

THE SUPREME COURT SHOULD ADOPT AN ETHICS CODE, OR CONGRESS SHOULD DO IT FOR THEM

A Report of the Task Force on the Supreme Court of the United States of the New York County Lawyers Association

Adopted by the Board of Directors as a report of the Association on April 17, 2023

The Supreme Court of the United States is the only federal court in the nation that is not subject to a Code of Ethics. Indeed, it is likely the only court in the entire United States, state or federal, that is not so bound. As one of the most respected court analysts has put it:

The regulation of federal judges’—including justices’—ethics has been a recurrent topic throughout American history. In just the last half century, aberrant federal judicial behavior, including the Justice Fortas controversy, prompted the Judicial Conference to adopt its Code of Conduct for United States Judges in 1973, and Congress to enact the 1980 Judicial Conduct and Disability Act.¹

Despite these reforms, no code of ethics on the US Supreme Court has been adopted. It is time for that to change.

Declining Confidence in the Court

The Supreme Court faces declining confidence in the Court’s institutional role.² Some of that may be due to recent, politically charged, decisions on issues such as abortion rights and firearms regulations, which represent a departure from longstanding precedents. Beyond that, some of the loss of confidence may stem from the politicization of the nomination process. The

¹ Statement of Russell R. Wheeler To the Presidential Commission on the Supreme Court of the United States June 30, 2021—Panel Four (<https://www.brookings.edu/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS-.pdf>)

² “Forty-seven percent of U.S. adults say they have “a great deal” or “a fair amount” of trust in the judicial branch of the federal government that is headed by the Supreme Court. This represents a 20-percentage-point drop from two years ago, including seven points since last year, and is now the lowest in Gallup’s trend by six points. The judicial branch’s current tarnished image contrasts with trust levels exceeding two-thirds in most years in Gallup’s trend that began in 1972.” J. Jones, Gallup, Supreme Court Trust, Job Approval at Historical Lows (Sept. 22, 2022) (<https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>).

public perception, rightly or wrongly, is that the Court has become more polarized and more ideological. The Court's use (some might say misuse) of the so-called "shadow docket," along with the increasingly small number of matters the Court accepts for review each year, also tend to distance the Court from the public.

There is, however, another significant factor contributing to the decline in confidence: the perception that the Court lacks appropriate ethical standards. That perception is understandable, because in fact the Court has no publicly available code of ethical conduct and no transparent process for the consideration of questions of such conduct. We say it again: it is time for that to change.

In recent years, serious questions have been raised about the ethical standards that ought to govern Justices of the Supreme Court. For instance, questions have been raised about whether Justices should be commenting, even in the abstract, about legal issues that might eventually make their way to the Court. Questions have been raised about whether Justices should be recusing themselves more often because of potential conflicts of interest, or the appearance of a conflict, as the lower court judges routinely do. And questions have been raised about the acceptance by Justices, past and present, of travel packages and other gifts paid for by wealthy individuals or organizations. While NYCLA does not wish to single out any particular Justice for criticism, recent reports by ProPublica and others concerning Justice Thomas³ have brought this issue into national focus.⁴ The problem is not limited to one judge, or one party. Over the decades, judges

³ See, e.g., Kaplan, Elliott and Mierjeski, "Clarence Thomas and the Billionaire," ProPublica (April 6, 2023); Elliott, Kaplan and Mierjeski, "Billionaire Harlan Crow Bought Property from Clarence Thomas, the Justice Didn't Disclose the Deal," ProPublica (April 13, 2023).

⁴ See, e.g., Bennett Gershman, "Should These Justices Have Attended Federalist Society Celebration?," *New York Law Journal*, November 17, 2022; T. O'Brien, Supreme Court's Ethics Problems Are Bigger Than Coney Barrett (Bloomberg May 2, 2021) <https://www.bloomberg.com/opinion/articles/2021-05-02/supreme-court-s-ethics-problems-are-bigger-than-coney-barrett>; Kalb and Bannon, "Supreme Court Ethics Reform," Brennan Center for Justice (September 24, 2019).

of all political and ideological stripes have been the subject of press or Congressional inquiries for accepting improper gifts or honoraria, for taking trips without making proper disclosure, or for other misconduct. As just one example, more than 50 years ago Abe Fortas was forced off the court for accepting a \$20,000 annuity from a Wall Street financier earlier in his career. Other recent controversies include subsidized trips taken by Justices Ginsburg, Breyer, and Scalia.⁵

These are a sample of the examples we know. But the growing sense that much more is happening under the radar erodes public confidence. Indeed, the lack of transparency engenders cynicism about the ethics of our highest Court.

A Code of Conduct Should be Adopted

As former federal judge and Harvard Law School lecturer Nancy Gertner has noted, “there’s no question” that adoption of an ethics code would improve the Court’s public image.⁶ The simplest solution is for the Supreme Court to voluntarily subject itself to the same standards as every other federal judge by adding itself to the Code of Conduct for United States Judges.⁷ This can be achieved quite simply, by putting the word “justice” before “judge” every time that word appears in the Code. The Code, coupled with interpretations of it (for example, advisory opinions), covers a broad array of relevant questions relating to gifts, political activity, recusal and other matters at the heart of many of the ethical controversies faced by the Supreme Court. To be sure, appropriate modifications may be required, arising from the unique nature of the Supreme Court. Nevertheless, this is certainly a good starting point.

⁵ [Opinion | The Ethics of Nine of the Most Powerful People in America - The New York Times \(nytimes.com\)](#); [Cheney and Scalia Went Hunting Together - The Washington Post](#)

⁶ Time for Supreme Court to adopt ethics rules, *Harvard Gazette*, 3/29/23 (<https://news.harvard.edu/gazette/story/2023/03/time-for-supreme-court-to-adopt-ethics-rules/>)

⁷ <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>

Notably, the US Judicial Code is primarily advisory in nature.”⁸ Nonetheless, enforcement of the Code presents an important and difficult question. For other federal courts, enforcement is handled internally by each judicial circuit, primarily by the Chief Judge and supplemented by committees he or she may appoint to investigate and assist. In the case of the Supreme Court, the Chief Justice could perform the same functions, unless the issues concerned him personally; in that case, the next most senior justice could act, with delegation of investigatory functions possibly to the Judicial Conference of the United States. The Chief Justice could also appoint committees of (for example) three other Justices, or himself plus two other Justices, to investigate or supervise matters – just as the Chief Judges in the various circuits have the ability to do today.

Separation of powers concerns could be avoided by having the Supreme Court voluntarily adopt the Code of Conduct itself. Then, no other branch needs to be involved. It has been reported that Chief Justice Roberts has discussed with his fellow Justices just such an approach, although nothing has come of it as yet.

Legislative Action is Warranted if a Code is Not Voluntarily Adopted

Mindful of these separation of powers concerns, we greatly favor voluntary action on the part of the Supreme Court. If the Supreme Court declines to adopt the Code for itself, however, we favor Congress enacting legislation to fill the void. One legislative proposal that would have

⁸ “The Code itself makes clear that, unlike a statute (and unlike some state judicial conduct codes), the U.S. Judicial Conduct Code is advisory. Its “Commentary” on Canon 1 says “The Code is designed to provide guidance to judges and nominees for judicial office”—language the Chief Justice quoted in his 2011 report. “Many of the restrictions in the Code,” the Commentary continues, “are necessarily cast in general terms, and judges may reasonably differ in their interpretation.” Statement of Russell R. Wheeler To the Presidential Commission on the Supreme Court of the United States June 30, 2021—Panel Four (<https://www.brookings.edu/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS-.pdf>)

achieved that goal was H.R. 4766, which would direct the Court to adopt ethical guidelines that do not affect the way in which it decides cases.⁹

While it is a question that is far from settled in the courts, we do not believe that there are separation of powers issues of disabling constitutional dimension involved in Congress imposing a Code of Conduct. While Congress may not be able to direct the substantive decisions of the Supreme Court consistent with *Marbury v. Madison* and principles of judicial review, Congress has long had the power to regulate the Supreme Court's size, procedures and budget. In fact, 28 USC Section 455, which governs disqualification standards, applies on its face to all federal judges, including Supreme Court Justices. Moreover, almost a century ago Congress adopted the Rules Enabling Act,¹⁰ which directed the Supreme Court to create the Federal Rules of Civil Procedure and established ground rules for how to go about it and what those Rules should provide. HR 4766 would similarly direct the Court to adopt ethical guidelines which do not affect the way in which it decides cases. As noted above, a Code of Judicial Conduct is primarily advisory in nature and is not enforced through legislative fiat. Thus, in our view, legislation imposing a Code of Judicial Conduct would not violate separation of powers principles.¹¹

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The American Bar Association recently adopted a resolution proposed by the King County [Washington] Bar Association (ABA Resolution No. 400), also recommending that the Supreme

⁹ <https://www.congress.gov/bill/117th-congress/house-bill/4766>

¹⁰ 28 U.S.C. §2072 (enacted June 19, 1934)

¹¹ it should be noted, however, that the Supreme Court itself would likely determine the constitutionality of any such legislation. Congressional Research Service, Congressional Control over the Supreme Court p. 43 (January 11, 2023) (<https://crsreports.congress.gov/product/pdf/R/R47382>)

Court adopt a Code of Ethics for the nine Justices.¹² Likewise, the Project on Government Oversight of Lawyers Defending American Democracy has proposed a Model Code of Conduct for U.S. Supreme Court Justices (2023). We support these efforts. We hope this report, too, helps spur the adoption of a Supreme Court Code of Ethics.

NYCLA stands ready to assist further in this effort.

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Respectfully submitted,

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¹²ABA House of Delegates Resolution 400 (Feb. 2023)
(https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/400/)