



A Code of Conduct for the Supreme Court? Legal Questions and Considerations

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The [Code of Conduct for United States Judges](#) (the Code) is a set of ethical canons that the [Judicial Conference of the United States](#) (Judicial Conference) has adopted to promote public confidence in the [integrity, independence, and impartiality](#) of the federal judiciary. The Code governs the behavior of [most federal judges](#); however, it does not explicitly apply to Justices of the [U.S. Supreme Court](#). Although the Justices [consult](#) the Code, along with [other sources](#), for guidance when performing their judicial duties, the Court is [not presently subject](#) to a defined body of general ethical rules.

Some observers maintain that “Supreme Court justices should be bound by the [same code of ethics](#) that all other federal judges are required to follow.” To that end, some Members of Congress [have](#) introduced [legislation](#) that [would require](#) the Judicial Conference to “issue a code of conduct[] which applies to each justice” on the Court. While some commentators and legislators have supported ethical rules for the Supreme Court [for years](#), the issue gained increased prominence in March 2022 following [reports](#) that Virginia Thomas, wife of Associate Justice Clarence Thomas, sent text messages in January 2021 to then-White House Chief of Staff Mark Meadows encouraging him to contest the result of the 2020 presidential election. In response to those reports, some have [debated](#) whether Justice Thomas should [recuse](#) himself from certain cases [voluntarily](#), while others have [called for broader changes](#) to the Court’s ethical obligations that would bind all the Justices. By contrast, some commentators question whether Congress should—[or even could](#)—impose a code of ethics on the Supreme Court.

This Sidebar canvasses the relevant legal considerations surrounding proposals to establish a Supreme Court code of conduct. After discussing the existing Code that applies to lower federal judges, the Sidebar describes recent legislative proposals to create a similar code for the Supreme Court, as well as potential constitutional obstacles to those proposals.

The Code of Conduct for United States Judges

The Judicial Conference—a body [composed of](#) the Chief Justice of the United States and selected judges from the lower federal courts—promulgated the Code to “prescribe[] [ethical norms](#) for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary.” The Code [applies to most federal judges](#), including most U.S. appellate and trial court judges. Among other things, the Code instructs federal judges to:

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- Uphold the [integrity and independence](#) of the judiciary;
- Avoid not only [impropriety](#) but the appearance thereof;
- Perform the duties of their offices [fairly, impartially, and diligently](#);
- Avoid [extrajudicial activities](#) that would be inconsistent with the obligations of judicial office; and
- Refrain from [political activity](#).

The Code is [not a binding set of laws](#) but rather a set of “[aspirational rules](#)” by which federal judges should strive to abide. The Code “contains [no enforcement mechanism](#)” of its own and it “is not designed or intended as a basis for [civil liability or criminal prosecution](#).” The Code [contemplates the possibility of discipline](#) for judges who violate its tenets but also states, “Not every violation of the Code should lead to disciplinary action.” Judges who fail to abide by the Code risk [judicial discipline](#) (such as being [temporarily barred](#) from hearing new cases) or [disqualification](#) from an existing case. Neither of those remedies is [often granted](#).

Ethics and the Supreme Court

By its explicit terms, the Code governs only the judges of the [lower federal courts](#). It does not apply to [Supreme Court Justices](#), nor has the Supreme Court formally promulgated [its own ethical code](#). As a result, there is presently [no single body](#) of ethical canons with which the nation’s highest court must comply when discharging its judicial duties.

The absence of such a body of canons [does not mean](#) that Supreme Court Justices are wholly unconstrained by ethical norms and guidelines. Even though the Code [does not formally apply](#) to Supreme Court Justices, the Justices “[consult the Code of Conduct](#)” and [other authorities](#) “to resolve specific ethical issues.” Moreover, although Congress has not enacted legislation mandating the adoption of a Supreme Court code of conduct, several statutes do impose [various other ethical requirements](#) upon the Justices. For example, [28 U.S.C. § 455](#) requires federal judges, including Supreme Court Justices, to [recuse themselves](#) from particular cases under specified circumstances, such as when the judge or Justice “has a personal bias or prejudice concerning a party” or “a financial interest in the subject matter in controversy.” Congress has also [directed Supreme Court Justices](#) to comply with certain [financial disclosure](#) requirements that apply to [federal officials generally](#). In addition, the Court has voluntarily [resolved to comply](#) with certain [Judicial Conference regulations](#) pertaining to the receipt of gifts by judicial officers, even though those regulations would otherwise [not apply to Supreme Court Justices](#).

In response to calls to mandate a code of ethics for the Supreme Court, some Members of the 117th Congress introduced the For the People Act of 2021 (H.R. 1/S. 1), which, among other things, would require “the Judicial Conference [to] issue a code of conduct, which applies to each justice ... of the United States.” The Supreme Court Ethics Act (H.R. 4766/S. 2512) would impose the same requirement through standalone legislation. These proposals [echo](#) similar [bills](#) from [past Congresses](#) that would have likewise [subjected the Supreme Court](#) to a code of judicial conduct.

Legal Considerations for Congress

Legislative proposals to impose a code of conduct on the Supreme Court raise an array of legal questions. The first is a question of statutory design: Which institution would Congress charge with formulating the ethical standards to govern the Justices? A legislative proposal introduced in the 115th Congress would have entrusted [the Supreme Court itself](#) with the task of “promulgat[ing] a code of ethics” and would have given the Justices substantial (albeit not unbounded) freedom to design the rules that would govern their own conduct. Similarly, a [House resolution](#) introduced during the 117th Congress would express

“the sense of the House of Representatives that the Justices of the Supreme Court should make themselves subject to the existing and operative ethics guidelines set out in the Code of Conduct for United States Judges, or should promulgate their own code of conduct.” The For the People Act and the Supreme Court Ethics Act, by contrast, would not allow the Court to design its own ethical code; those proposals would instead grant that authority to the Judicial Conference.

A related question is whether legislative efforts to require the Supreme Court to abide by a code of judicial conduct would [violate the constitutional separation of powers](#). To ensure that federal judges would decide cases impartially without fear of political retaliation, the Framers of the Constitution [purposefully insulated](#) the federal judiciary from political control. Chief Justice John Roberts invoked those ideals in his [2021 Year-End Report on the Federal Judiciary](#), asserting that the courts “require ample institutional independence” and that “[t]he Judiciary’s power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government.” Some observers have argued that imposing a code of conduct upon the Supreme Court would amount to an unconstitutional [legislative usurpation of judicial authority](#). The [House resolution](#) discussed above notes that separation of powers and the independence of the judiciary “may be compromised by extensive legislative or executive interference into that branch’s functions” and would thus avoid imposing any binding requirement on the Court. On the other hand, [some commentators](#) emphasize the ways that Congress may validly act with respect to the Supreme Court, for example through its authority to [impeach](#) Justices and [decide](#) whether Justices are entitled to salary increases. By extension, according to this argument, requiring the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress’s authority.

Because the Supreme Court possesses the [authority](#) to determine the constitutionality of legislative enactments, the [Supreme Court itself](#) would appear to have a critical role in determining whether Congress may validly impose a code of ethical conduct upon it. It is difficult to predict whether the Court would uphold the constitutionality of a legislatively mandated code of conduct, as existing judicial precedent [offers minimal guidance](#) on how the Court might resolve this constitutional question. For instance, the Supreme Court [has never explicitly decided](#) whether the [federal statute](#) requiring Supreme Court Justices to recuse themselves from particular cases is an unconstitutional [legislative encroachment](#) upon the judiciary, nor has the Court ever directly addressed whether Congress may subject Supreme Court Justices to [financial reporting requirements](#) or limitations upon the receipt of gifts.

Distinct from this separation-of-powers issue is the question of whether Congress may authorize the Judicial Conference—which is composed almost entirely of judges from the [inferior federal courts](#)—to promulgate ethical rules to govern Justices on the High Court. The Constitution explicitly contemplates that the Supreme Court will remain “[supreme](#)” over any “inferior” courts that “Congress may from time to time ordain and establish,” such as the federal district and appellate courts. Some observers have therefore suggested that it would be [unconstitutional](#), or at least inappropriate, for the Judicial Conference to make rules for the Supreme Court. As one example, Senior Associate Justice Anthony Kennedy has stated that it would raise a “legal problem” and would be “structurally unprecedented for district and circuit judges to make rules that Supreme Court judges have to follow.”

A Supreme Court code of conduct could also raise practical issues to the extent that it would require Justices to [disqualify themselves](#) from particular cases. [Unlike in the lower courts](#), where a district or circuit judge from the same court may [step in](#) to take a recused judge’s place, neither retired Justices of the Supreme Court nor lower court judges may hear a case in a [recused Justice’s stead](#). The disqualification of a Supreme Court Justice from a particular case could leave the Court with an [even number of Justices](#) to decide the case and thus increase the likelihood that the Court would be [evenly divided](#) and [unable to create binding precedent](#) for future litigants. Conversely, if the other Justices would otherwise be evenly divided, it may be even more critical for a Justice with an appearance of partiality to avoid casting the deciding vote.

If one or more Justices refused or failed to comply with a newly created code of conduct, Congress might also encounter difficulties enforcing its tenets. The Constitution [forbids](#) Congress from reducing Supreme Court Justices' salaries or [removing them from office](#) except via the extraordinary and blunt remedy of [impeachment](#). Thus, Congress may lack precise tools to induce recalcitrant Justices to behave ethically.

Ultimately, the foregoing questions related to a Supreme Court code of conduct may be largely academic. Promulgating an ethical code for the Supreme Court could establish norms for proper judicial behavior that guide the Justices' actions. Thus, if Congress sought to compel the Supreme Court to comply with a code of judicial conduct, the Justices might simply [comply with its mandates](#) without challenging Congress's constitutional authority to impose them. The Court has often acquiesced to congressional attempts to subject Justices to specific ethical standards. For example, when Congress decided to subject the Justices to [financial disclosure requirements](#), the Justices opted to [comply](#) with those provisions rather than challenge their constitutionality in court. Justices have likewise implicitly [accepted the validity of 28 U.S.C. § 455](#), discussed above, and [recused themselves](#) pursuant to that statute [without questioning](#) whether Congress possesses the constitutional authority to enact a judicial disqualification statute.

Former Legislative Attorney Kevin M. Lewis was the author of a prior version of this Legal Sidebar. Inquiries on this topic can be submitted to the listed author.

Author Information

Joanna R. Lampe
Legislative Attorney

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