and Efficiency, 2014). However, there are no such inspector generals who have authority to review or investigate the judicial branch.

The former principal deputy Inspector General of the Department of Defense, Glenn Fine, has called for an Inspector General to oversee the judiciary (Fine, 2022b). He argues cogently that no public official can be expected to objectively monitor their own behavior. He also asserts that these Justices are not, and should not be above the law, ethical rules, or independent oversight (Fine, 2022a). An Inspector General with jurisdiction over the federal bench would have authority to accept, review, and adjudicate complaints against members of the federal courts, would oversee and review audits of processes, procedures, expenditures, and refine reporting requirements. This overarching and independent authority would not only hold federal judges to uniform standards, but would also ensure that our jurists, especially those on the highest court in the land, adhere to the highest ethical standards.

Conclusion

In a healthy and functioning republic, citizens must have confidence in their public officials. Over 20 years ago, reputable polls indicated that about 50-60% of the public had a favorable view of the U.S. Supreme Court (Gallup, n.d.) but those numbers have recently plummeted. Today, only 25% of the public have a favorable view of the U.S. Supreme Court (Jones, 2022). That decline should be a sufficient impetus for the Supreme Court to responsibly and aggressively address these very serious issues.

The good news is that Chief Justice Roberts recently addressed a group of legal scholars and professionals in Washington, DC indicating that the Supreme Court is aware of the public's concern for ethical standards with the Justices and are now seeking ways to address those concerns without compromising the Supreme Court's independence (Gerstein, 2023). Chief Justice Roberts stated that:

"I want to assure people that I'm committed to making certain that we as a court adhere to the highest standards of conduct. We are continuing to look at things we can do to give practical effect to that commitment, and I am confident there are ways to do that that are consistent with our status as an independent branch of government and with the constitution's separation of powers" (cited in Gerstein, 2023).

Arguing that no branch of government and no organization can police itself, it only seems logical that the Supreme Court have similar rules of conduct like those ethical standards established by the American Bar Association, the International Chief's of Police Code of Conduct, the American Corrections Association, and the Judicial Code of Conduct for United States Judges. These ethical standards not only hold individuals accountable, but give the public the necessary confidence in those administering the American criminal justice system. Furthermore, if Congress can determine the number of Justices serving on the Supreme Court; determine the budget for the Supreme Court; pass laws directing circumstances for recusal; require financial disclosures and transparency; impeach judges and Justices'; and pass codes of ethical conduct for the executive branch, the legislative branch and the lower federal court judges, it would seem passing a code of conduct for the Justices of the U.S. Supreme Court is not asking too much. Instituting a nonpartisan, objective, and independent inspector general to provide oversight and enforcement of such a code would bring the judicial branch in line with the executive and legislative branches that have been subject to such oversight for almost half a century. Moreover, this would be consistent with the aspirations of our Founders: that no branch be superior to the other branches of government.

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