A Case for the Status Quo in Supreme Court Ethics

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Introduction

In 2004, then-Vice President Richard Cheney joined the late Justice Antonin Scalia on a weekend-long duck hunting trip at the home of Justice Scalia's friend.[1] While relationships between officers in separate branches of the government are not unusual, the hunting trip came surrounded by a particularly contentious context: three weeks earlier, the Supreme Court announced it would be hearing *Cheney v. U.S. District Court for the District of Columbia*,[2] a case in which Cheney was named as a party in his official capacity as Vice President.[3] For Scalia's critics, the hunting trip created an unavoidable conflict which should have required Justice Scalia's recusal from hearing the case.[4] Most commentators thought the situation at least raised questions and concerns about the ethical conduct of Supreme Court Justices.[5] Justice Scalia, when he addressed the issue in a separate memorandum, assured litigants (and the public) that the hunting trip could in no way affect his ability to impartially judge the case.[6]

The Scalia-Cheney recusal question is far from the only situation in which the legal community or the national media have questioned the ethical conduct of Supreme Court Justices. For years, the public has scrutinized Justices who have exhibited seemingly partisan preferences.[7] It has voiced concerns over Justices' financial investments[8] and disclosures.[9] Justices have, on more than one occasion,

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1. David Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. Times (Jan. 17, 2004), https://www.latimes.com/archives/la-xpm-2004-jan-17-na-ducks17-story.html [https://perma.cc/PXU2-NLN4].

2. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367 (2004).

3. *Id*. at 372.

4. *See* Bill Mears, *Watchdog Groups Question Cheney, Scalia Hunting Trip*, CNN (Jan. 19, 2004), https://www.cnn.com/2004/ALLPOLITICS/01/19/scotus.cheney.scalia/ [https://perma.cc/VW8L-QSYV].

5. *Id*.

6. *See* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004).

7. *See* Editorial, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, Wash. Post (Jul. 12, 2016), https://www.washingtonpost.com/opinions/Justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html [https://perma.cc/3FAR-AH4L]; Martin Kady II, *Justice Alito mouths 'not true,'* Politico Now Blog (Jan. 27, 2010), https://www.politico.com/blogs/politico-now/2010/01/Justice-alito-mouths-not-true-024608 [https://perma.cc/8CW6-GH6B]; Andrew Chung, *Supreme Court's Gorsuch criticized over Trump hotel speech*, Reuters (Sept. 28, 2017), https://www.reuters.com/article/us-usa-court-gorsuch/supreme-courts-gorsuch-criticized-over-trump-hotel-speech-idUSKCN1C334B [https://perma.cc/NFK8-BN6J].

8. *John Roberts Voted. But He Shouldn't Have*., Fix the Court (Nov. 7, 2018), https://fixthecourt.com/2018/11/cjrrecusalerror3/ [https://perma.cc/3AJU-HALE].

responded to critics who accuse them of hearing cases with which the Justices may have previously been involved in their capacities as attorneys.[10]

As recently as December 17, 2019, Justice Neil Gorsuch appeared on *Fox and Friends* to discuss an upcoming book and was robustly criticized for demonstrating overt partisan preferences.[11]

These concerns arise in part because the Supreme Court is not—and has never been—bound to a code of conduct, unlike every other federal judge in the United States.[12] Outside of policies which itself adopts[13], as well as some external constraints,[14] the Court is free to address ethical problems in any manner in which it pleases, or not at all.

The lack of a code of conduct for the Supreme Court has been addressed sporadically, usually after the behavior of a Justice garners the attention of the media or there is a controversial appointment.[15] When the issue has been addressed in legal literature, it has been in support of a code of conduct for the Supreme Court Justices.[16] Legal scholars have articulated a number of ways that the Court could be made legally bound to a code of conduct, including passing legislation and leveraging power in the Judicial Conference of the United States.[17]

The hole in the existing literature exists on the other side of the argument. Very few, if any, have made a case in opposition to a code of conduct externally imposed on the Supreme Court by a branch of government or the Judicial Conference.[18] This Note contributes to the larger conversation by filling out this other side. This Note asks whether there should be a mandatory code of conduct

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9. Eric Lichtblau, *Thomas Cites Failure to Disclose Wife's Job*, N.Y. TIMES (Jan. 24, 2011), https://www.nytimes.com/2011/01/25/us/politics/25thomas.html [https://perma.cc/MKT9-6ZK9].

10. *See, e.g.*, Laird v. Tatum, 409 U.S. 824 (1972); Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993).

11. Ryan Bort, *Neil Gorsuch Goes on 'Fox & Friends' to Decry 'Making Things Up.' RIP Self-Awareness*, ROLLING STONE (Dec. 17, 2019), https://www.rollingstone.com/politics/politics-news/neil-gorsuch-fox-and-friends-supreme-court-Justice-928134/ [https://perma.cc/P5DX-ZB99].

12. JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES 2 (2019) (applying a Code of Conduct to "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges," but not Supreme Court Justices).

13. Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993).

14. 28 U.S.C. § 455 (1945) (the constitutionality of the application of this statute to the Supreme Court has never been decided. *See* 2011 Year-End Report on the Federal Judiciary 8 (Dec. 31, 2011) ("[t]he constitutionality has never been tested. . .")).

15. *See, e.g.*, Supreme Court Ethics Act, H.R. 1057, 116th Congress (2019) (legislation introduced one year after Justice Kavanaugh's appointment).

16. *See, e.g.*, Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 457 (2013) (advocating for ethics regulation from Congress); Alicia Bannon and Johanna Kalb, *Supreme Court Ethics Reform*, BRENNAN CENTER FOR JUSTICE (2019) (advocating for procedural reform in the Supreme Court); Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE. L. REV. 1535, 1587 (2012) (advocating for legislation to monitor Supreme Court ethical conduct).

17. *See* Supreme Court Ethics Act, *supra* note 15.

18. *Id.*

for the Supreme Court outside of one which the Court itself creates, concluding that there should not be an imposed code of conduct on the judicial branch.

Three considerations inform this Note's conclusion. First, this Note will argue that there are structural problems with enforcing a code of conduct. If either of the two other branches of government enforce the code, they risk undermining the independence of the judicial branch. An independent judicial branch is one of the foundations of the structure of our government. Supposing that the Supreme Court itself could enforce the code through *en banc* review of its members actions, there would be a risk that (1) the Justices would have no motive to perform serious review, or (2) the Justices would incur distrust of each other when such review does occur. Additionally, it would raise structural problems with enforcing the code when the Supreme Court is already the highest court in the land. There is no court to which its members may appeal; no forum may be created that could be "higher" than the Supreme Court.[19] The enforcement of a code against individuals with no legal mechanism to fight the enforcement would set a dangerous precedent in the judicial branch.

Second, this Note will argue that there are existing mechanisms which may address serious Supreme Court ethical violations. As principal officers of the United States, Justices are already subject to the Impeachment Clause of Article II of the Constitution, meaning that if they commit a high crime or misdemeanor, they may be impeached in the House of Representatives, tried in the Senate, and if convicted, removed from office.[20] Such an impeachment has occurred before.[21] Furthermore, the confirmation process ensures that candidates are well-vetted for their legal prowess and moral character *even before* the Justices make it to the bench. Then, supposing that serious ethical transgressions are covered by the safeguards of impeachment and confirmation, the only conduct left to regulate would be minor violations. Yet, there would hardly be a purpose served for enforcing a code against such minor transgressions. If the purpose would be to hold Justices accountable in the "Court of Public Opinion," then this purpose is already served through the media's rigorous cataloguing of the Justices' behavior when in the public eye, including recusals, financial filings, or attendance at allegedly partisan speeches and events. Thus, an imposed code would serve little purpose outside of one that is already covered through existing structural frameworks, namely impeachment and confirmation.

This Note will argue finally that there are pragmatic reasons why a code of conduct should not be externally enforced against the Supreme Court. First, recusal (or "disqualification" as it is called in the legislation and codes of conduct) presents a particularly tricky issue for the Supreme Court. Because the Court consists of only nine members, there are no additional Justices who may replace

19. U.S. CONST. art. III, § 1.
20. U.S. CONST. art. II, § 4.
21. *See* discussion of Samuel Chase *infra* Part I.A.

recused or removed Justices if a conflict of interest does arise. This means that litigants may be forced to contend with a four-to-four split in the result of a case due to a lack of a tie breaker, or lose a Justice who may have voted in their favor. Additionally, isolating Justices from other branches of the government will hinder the operation of the Court without adding any additional benefit.

I. THE EXISTING FRAMEWORK

There is no Supreme Court code of conduct; however, the text of the Constitution, legislation, the Judicial Conference of the United States, and past practices of the Court itself all contribute to an understanding of how Justices have approached ethical problems in the past.

A. THE CONSTITUTION

The Good Behavior Clause and the Impeachment Clause are Constitutional provisions that provide remedies for extreme conduct—but not minor ethical violations—of Supreme Court Justices. Article III Section 1 creates the Supreme Court and addresses "good behavior": "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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."[22]

"[G]ood [b]ehaviour" is not perfectly synonymous with moral or ethical conduct. Alexander Hamilton in Federalist No. 78 indicated that the Good Behavior Clause was "one of the most valuable of the modern improvements in the practice of Government" because it referred instead to a Justice's lifetime tenure as an "excellent barrier to the encroachments and oppressions of the representative body."[23] Thus, the Good Behavior Clause had less to do with the ethical conduct of Supreme Court Justices and more to do with the fact that they ought to be insulated—through lifetime tenure—from the political pressures of either the executive or the legislative branches.[24]

As principal officers, the only mechanism for removing Supreme Court Justices is through the Impeachment Clause.[25] The language of the clause provides that "[t]he President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes or Misdemeanors."[26]

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22. U.S. CONST. art. III, § 1.
23. THE FEDERALIST NO. 78, at 365 (Alexander Hamilton) (Bourne & Smith ed., 2017).
24. *See id.*
25. U.S. CONST. art. III, § 1.
26. U.S. CONST. art. II, § 4.

There has been just one Justice in the history of the Supreme Court who has ever been impeached (though not removed): Samuel Chase.[27] The House of Representatives sent articles of impeachment to the Senate in the spring of 1805, condemning Chase for, among other things, outright partisan behavior while on the bench.[28] The final trigger for the impeachment proceeding was a jury charge that Chase read to a Baltimore grand jury while on circuit.[29] As an ardent Federalist, Chase had delivered remarks which were thinly veiled derogations of then-President Thomas Jefferson.[30] Ultimately the Senate did not convict Chase, and Chase has remained the only Supreme Court Justice who has been impeached[31] (although eight federal judges have been impeached).[32]

Beyond the customary language of Article III, there is no mention of a code of conduct for the Supreme Court.

B. LEGISLATION

Perhaps the most significant and explicit authority outlining ethical conduct for the Supreme Court is § 455 of the United States Code, which governs the "[d]isqualification of Justice, judge, or magistrate judge."[33] The text of the code provides in relevant part:

> (a) Any Justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice . . .
>
> (2) Where in private practice he served as lawyer in the matter in controversy . . .
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel . . .

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27. *Samuel Chase Impeached*, FED. JUDICIARY CTR., https://www.fjc.gov/history/timeline/samuel-chase-impeached [https://perma.cc/Q7QC-DH3U].

28. For a full explanation of the eight articles of impeachment brought against Chase, see generally Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 59 (1960).

29. *Id*. at 57.

30. *Id*. at 50.

31. *Samuel Chase Impeached*, *supra* note 27; *see also* Gillian Brockell, *Only One Supreme Court Justice Has Ever Been Impeached. His Nickname Was Old Bacon Face*, WASH. POST (Sept. 16, 2019), https://www.washingtonpost.com/history/2019/09/16/only-one-supreme-court-justice-has-ever-been-impeached-his-nickname-was-old-bacon-face/ [https://perma.cc/ST5E-YTJS] (only one Supreme Court Justice ever has been impeached).

32. *Samuel Chase Impeached*, *supra* note 27.

33. 28 U.S.C. § 455 (1945).

> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter . . . .[34]

Thus the text of the statute explicitly calls for the recusal of a Supreme Court "Justice" when his or her impartiality "might reasonably be questioned," when there is personal bias, prejudice, or knowledge of disputed evidentiary facts, when he or she has served as a lawyer or government counsel in the specific matter in the past, or when he or she has a financial interest in the proceeding.[35] The statute additionally includes provisions containing definitions,[36] waiver rules,[37] and allowance for divestment of financial interest if one exists.[38]

The constitutionality of the statute has never been decided by the Supreme Court, but Justices have frequently addressed the statute in memoranda or other documents[39] as a source of authority for the recusal decisions of the Court. When they have addressed it, some Justices have implied that the statute exercises binding authority over the Supreme Court's recusal decisions.[40] Others have suggested the opposite.[41]

Section 455 of the United States Code was amended to its current form in 1945.[42] Since then, two other pieces of legislation have been passed which place additional parameters on the ethical conduct of the Supreme Court. In 1978, the Ethics in Government Act[43] was passed, requiring high ranking federal officers in all three branches of government to disclose their finances. Supreme Court Justices comply with this Act by filing their finances with the Judicial Conference of the United States.[44] The Ethics Reform Act of 1989[45] contained further restrictions on the outside earned income of Supreme Court Justices and strict parameters regarding gifts.

Over the last several years, Congressmen and -women have attempted to pass legislation with even stricter rules governing the Supreme Court Justices. These attempts have been unsuccessful.[46] First, in 2011, Representative Christopher

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34. *Id.*

35. *Id.*

36. 28 U.S.C. § 455(d) (1945).

37. § 455(e).

38. § 455(f).

39. *See* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004); Laird v. Tatum, 409 U.S. 824, 825 (1972); 2011 Year-End Report on the Federal Judiciary, Chief Justice Roberts, 7 (Dec. 31, 2011).

40. *Cheney*, 541 U.S. at 916 ("My recusal is required if, by reason of the actions described above, my impartiality might reasonably be questioned.") (internal quotations omitted).

41. 2011 Year-End Report on the Federal Judiciary, *supra* note 39, at 8 ("Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455.").

42. 28 U.S.C. § 455 (1945).

43. Pub. L. No. 95-521 (1978).

44. 2011 Year-End Report on the Federal Judiciary, *supra* note 39, at 6 ("The Justices file the same financial disclosure reports as other federal judges. . .The Justices also observe the same limitations on gifts and outside income as apply to other federal judges).

45. Ethics Reform Act of 1989, Pub. L. No. 101-194 (1989).

46. *See generally* Frost, *supra* note 16.

Murphy attempted to pass the Supreme Court Transparency and Disclosure Act. The bill proposed the extension of the Judicial Conference Code of Conduct (discussed below in II.B) to affirmatively cover the Supreme Court Justices, and not just federal circuit and district court judges.[47] It would have required the investigation—with possible sanctions—of ethical code violations, as well as external review of Justices' recusal determinations.[48] The bill was introduced in the House but never passed. When he later became a senator, Murphy re-introduced a similar bill that drew parallel legislation in the House from Representative Louise Slaughter.[49] Almost one hundred representatives co-sponsored Slaughter's bill, but again, the bill was never passed.[50] Following the attempts by Murphy and Slaughter, Senator Elizabeth Warren introduced legislation that would have imposed an enforceable code of conduct on the Supreme Court Justices,[51] but this attempt—like many before it—was in vain.

Despite persistent efforts by Members of Congress, 28 U.S.C. § 455 remains the primary cited statutory authority that significantly restrains the actions of the Supreme Court in some way.[52]

C. CODE OF CONDUCT FROM THE JUDICIAL CONFERENCE OF THE UNITED STATES

All federal court judges in the United States, including district and circuit court judges, but excluding the Supreme Court Justices, are subject to a code of conduct issued by the Judicial Conference of the United States.[53] Chief Justice John Roberts of the United States Supreme Court "is the presiding officer of the Judicial Conference" and its members include "the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional circuit."[54]

While the Judicial Conference code of conduct, by its own terms, is not binding on Supreme Court Justices, it is frequently consulted by the Justices for guidance on ethical issues.[55] The code consists of five canons which are separately explored and explained within the text of the code.[56] The canons are as follows:

1. A Judge Should Uphold the Integrity and Independence of the Judiciary

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47. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Congress (2011).
48. *Id.*
49. Supreme Court Ethics Act of 2017, H.R. 1960, 115th Congress (2017).
50. *Id.*
51. Anti-Corruption and Public Integrity Act, S.R. 3357, 115th Congress (2018).
52. Frost, *supra* note 16, at 449.
53. JUDICIAL CONFERENCE OF THE UNITED STATES, ABOUT THE JUDICIAL CONFERENCE, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/VW2D-2F7X].
54. *See id.*
55. 2011 Year-End Report on the Federal Judiciary, *supra* note 39, at 4–5.
56. CODE OF CONDUCT FOR UNITED STATES JUDGES (JUDICIAL CONFERENCE OF THE U.S. 2019).

2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
3. A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently
4. A Judge May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office
5. A Judge Should Refrain from Political Activity[57]

The code contains more general guidance rather than a list of particular and binding rules, but it does outline some specific prohibitions. For example, federal judges may not testify voluntarily as character witnesses or hold memberships in invidiously discriminatory organizations.[58] They are forbidden from initiating or permitting *ex parte* communications during an open legal proceeding.[59] The code even touches the personal affectation of the judges: they are requested to be "patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity."[60]

Canon 3, Section C also provides a significant amount of guidance regarding judge disqualification, or recusal.[61] The language of the judicial code largely mirrors the text of section 455. It provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which [there is]:
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> (a) . . . personal bias or . . . personal knowledge of disputed evidentiary facts . . .
>
> (b) . . . [service] as a lawyer in the matter in controversy . . .
>
> (c) . . . financial interest in the subject matter in controversy . . .
>
> (d) [a relationship with] the judge or the judge's spouse, or a person related to either within the third degree of relationship . . .
>
> (e) . . . [previous] government employment . . . or express[ion of] an opinion concerning the merits of the particular case in controversy.[62]

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57. *Id.*

58. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2, 2B (2019) ("A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of Justice require"); Canon 2C ("[A] judge's membership in any organization that . . . invidiously discriminat[es]. . . [is] prohibited . . . and gives the appearance of impropriety").

59. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(4) (2019).

60. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(3) (2019).

61. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C) (2019).

62. *Id.* (C)(1)(a) – (e).

It bears repeating, however, that although the code is a comprehensive source of judicial ethics authority and the Judicial Conference itself is chaired by Chief Justice Roberts, the code is in no way binding on the Supreme Court Justices.[63] Rather, they are free to consult the code for guidance if they believe that they are faced with an ethical problem just as they are free to consult the text of § 455, the Constitution, or each other.[64]

There are a number of subcommittees in the Judicial Conference, including the Committee on Codes of Conduct, which issues advisory opinions (similar to state bar ethics advisory opinions[65]) related to judicial ethical questions.[66] The opinions respond to inquiries by judges who seek to understand whether or not a specific instance of conduct falls within the parameters of the code of conduct—for example, whether or not disqualification is required when a relative is an Assistant United States Attorney (the answer is no, with three exceptions).[67] The advisory opinions range in subject matter from the use of electronic social media by judges and judicial employees,[68] to the possession of investment funds,[69] to whether or not a judge may solicit funds for the Boy Scouts of America.[70] Like the generally applicable Code of Conduct, federal judges can look to these advisory opinions for guidance when they have questions about the validity of their own conduct as judges.[71] Thus, it stands to reason that Supreme Court Justices, too, may consult the advisory opinions for more information.

The Judicial Conference's Code of Conduct is enforced pursuant to 28 U.S.C. § 351.[72] Under the Code, any person may file a complaint of alleged judicial misconduct with the appropriate circuit court clerk.[73] After receiving the complaint, the judiciary retains the power to investigate and discipline judges accordingly.[74]

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63. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES (2019) ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.").

64. 2011 Year-End Report on the Federal Judiciary, *supra* note 39, at 5 ("The Justices, like other federal judges, may consult a wide variety of other authorities to resolve specific ethical issues.").

65. *See, e.g.*, The Prof'l Ethics Comm. for the St. Bar of Tex., Formal Op. 684 (2019).

66. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES (2019) ("The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies.").

67. Judicial Conference of the U.S. Committee on Codes of Conduct, Formal Op. 38 (2009).

68. Judicial Conference of the U.S. Committee on Codes of Conduct, Formal Op. 112 (2017).

69. Judicial Conference of the U.S. Committee on Codes of Conduct, Formal Op. 106 (2011).

70. Judicial Conference of the U.S. Committee on Codes of Conduct, Formal Op. 32 (2009).

71. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES, 2 (2019) ("The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies.").

72. 28 U.S.C. § 351(a) (2009).

73. *Id.*

74. *See* In re Complaints Under the Judicial Conduct and Disability Act, Nos. 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107 and 10-18-90109 through 10-18-90122, 1 (2018) (resolving complaints filed against Justice Kavanaugh).

In 1979, Congress considered extending the Conduct and Disability Act to govern the Supreme Court, but that proposal was rejected.[75]

In 2018, eighty-three complaints were filed against then-recently nominated Justice Brett Kavanaugh for, among other things, making false statements during his nominee proceedings before the D.C. Circuit and the Supreme Court, making inappropriately partisan statements in those same proceedings, and treating senators on the Judiciary Committee with disrespect.[76] These complaints were initially filed with the Judicial Council of the D.C. Circuit, but Chief Justice Roberts transferred the complaints to the Judicial Council for the 10th Circuit under the Judicial Council rules of procedure.[77] After taking up the matter on its merits, the Judicial Council found that "the complaints must be dismissed because, due to his elevation to the Supreme Court, Justice Kavanaugh [was] no longer a judge covered by the Act."[78] This was true even if, at the time that the alleged conduct occurred, Justice Kavanaugh had remained a judge on the D.C. Circuit.[79]

D. SUPREME COURT PRECEDENT

In the arena of disqualification, at least, the Supreme Court has shown a willingness to publicly address policies and procedures that it follows.[80] In 1993, the Supreme Court issued a Statement of Recusal Policy; Justices Scalia and Rehnquist have separately written memoranda explaining their decisions not to disqualify themselves when parties litigating before the Court have filed motions for their disqualification.[81] These examples from the Supreme Court are taken in turn below.

1. 1993 STATEMENT OF RECUSAL POLICY

In a move that had never occurred before and has never occurred since, the Supreme Court in 1993 publicly issued a statement of its disqualification practices addressing two specific questions of disqualification.[82] The statement was signed by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg,

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75. *See* 125 Cong. Rec. 30,080–30,094 (1979).

76. In re Complaints Under the Judicial Conduct and Disability Act, Nos. 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107 and 10-18-90109 through 10-18-90122, 2 (2018).

77. *Id*. at 1.

78. *Id*. at 2 (internal citation omitted).

79. *Id*. at 7. In other words, the Act no longer applied *because* Justice Kavanaugh was, at the time of the Tenth Circuit Judicial Council's resolution, elevated to the Supreme Court. It did not matter that the alleged conduct occurred when Justice Kavanaugh was still a judge on the D.C. Circuit.

80. *See, e.g*., Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993); Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004); Laird v. Tatum, 409 U.S. 824, 825 (1972).

81. *Cheney*, 541 U.S. at 916; *Laird*, 409 U.S. at 825.

82. Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993).

Stevens, Scalia, and Thomas.[83] In the introduction to the statement, the Justices wrote that they believed publishing the policy would serve to show that circumstances in future cases would not affect their recusal decisions and would provide helpful guidance to the Justices' relatives and their relatives' firms.[84]

The statement responded to a question of how the Justices would make disqualification decisions when Justices' family members, spouses, or other relatives within the degree of relationship specified by 28 U.S.C. § 355 (1) had participated in the case at an earlier stage of litigation, or (2) were partners in a law firm that appeared before the Court.[85]

To the first question, the Court concluded in its statement that the situation on its own did not present a particularly compelling reason for the Court to adopt a blanket recusal policy without further consideration of the details in each case.[86] The Court explained that it would only be exercising "an excess of caution" that would result in significant detriment to the operation of the Court.[87] This is because the breadth of national law firms and the frequency with which many of them appear before the Court could create situations where Justices are, due to the relevant relationship, frequently forced to recuse themselves.[88] Because there are no substitute Justices,

> needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain . . . four votes out of eight instead of four out of nine.[89]

The memo went on to identify a "special factor" which would weigh in favor of recusal: when a covered attorney was the lead counsel on a case below.[90]

As to the second question, however, the Justices found more persuasive reasons for a general recusal rule.[91] In that instance, it would be too difficult to tell whether or not the partner's salary would remain unaffected from the law firm's participation in the case.[92] Because the nature of partner compensation in law firms makes it impractical to distinguish situations when partner salary has or has not been "substantially affected" by the outcome in a case, the Justices promised to "recuse [them]selves from all cases in which appearances on behalf of parties are made by firms in which [their] relatives are partners, unless [they] have received from the firm written assurance that income from Supreme Court

83. *Id.* at 2.
84. *Id.* at 1.
85. *Id.*
86. *Id.*
87. *Id.* at 1.
88. *Id.* at 1–2.
89. *Id.* at 2.
90. *Id.*
91. *See id.*
92. *Id.*

litigation is, on a permanent basis, excluded from [their] relatives' partnership shares."[93]

This policy statement is significant as evidence of one of seemingly few instances where the Supreme Court has adopted any hard policy related to ethical conduct issues.[94] Because many of the members who signed the memorandum are no longer on the court—Rehnquist, O'Connor, Scalia, Kennedy, and Stevens—it is not clear that the recusal policy still governs. If it does, it may be fair to say that the Justices who signed the policy statement and are still on the court—Thomas and Ginsburg—still follow its policy.

2. 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY

Chief Justice John Roberts squarely addressed the Supreme Court's lack of a code of conduct in his 2011 Year-End Report on the Federal Judiciary.[95] In it, Chief Justice Roberts acknowledged that, although the Justices are not bound by the Judicial Conference's Code of Conduct for federal judges, "[a]ll members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations."[96] Justices may and do, in addition to the Code of Conduct, consult "judicial opinions, treatises, scholarly articles, and disciplinary decisions," as well as "advice from the Court's Legal Office, from the Judicial Conference's Committee on the Code of Conduct, and from their colleagues."[97] The ability of the Justices to consult these sources is not unlike that of lower court federal judges; the main difference being that Justices cannot appeal perceived ethical violations to a higher court.[98] The practical differences between the Supreme Court and the lower federal courts are discussed more in Part II.C.

The Chief Justice specifically discussed two areas of judicial ethics governed by statute: financial disclosures and gifts, and recusal.[99] In both cases, Chief Justice Roberts was careful to remind readers that "[t]he Court has never addressed whether Congress may impose [such] requirements on the Supreme Court. The Justices nevertheless comply with those provisions."[100] Thus, although the Supreme Court Justices may *look* to statutes and federal codes of conduct, practical considerations often prevent them from formally adopting those statutes and codes.[101]

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93. *Id.*

94. *See, e.g.*, Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993); Press Release Regarding the Judicial Conduct and Disability Study Committee Report, U.S. Supreme Court (Sept. 19, 2006).

95. *See* 2011 Year-End Report on the Federal Judiciary, *supra* 39.

96. *Id.* at 4.

97. *Id.* at 5.

98. *Id.* at 4.

99. *Id.* at 6, 7.

100. *Id.* at 6.

101. *Id.* at 5 ("But as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues.").

3. MEMORANDUM OF SCALIA, J., IN *CHENEY V. DISTRICT COURT FOR D.C.*

After the duck hunting trip with Vice President Cheney, discussed in the introduction above, Sierra Club filed a motion for recusal with Justice Scalia alleging that his impartiality could reasonably be questioned under a standard like the one set forth in § 455.[102] In a separate opinion, Justice Scalia addressed the merits of Sierra Club's contention at length.[103]

Justice Scalia began by giving the facts of the relationship in order to distinguish his version of the details of the duck hunting trip from those that had been reported in the media.[104] Scalia explained that for the prior five years before the trip with Vice President Cheney, he had been visiting the duck-hunting camp of his long-time friend.[105] In 2003, he invited Vice President Cheney to join Scalia and Scalia's friend on the duck hunt; Scalia's invitation was accepted.[106] The trip was set before the petition for certiorari had been filed in *Cheney v. District Court for D.C.*[107] Scalia flew to Louisiana with Vice President Cheney on the Vice President's government plane.[108] The total number of guests on the duck-hunting camp during the trip was, Justice Scalia described, around thirteen along with staff and security details: "It was not an intimate setting."[109] Finally, the time that Scalia and Cheney spent together at the camp lasted about two days.[110] During that time, Scalia and Cheney were hardly alone, did not speak about the case, and did not have any private time together.[111]

Justice Scalia then turned to the question of the governing legal ethics standard. First, he argued that Supreme Court Justices cannot resolve questions of disqualification in favor of recusal because the Court members—unlike Courts of Appeal judges—cannot be substituted by other judges.[112] He then turned to § 455 of the U.S. Code: "My recusal is required if, by reason of the actions described above, my impartiality might reasonably be questioned."[113] Impartiality, Scalia argued, cannot be reasonably found when a person is "in a sizeable group of persons, in a hunting camp with the Vice President, where [one] never hunted with him in the same blind or had other opportunity for private conversation[.]"[114] The only argument in favor of recusal from Justice Scalia's perspective was a standard which would require Supreme Court Justices to recuse when they were friends with a

102. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 913 (2004).
103. *Id.*
104. *Id.* at 914.
105. *Id.*
106. *Id.*
107. *Id.* at 915.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 916.
113. *Id.* (internal quotation marks omitted).
114. *Id.*

party before the court.[115] But that standard could not hold when Vice President Cheney was being sued in his official capacity before the Court and not as a personal individual.[116] Therefore, there was no ethical violation.

More of Justice Scalia's pragmatic arguments are discussed below in Part II.C. For purposes of establishing the governing framework, it is most important to note that Justice Scalia relied on § 455 as a source of authority for recusal rules. Otherwise, he noted that "recusal is the course [he] must take—and [would] take—when, on the basis of established principles and practices, [he had] said or done something which require[d] that course."[117] What those established principles and practices are, however, is anyone's guess.

4. MICROSOFT CORP. V. UNITED STATES

A few years before the *Cheney* case, Justice Rehnquist issued a statement from a Supreme Court denial of direct appeal regarding Rehnquist's decision not to recuse in the judgment.[118] At the time, Microsoft had retained Goodwin, Procter & Hoar for counsel in private antitrust litigation.[119] This presented a potential ethical question because of the fact that Chief Justice Rehnquist's son, James Rehnquist, was a partner in the law firm and had worked on the case in his capacity as an attorney.[120] Despite the seeming personal conflict, Rehnquist did not recuse.

Chief Justice Rehnquist—like Scalia after him—relied primarily on § 455 for authority on questions of disqualification.[121] Rehnquist considered two provisions of the statute as applicable to his situation. First, Rehnquist addressed whether or not he felt that § 455(b)(5)(iii) (requiring disqualification where a relative of a Justice "[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding") disqualified him from participation in the case.[122] Rehnquist stated that "it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on [his son's pecuniary and nonpecuniary] interests when neither [his son] nor his firm would have done any work on the matters [before the Court]."[123]

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115. *Id*. ("The only possibility is that it would suggest I am a friend of his.").

116. *Id*. ("But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue . . .").

117. *Id*.

118. Microsoft Corp. v. United States, 530 U.S. 1301, 1301 (2000).

119. *Id*. at 1302.

120. *Id*. at 1301.

121. *Id*. ("Title 28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices.").

122. *Id*. at 1301–02 (citing 28 U.S.C. § 455(d) (1945)).

123. *Id*. at 1302.

Second, Rehnquist concluded that even under the more general language in § 455(a), an individual aware of the surrounding facts could not reasonably conclude that the appearance of impropriety existed.[124]

Most importantly, Rehnquist identified two sources of authority which he believed governed the disqualification decision: "relevant legal authorities" and his "colleagues."[125] This is consistent with what Justice Scalia would rely on in his decision a few years later (discussed above).[126]

II. A CASE FOR THE STATUS QUO

What does all of this teach us? At the very least, there are *some* constitutional, legislative, and judicial measures in place in order to ensure that Supreme Court Justices are behaving ethically in their role to deliberate on the most important issues in the United States. For many, the existing framework is not enough.[127] Some advocates propose more structured legislative remedies for the Supreme Court's lack of a code of conduct, either by explicitly incorporating the Supreme Court into the relevant statutes, or by writing new legislation that is directly aimed at the Supreme Court.[128] Other advocates believe that it is more manageable for the Judicial Conference to govern the conduct of the Justices and to hear ethics complaints or appeals.[129] Still others believe that the Supreme Court should hear its own ethics cases: in the event that someone has complained about a Justice's conduct, the other eight Justices would sit in judgment about the alleged violation.[130]

But the reason why the Court has lasted so long without having a code imposed on it by another branch or body is because—despite the many arguments to the contrary—a self-created code of conduct is the most structurally sound, constitutional, pragmatic code the Court can adopt.

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124. *Id*. ("I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.").

125. *Id*. at 1301.

126. *See supra* Part I.D.3. There are more than a few instances where Justices have made separate statements in order to address perceived ethical concerns in judicial opinions. *See, e.g*., Laird v. Tatum, 409 U.S. 824 (1972). This Note only includes two examples to serve the dual purposes of (1) keeping Part I a manageable length (2) and demonstrating the reasoning of Supreme Court Justices. Although Justices are not required to write memoranda or issue statements every time they disqualify themselves from cases, it is usually in the recusal context that they do so. *See generally Laird*, 409 U.S. at 824; Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004).

127. *See, e.g*., Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO (Nov. 1, 2017), https://www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772 [https://perma.cc/H2EF-C339]; Frost, *supra* note 16, at 457.

128. *See* Anti-Corruption and Public Integrity Act, S.R. 3357, 115th Congress (2018); *see also supra* note 16 and accompanying text.

129. Frost, *supra* note 16, at 471.

130. *Id*. at 473–74.

This Note argues that there are serious structural concerns that caution against adopting a code of conduct that is enforced by another branch or body. Then, it turns to the ways that existing constitutional safeguards take into account the ethical conduct of the Supreme Court Justices without threatening underlying separation of powers principles or the integrity of the institution. Finally, it discusses pragmatic reasons why it is difficult for the Court to adopt an inflexible code of conduct.

A. STRUCTURAL

Whether a code of conduct is imposed on the court by the president, Congress, or the Supreme Court itself, the code of conduct would threaten the structural integrity of the institution and the balance of separation of powers.

1. THE EXECUTIVE BRANCH

Although the President nominates the Supreme Court Justices, it does not follow that the President or anyone from the executive branch should write a Supreme Court code of conduct and enforce the code. The primary problem with executive branch involvement and legislative branch involvement beyond the nomination process is that it automatically injects an independent branch with partisanship, or at the very least, has the potential to do so.[131] It is a fundamental tenant of our republican system that the judiciary be independent.[132] That is why Alexander Hamilton wrote in Federalist No. 78 that the Good Behavior Clause was so essential:

> The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of Government. . . . [I]t is the best expedient which can be devised in any Government, to secure a steady, upright, and impartial administration of the laws. . . . If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either. . . .[133]

The same arguments that weigh in favor of insulating the judiciary through lifetime tenure weigh against the imposition of a code of conduct by the president. If the executive branch has the power to write a code of conduct, it will inevitably do so in a way that will favor the advancement of its policies. For example, if the president has nominated a number of Supreme Court Justices, it may not have much of an incentive to write or enforce a code that restricts

131. *See* THE FEDERALIST NO. 78, at 365 (Alexander Hamilton) (Bourne & Smith ed., 2017).

132. *Id.* at 366 ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

133. *Id.* at 364–65.

Justices' partisan activity. In a reverse situation where the president has very little in common ideologically with the Justices, the president may be incentivized to write a code in which there must always be complete separation between anything remotely partisan and the Supreme Court Justices. Such a conundrum might be the very question that would have arisen in the case of Justice Gorsuch's recent appearance on Fox and Friends if an executive branch code of conduct were in place.

Neither situation is very practical. On the one hand, Supreme Court Justices receive their nominations precisely because they have some connection to the executive branch;[134] additionally, more than a few Supreme Court Justices have held positions in the executive branch before being elevated to the Court.[135] A rule that restricts any interaction between Supreme Court Justices and political individuals could severely isolate Justices whose careers began in the executive branch. Also, some knowledge of the realities of the executive branch can only help Justices write better opinions. On the other hand, a policy that pays short shrift to a Justice's duty to remain objective could harm the institution. An overtly political Supreme Court bench would fly in the face of the institution that the Founding Fathers envisioned when they designed the three branches of government.

Few, if any, have argued that the executive branch should be the one to monitor the ethical conduct of Justices, presumably because of the obvious constitutional and separation of powers concerns that such a practice would raise. The ever-changing, partisan nature of the executive branch does not square very easily with the steady, independent nature of the judiciary; by imposing a code of conduct from the president onto the Justices, we would only be creating more problems than we would be solving. The simpler answer is that the partisan nature of the executive branch can never easily extricate itself from problems if it attempts to write and enforce a code of conduct for the Supreme Court. Thus, the task is better left to the Court itself to initiate if it chooses to do so.

2. THE JUDICIAL BRANCH

Many have advocated that the Supreme Court sit in judgment of itself on ethical issues.[136] Under this approach, the other eight Justices of the Supreme Court would sit in judgment of a Justice who has allegedly violated the code of conduct.[137] These proposals are dangerous for a few reasons.

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134. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004).

135. *See, e.g.*, WILLIAM H. REHNQUIST, OYEZ, https://www.oyez.org/Justices/william_h_rehnquist [https://perma.cc/H8JN-C8NR] (serving as the Deputy Attorney General under President Nixon); ELENA KAGAN, OYEZ, https://www.oyez.org/Justices/elena_kagan [https://perma.cc/S6FC-CR5V] (serving as an associate counsel to President Clinton and as a Solicitor General under President Obama).

136. *See, e.g.*, Frost, *supra* note 16, at 471.

137. *Id.* at 173–74.

If the Supreme Court Justices review ethics violations for its own members, it is not entirely clear what motivation would exist for a rigorous review of ethics violations. In fact, it is more than likely that, if any ethics review method is currently in place in the Supreme Court, it is colleague review. Yet the current peer "enforcement" of the ethics code is clearly not enough for those who criticize the Court for having lax ethical policies in the first place and have consequently advocated for ethical reform at the Court.[138] If no one will be reviewing the ethical enforcement of the Justices, the Justices may simply determine to say nothing at all. A policy of silence and non-enforcement allows each Justice to act in any way they please, as long as they allow their peers to do the same.

Conversely, Justices might apply the ethics code asymmetrically to the Court's members, like Scalia mentioned in his memorandum. It is entirely possible that a majority of the Supreme Court could have one view about the severity of an ethics code violation that is not shared by the minority. Yet the minority (or even an individual) would continuously be subject to the judgments of the rest of the Court without any hope for appeal.

Finally, a judicially reviewed ethics code might break down the trust among the members of the Court. If Justices feel that their peers are unfairly applying a code of conduct to each other, the willingness of the Justices to impartially and objectively administer the law might be harmed by the proceedings of the Court that occur outside of the cases that it decides.

3. THE LEGISLATIVE BRANCH

Perhaps the strongest arguments for the imposition of an external code of conduct is the argument that Congress could legislate a code, especially when it can already legislate the Court's jurisdiction and has plenary power over lower federal courts.[139] These proposals should also fail. Unlike lower federal courts, Congress does not exercise plenary power over the Supreme Court. Rather, it is the Constitution that created the Supreme Court.[140] Many believe that the fact that Congress has already legislated to constrict the Supreme Court in some way should support the idea that it can impose a code of conduct over the Court.[141] It is true—Congress has several provisions in the U.S. Code, including, most notably, § 455, which several Justices have already intimated they believe to be bound by that section.[142] However, the fact that Congress has legislated over smaller

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138. *See* Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO (Nov. 1, 2017), https://www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772 [https://perma.cc/DR2A-3STK].

139. *See* U.S. CONST. art. I, § 8 ("To constitute Tribunals inferior to the supreme Court").

140. 2011 Year-End Report on the Federal Judiciary, *supra* note 39, at 4.

141. *See, e.g.*, Frost, *supra* note 16, at 475.

142. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004); Microsoft Corp. v. U.S., 530 U.S. 1301, 1301 (2000); Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993). *But see* 2011 Year-End Report on the Federal Judiciary, *supra*

administrative matters should not weigh in favor of imposing a more comprehensive code on the Court. This is especially true when the text of the Constitution does not grant Congress any authority over the Supreme Court besides the power to set the Court's jurisdiction,[143] and none of the branches of the government have explicitly addressed the constitutionality of the legislation.

Furthermore, it is not entirely the case that—regardless of what the Constitution says—the Justices have acquiesced to a congressional code of conduct. Chief Justice Roberts in 2011 intentionally reminded readers in his year-end report that the statute is a form of guidance, and not binding on the Court.[144] The Court has additionally never itself taken up the matter to determine constitutionality.[145] Prior judicial practice, therefore, cannot be a reason for the imposition of the code.

Even if we take the arguments for the code of conduct as is, the same partisan concerns that counsel against the President writing or enforcing a code of conduct over the Supreme Court counsel against Congress doing so. The Founders agreed that the partisan nature of the legislature was *just as dangerous* as the partisan nature of the executive:

> There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge.[146]

Hamilton in Federalist No. 81 believed this to be true because "there will be no less reason to fear that the pestilential breath of faction may poison the fountains of Justice."[147] Thus, the partisan nature of Congress should foreclose the institution from affecting the judicial branch by imposing an ethical code of conduct.

Congressional regulation of the Supreme Court has been the most widely discussed proposal for solving the problem of Supreme Court ethics. Authors like Amanda Frost have argued that, among other Constitutional provisions, the Necessary and Proper Clause provides sufficient authority for Congress to legislate the Supreme Court's ethical code.[148] This is because the broadly-worded Necessary and Proper Clause supplements the already-existing measures that Congress uses to direct activity at the Supreme Court: "[e]thics legislation is not

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note 39, at 6 ("The Court has never addressed whether Congress may impose [ethical] requirements on the Supreme Court.").

143. U.S. CONST. art. I, § 8.

144. 2011 Year-End Report on the Federal Judiciary, *supra* note 39.

145. *Cf. id.* ("The Court has never addressed whether Congress may impose those requirements on the Supreme Court.").

146. THE FEDERALIST NO. 81, at 379–80 (Alexander Hamilton) (Bourne & Smith ed., 2017).

147. *Id.*

148. Frost, *supra* note 16, at 457.

sui generis, but rather is simply one particular category of legislation within the broader field of judicial administration—a field in which Congress has always played a major role,"[149] like when Congress passed legislation in order to set the Court's appellate jurisdiction or structure the activity of the Court's clerks.[150]

These arguments rely on a fundamental distinction that does not hold: administrative versus "decisional" independence.[151] Frost argues that "[t]he Constitution protects federal judges' *decisional* independence—that is, their ability to issue judicial decisions free from fear that their compensation will be diminished or that they will be forced from office."[152] This independence is entirely separate from administrative independence, upon which Congress can presumably encroach without institutional concern.[153] But the issue with ethics legislation is that it does—it *must*—walk the very line between decisional and administrative independence. It is true that judicial ethics violations can occur completely outside of the Court's work to hear cases. But it is also true that any consequences imposed for *violating* an ethics code can impair a Justice's duty to hear cases and issue decisions, especially with issues like recusal. A Justice cannot make an *independent* decision on a case if he or she cannot even *make the decision to begin with* because of administrative oversight. Perhaps this argument would work in the lower federal courts over which Congress exercises plenary power because these courts have procedures that can insulate a court's day-to-day operation from administrative consequences. For examples, judges that must recuse themselves for ethical purposes can be replaced by other available judges. This remedy, however, is not available to the Supreme Court. Thus, the distinction is artificial, and would prove unworkable in practice.

It is also not entirely clear that the Constitution mandates such a distinction to begin with. When he wrote about Article III of the Constitution, Hamilton made no distinction between administrative and decisional independence.[154] In fact, a Justice's "tenure" is arguably an *administrative* aspect of the Court that Hamilton stressed was fundamental for the *decisional* duties that the Court would perform. The first Canon of the Judicial Conference Code of Conduct says that "[a] judge should maintain and enforce high standards of conduct and should personally observe those standards, *so that* the integrity and independence of the judiciary may be preserved."[155] Thus, justifying ethics legislation by contending that it somehow affects a realm of a Justice's duty that is completely separate from and

149. *Id*. at 459.

150. *Id* at 458, 465 ("As previously discussed, federal legislation controls many aspects of judges' and Justices' lives, ranging from the number of administrative assistants they can hire, to courtroom security, to the budget for office supplies.").

151. *Id*. at 463.

152. *Id*.

153. *Id*. at 463–64.

154. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Bourne & Smith ed., 2017).

155. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 (2019) (emphasis added).

outside of his or her duty to hear cases is not a justification that can be reasonably applied to the Supreme Court.

4. THE JUDICIAL CONFERENCE

Still others have argued that the Judicial Conference could be a solution for Supreme Court ethics.[156] These arguments have depended on complex, often convoluted constructions of the real "status" of the Judicial Conference to avoid constitutional problems.[157] The constitutional problem is the following: the Supreme Court is the only court created by the Constitution itself and is, by the language therein, "vested" with "[t]he judicial Power of the United States."[158] By subjecting Supreme Court Justices to ethics patrol, we would need a forum in which the Justices and their accusers should be able to resolve their disputes. Some have offered the Judicial Conference as such a forum. But using the Conference in this manner would in effect be creating "a higher" court than our highest one. This construction cannot be sound.

Authors like Amanda Frost have again relied on an administrative/decisional distinction to suggest why the Judicial Conference option may not be as problematic as it appears at first blush.[159] She argues that, "[b]ecause these laws seek to regulate the behavior of judges and Justices off the bench, the Court's status [as the highest court] would appear to be irrelevant."[160] In other words, because the ethical conduct of Justices can be considered as distinct from judicial opinion-making, the status of the court hearing the issues should not be an obstacle. But it is underinclusive to cabin the realm of legal ethics to a purely "administrative" category, and overinclusive to include Supreme Court Justice conduct with that of the other federal judges in the United States. It is underinclusive because the Code of Conduct of the Judicial Conference itself addresses subjects that are not purely administrative: for example, Canon 2 of the Judicial Conference Code of Conduct tells judges that they "should not allow family, social, political, financial, or other relationships to influence judicial conduct *or judgment*."[161] It is over-inclusive because the ethical conduct of Supreme Court Justices is always going to have higher stakes and larger consequences than will the ethical conduct of other federal judges. Homogenizing the ethical violation investigation process will only serve to blunt the important differences between these two, constitutionally separate judicial institutions.

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156. *See* Frost, *supra* note 16, at 474. ("Accordingly, the Judicial Conference would be on fairly safe constitutional ground were it to delete to the full Court to review a single Justice's refusal to recuse him or herself from a pending case.")

157. *Id*. at 471–74.

158. U.S. CONST. art. III, § 1.

159. Frost, *supra* note 16, at 468–69.

160. *Id*. at 469.

161. JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2019) (emphasis added).

B. EXISTING SAFEGUARDS

Second, existing safeguards are effective protections against egregious ethical violations from Supreme Court Justices. Specifically, the impeachment provision for the removal of principle officers in the Constitution and the confirmation process ensure that Supreme Court Justices will not abuse their ethical duties.

1. IMPEACHMENT

Article II of the Constitution ensures that principal officers—including Supreme Court Justices—"shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[162] This means that in the event that a Supreme Court Justice has been accused and convicted of treason, bribery, and other high crimes and misdemeanors, there is already a provision in the Constitution which provides for that Justice's removal. Indeed, impeachment has been advocated as "perhaps [Congress's] strongest means" of indirectly regulating the ethical behavior of Justices.[163] The benefit of impeachment is that it is an explicit method for Congress to remove Supreme Court Justices who have committed egregious ethical violations. It is also a mechanism that Congress has not been afraid to wield in the past.

In 1805, Justice Samuel Chase was impeached by the House for, among other things, being overtly political in a charge that he read to a grand jury in Baltimore two years prior.[164] The House drew up eight articles of impeachment but Chase was ultimately acquitted by the Senate.[165] He nonetheless resigned his position over objection to the impeachment proceedings.[166] No other Justice besides Chase has been impeached.

Some have argued that the impeachment process is an ineffective way to handle more minor ethical violations,[167] like the kind that would probably be implicated with the enactment of a comprehensive code of conduct. Additionally, the fact that only one Supreme Court Justice has been impeached might suggest that the process is ineffective at resolving ethical violations. These are certainly fair points; overuse of impeachment could diminish its import while underuse of impeachment could indicate a defunct system. But the solution for enforcing minor ethics violations is elusive, and would likely create pragmatic concerns. Normal sanctions that are applied to lower courts may not directly transfer onto the Supreme Court. Diminishing its members only inhibits the Court's

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162. U.S. CONST. art. II, § 4.

163. Virelli III, *supra* note 16, at 1587 ("Congress's impeachment power is perhaps its strongest means of curtailing perceived recusal abuses by the Justices.").

164. Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 50–51 (1960).

165. *Id*. at 49, 57–59.

166. *Id*. at 49.

167. Frost, *supra* note 16, at 466–68.

productivity. Thus, continuing the practice of impeachment for serious judicial ethics violations is a smart way to keep the Court accountable without affecting its work. And while such an impeachment has only occurred once, Congress has tended to propose legislation rather than propose impeachment when it has considered its tools for remedying perceived ethics errors.[168]

2. CONFIRMATION

The confirmation process is another powerful mechanism available to check the Court's behavior. In order to become a Supreme Court Justice in the first place, Justices must survive a rigorous confirmation process, which includes presidential nomination, publicized hearings in front of the Senate Judiciary Committee, a preliminary vote in the Judiciary Committee, a full-Senate debate, and full Senate vote.[169] In fact, all of the Justices currently on the Supreme Court except one have had to go through the confirmation process more than once because of previous nominations to Federal Circuit Court of Appeals Judgeships.[170] These processes are specifically designed to shed light on information—good or bad—about nominees.[171] Therefore, before the Justice even reaches the bench, he or she has been thoroughly vetted for professional and personal integrity. Furthermore, there is not a strong indication that questions about approaches to legal ethics should be excluded from nomination-hearing questions:

> There is also no reason to believe that Senators' questions regarding a nominee's views on recusal would not be answered. Although many of the Senators' inquiries about specific and controversial areas of the law are met with generic and noncommittal responses by the nominee in order to avoid appearing as if they have prejudged issues that could come before the Court, questions about a potential Justice's views on judicial recusal would be largely immune from such an objection. Recusal questions are technically not the subject of cases before the Court, as they are committed entirely to an individual Justice's judgment. They are more akin to questions about judicial philosophy, which is a popular topic at confirmation hearings and has not been treated as objectionable by the nominees . . . .[172]

If senators are concerned about a nominee's approach to judicial ethics then they should feel free to ask the nominee about that approach during the

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168. *See, e.g.*, *id.* at 467.

169. NOMINATION & CONFIRMATION PROCESS, GEORGETOWN LAW LIBRARY, 1, https://guides.ll.georgetown.edu/c.php?g=365722&p=2471070 [https://perma.cc/V9FQ-L95E].

170. Justice Elena Kagan was a Solicitor General in the Obama Administration before becoming a Supreme Court Justice. *See* ELENA KAGAN, *supra* note 135.

171. Denis Rutkus, *Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue*, CONGRESSIONAL RESEARCH SERVICE, 2 (2010).

172. Virelli III, *supra* note 16, at 1594.

nomination hearing. The important point is that the confirmation hearing exists at all so that these issues can be aired before the Justice even makes it to the Court.

C. PRAGMATIC REASONS

Finally, there are a number of pragmatic reasons which counsel against adopting a code of conduct. Many of these arguments have been explored in other Sections of this Note, but it is worth repeating them here. Many of these pragmatic considerations have been voiced by sitting Supreme Court Justices when they have written about conduct questions.[173]

First: consider recusals. If someone alleges a disqualifying violation against a Justice, the Justice cannot appeal the determination to a higher court.[174] This is problematic because, as previously mentioned, (1) the Constitution does not create (and impliedly then, would seemingly not allow) a "higher court" that may hear recusal appeals;[175] and (2) Supreme Court Justices, unlike other federal court judges, cannot be substituted or replaced in the event that someone is recused from a case.[176] Because there are no substitute Justices, litigants may be forced to argue in front of an incomplete Court or be saddled with an indeterminate, four-to-four opinion with little precedential value.

When it comes to the Justices' associates in other branches, it would be asking too much for Justices to completely disassociate from friends or colleagues in either of the branches simply because they have been nominated to the Supreme Court. Justices are often nominated to the Supreme Court due to prior existing relationships with presidents.[177] Many Justices were elevated from roles in the Executive Branch—for example, Justice Kagan was the Solicitor General in the Obama Administration.[178] These considerations make partisan activity a grey area even in the realm of federal circuit court judgeships, which also require nomination and confirmation.

CONCLUSION

Ultimately, a code of conduct should not be imposed on the Supreme Court by any external branch due to structural and pragmatic concerns. If a code of conduct is imposed on the Supreme Court by Congress or the president, we risk introducing partisanship into a branch that is supposed to remain independent. Justices of the Supreme Court should likewise not be asked to sit in judgment of each other

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173. 2011 Year-End Report on the Federal Judiciary, *supra* 39, at 9; Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004); Microsoft Corp. v. U.S., 530 U.S. 1301, 1301 (2000); Statement of Recusal Policy, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Supreme Court (Nov. 1, 1993).

174. 2011 Year-End Report on the Federal Judiciary, *supra* note 39, at 9.

175. *Id*. at 8.

176. *Id*. at 9.

177. *See* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004).

178. *See* Virelli, *supra* note 16, at 1539.

because there will either be (1) no motivation for the Justices to impose any sanctions on each other, or (2) the Justices will apply a code asymmetrically among each other. Furthermore, the Court's composition prevents remedies that might be available to other federal courts, like having substitutes who can replace judges when they are forced to recuse themselves from hearing a case. It would also be difficult to draw hard lines between relationships that straddle two or more branches of the government.

This recommendation is the best course of action because the Supreme Court is already protected by constitutional safeguards: the impeachment and confirmation processes. Through impeachment, Congress can ensure that serious ethical violations will be addressed. Through confirmation, Congress will vet Justices for professional and personal integrity so that ethical violations will hopefully never arise in the first place.

Instead, if and when the Supreme Court chooses to adopt a uniform code of conduct, it should be in the same form as the statement of recusal policy that the Court published in 1993. The Court can, through informal deliberation among its members, decide which rules it would like to follow as a Court and re-visit these codes any time another Justice is added. In addition, they should continue to consult sources like the Judicial Conference Code of Conduct, their colleagues, or existing statutes for guidance. Justice Kagan recently hinted that Chief Justice Roberts may already be thinking about creating a unique code for the Court.[179] A self-initiated code would maintain the integrity of our judicial system and ensure ethical conduct without encroaching on the all-important duty of the Supreme Court of the United States.

179. "Supreme Court Fiscal Year 2020 Budget Request," C-SPAN (Mar. 7, 2019), www.c-span.org/video/?458421-1/Justices-alito-kagan-testify-supreme-courts-budget&live [https://perma.cc/TNY4-H87X] (discussing, among other things, the Supreme Court's plan to address ethical issues in 2020 after legislation was proposed in the House of Representatives).