Serving at the Pleasure of the President: Justice Fortas's Failings as a Judge and the Continued Need for a Supreme Court Code of Ethics

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INTRODUCTION

When legal ethics scholars and historians think of Justice Abe Fortas, his failed confirmation for Chief Justice of the United States Supreme Court often comes to mind. Many likely remember that Fortas's Chief Justice confirmation ultimately failed as a result of ethics allegations, one of which involved him receiving $15,000 from donors for a seminar at American University, and another in which "Fortas had accepted a $20,000 annual retainer from Wall Street financier Louis Wolfson. . . ."[1] While these allegations of inappropriate gifts ultimately doomed Fortas's chance of becoming Chief Justice, according to historian Robert David Johnson, other significant issues also put his confirmation in doubt—most notably, Fortas's relationship with President Lyndon B. Johnson.[2] As President Johnson's close friend and long-time advisor, many senators were quite suspicious of Justice Fortas's role in the Johnson administration, especially given that Fortas maintained his advisory role while serving on the Supreme Court.[3] The relationship raised some concerns about whether Fortas would have the ability to lead the Court independently and impartially.[4] However, as noted by Robert Johnson, the Senate's knowledge of Fortas's advisory role in the White House may not have been enough to stop the Justice from filling Earl Warren's seat.[5] Throughout American history, Justices such as Louis Brandies, Felix Frankfurter, and Chief Justice Taft frequently served as Presidential advisors during their time on the bench.[6] Therefore, Fortas's relationship with a sitting President was not

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1. Robert David Johnson, *Lyndon B. Johnson and the Fortas Nomination* 41 J. SUP. CT. HIST. 103, 115-17 (2016). "Louis Wolfson was under investigation for fraud and was seeking a pardon from [President] Johnson." at 117.

2. *See id.* at 117–18 (suggesting that if the $20,000 retainer was not exposed, it would have still been possible for Fortas to overcome the confirmation hearings).

3. *See* Fred P. Graham, *Fortas Testifies He Aided Johnson While a Justice*, N.Y. TIMES, July 17, 1968, PROQUEST HISTORICAL NEWSPAPERS.

4. *See* Johnson, *supra* note 1, at 111.

5. *See id.* at 118.

6. *See* Bruce Allen Murphy, *A Supreme Court Justice as Politician: Felix Frankfurter and Federal Court Appointments*, 21 AM. J. LEGAL HIST. 316, 316–17 (1977). Chief Justice Taft, Justice Miller, Justice Field, and Justice Frankfurter are known to have counseled the Presidents, especially when it came to judicial

unprecedented, and thus, arguably insufficient grounds to deny Fortas the position of Chief Justice without the additional ethics violations that later came to light.[7] Nonetheless, those senators were justly concerned about Justice Fortas's role in the White House and the risk it posed both to the separation of powers and an independent, impartial Judiciary.

Through a close examination of the 1967 Supreme Court case, *Pierson v. Ray*,[8] this Note will demonstrate how Justice Abe Fortas's desire to serve President Johnson in his role on the bench undermined the independence of the Court while also highlighting the need to create a clear, bright-line separation between the Executive and Judicial branches in order to maintain the proper administration of justice. Additionally, this Note will also explain how establishing a Judicial Code of Conduct that is enforceable on the Supreme Court would help alleviate these constitutional concerns moving forward. Ideally, the Judicial Code of Conduct would include the enforcement of Rule 2 and 3 found in the current Judicial Code of Conduct while also expanding beyond the existing rules by including a provision prohibiting communication involving issues of policy and politics between the President and members of the Court.[9] By having Congress establish a clear, unambiguous, and self-enforcing code of ethics on the Court, the justices would be less likely to engage in potentially unethical behavior, and Congress would have much clearer grounds to impose articles of impeachment for failure to meet those ethical obligations. Consequently, establishing this objective ethical standard would preserve our Founder's institutional design while also maintaining the legitimacy and independence of the nation's highest Court.

While many scholars have contemplated and advocated the need for a Judicial Code of Conduct that would apply to the United States Supreme Court, the scholarship primarily focuses on the problems associated with recusal in specific cases and inappropriate partisan organization affiliations.[10] However, little attention has been given to the serious constitutional concerns that arise when a Supreme Court Justice plays a policy or advisory role within the President's Administration. Ensuring the independence and impartiality of members of the Court is arguably more important now than ever before. After witnessing President Trump's recent threats to America's political institutions, ranging from: intimidating and firing

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appointments; *see also Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 916–17 (2004) (describing the various personal relationships Justices and presidents had throughout American history).

7. *See* Johnson, *supra* note 1, at 118; *Cheney*, 541 U.S at 916–17.

8. Pierson v. Ray, 386 U.S. 547 (1967).

9. MODEL CODE OF JUDICIAL CONDUCT R. 2 & R. 3 (2010).

10. *See, e.g.*, Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO J. LEGAL ETHICS 443, 456–59 (2013); Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1587 (2012); Lori Ann Foertsch, *Scalia's Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciaries Should Change Their Recusal Approach*, 43 HOUS. L. REV. 457, 459–60 (2006).

government officials who failed to support the Presidents allegations of fraud,[11] to pressuring his own Vice President to act unconstitutionally,[12] to even allegedly inciting a coup in hopes of overturning the 2020 election results;[13] it is clear that Congress needs to take steps to ensure that the President's influence on the Judiciary remains strictly confined to the nomination process. Therefore, this Note argues that Congress should impose a binding and self-enforcing code of ethics on members of the Supreme Court in order to ensure the Court remains insulated from the pressures and concerns of the political branches.

I. FORTAS'S ETHICAL FAILINGS IN *PIERSON V. RAY*

To understand President Johnson's influence on Fortas's decision in *Pierson v. Ray*, it is important to appreciate Justice Fortas's reputation as a civil rights advocate. Prior to his time on the Court, Justice Fortas was known by his contemporaries as a dedicated New Deal liberal, an advocate for civil liberties, as well as a brilliant legal mind.[14] According to Laura Kalman, "[f]ew doubted the sincerity of Fortas's commitment to civil liberties and social justice."[15] While Fortas initially gained a reputation in Washington as an excellent and well-respected corporate lawyer, the *Washington Post* also described him "as a passionate defender of civil rights and liberties" and a man who "[championed] . . . the equal rights of Negroes and of women."[16] In his most notable case, *Gideon v. Wainwright*, Fortas demonstrated his compassion for the poor and marginalized, but more importantly, he showed an ability to advocate for those moral issues by relying on superior legal reasoning and a sophisticated understanding of the law. Observers of Fortas's oral argument said that his performance in the *Gideon* case was "brilliant," "careful," and "polished."[17] Justice Douglas went even further to say that Fortas's oral argument in *Gideon* was '"the best single legal argument'" he had ever heard during his time on the Court.[18] Similarly, in *Durham v. United*

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11. Alana Wise, *Trump Fires Election Security Director Who Corrected Voter Fraud Disinformation*, NPR (NOV. 17, 2020), https://www.npr.org/2020/11/17/936003057/cisa-director-chris-krebs-fired-after-trying-to-correct-voter-fraud-disinformati [https://perma.cc/9ECN-RLE2].

12. Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works.*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html [https://perma.cc/9PXA-ZZHX].

13. *See* Colby Itkowitz & Paulina Firozi, *Democrats, Republicans Blame Trump for Inciting 'Coup' as Mob Storms Capitol*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/democrats-republicans-reaction-trump/ [https://perma.cc/PDW5-JLEC].

14. *See Fortas is Praised by Jewish* Congress, N.Y. TIMES, Oct. 9, 1966, PROQUEST HISTORICAL NEWSPAPERS; John P. MacKenzie, *Intense Champion of Civil Rights: Abe Fortas—A Passionate Defender of Civil Rights and Liberties*, WASH. POST, June 27, 1968, PROQUEST HISTORICAL NEWSPAPERS; *Abe Fortas: Special to The New York Times*, N.Y. TIMES, June 27, 1968, PROQUEST HISTORICAL NEWSPAPERS.

15. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 217 (1990).

16. MacKenzie, *supra* note 14.

17. KALMAN, *supra* note 15, at 183.

18. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O DOUGLAS 187 (1980).

States, the D.C. Circuit made a "rare public tribute" by acknowledging in its decision that Fortas "ably argued" that the current rule on legal sanity should be abandoned because it had become "inadequate, obsolete, and unresponsive" to the realities of the day.[19] Given these accounts of Fortas's time as a lawyer, it is evident that he possessed a more than capable legal mind, especially when it came to arguments around protecting minorities and the poor.

Furthermore, in his first term on the Supreme Court, Justice Fortas was definitively in favor of expanding individual liberties and, in particular, ensuring civil rights demonstrators' ability to protest.[20] Yet, in *Pierson* the first case to establish qualified immunity for police officers[21] Fortas voted against expanding civil rights protections and further enabled southern law enforcement efforts to uphold the insidious institution of Jim Crow.[22] As such a skilled legal advocate for civil liberties and a strong defender of those liberties during his first term on the bench, why was Fortas willing to ignore the plain text and the legislative history of § 1983 to ultimately reach an outcome he seemed to historically oppose?[23] To understand how a man usually "tremendous" on the "great issues" could join such a decision, a closer examination of the case and its context is necessary.[24]

Pierson v. Ray was a case that began in Jackson, Mississippi, involving fifteen white and Black clergymen planning to make an "anti-segregation 'prayer pilgrimage'" through the South.[25] The clergymen were arrested by local police officers for "a breach of the peace" while attempting to use segregated facilities at a bus station.[26] The officers charged the clergy members with violating § 2087.5 of the Mississippi Code, a segregation law that the Court had already declared unconstitutional by the time this case had reached the Court.[27] The petitioners argued that based on the holdings in *Thomas v. Mississippi* and *Monroe v. Pape*,

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19. *See* KALMAN, *supra* note 15, at 180.

20. *See* Brown v. Louisiana, 383 U.S. 131, 133 (1966) (Fortas J.) (overturning the convictions of five Black men who were arrested for protesting a local library's segregation policy); *see also* Adderley v. Florida, 385 U.S. 39, 48–51 (1966) (Douglas J., dissenting) (explaining that students had a right to peacefully assemble to protest the state and local segregation laws).

21. *See* John D. Kirby, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 472 (1990); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 943 (1989).

22. Memorandum from Justice Abe Fortas to Chief Justice Earl Warren informing the Chief Justice he will be joining the *Pierson v. Ray* majority opinion, (Mar. 30, 1967) (Abe Fortas Papers, MS 858-box 34, folder 751) (on file with the Manuscripts and Archives, Yale University Library) [hereinafter Memorandum to Chief Justice Warren]; *see* Andrea Januta et al., *Rooted in Racism*, REUTERS (Dec. 23 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-history/ [https://perma.cc/C5FG-NWXQ].

23. *See* Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 618 (2002).

24. KALMAN, *supra* note 15, at 217.

25. Claude Sitton, *Episcopal Group Held in Jackson*, N.Y. TIMES, Sept. 14, 1961, PROQUEST HISTORICAL NEWSPAPERS*; see Pierson*, 386 U.S. at 549.

26. *U.S. Judge Refuse Default Plea in Ministers $44,000 Bias Suit*, DAILY DEFENDER (Chicago), Jan. 8, 1963, PROQUEST HISTORICAL NEWSPAPERS.

27. *See Pierson,* 386 U.S. at 549–50.

they were entitled to a civil remedy against the two officers under § 1983 of the Civil Rights Act of 1871.[28] The Court ultimately rejected this argument, notwithstanding that § 1983 explicitly states that '"every person' who under color of state law or custom 'subjects, or causes to be subjected, any citizen to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .'"[29] Nevertheless, Fortas and the majority construed that "every person" did not include members of police officers when these state officials acted in "good faith."[30] This narrowing of a seemingly clear and unambiguous statutory term through the use of common law doctrine added an unanticipated new meaning to a critical provision of § 1983.[31] However, what made this new interpretation particularly surprising, was not only did the statutory language "every person" appear to be unambiguous on its face, but the legislative history indicated Congress truly meant "every person" when it enacted the statute.[32] During the floor debate of the Civil Rights Act of 1871, Congress expressly contemplated the problems of holding all public officials liable for deprivations of a citizens' "rights, privileges or immunities secured by the Constitution."[33] Congressman Arthur, in particular, raised concerns over the significant overreach of the Federal Government by holding state and local officials liable under federal law for actions done in their official state capacity.[34] Congressman Lewis brought up similar concerns about federal intervention by raising fears that the first section of § 1983 would make a state court official liable in federal court for damages resulting from the official's decision against a party.[35] However, after these members raised their concerns, advocates of the bill did not suggest that the opposing members had misconstrued the bill's language, but rather reaffirmed that it meant what it said, and thus applied to all government officials.[36] Therefore, even after multiple members of Congress expressed their concerns about the potential consequences, the 42nd Congress decided to enact the disputed version of the statute as it was proposed.[37] This clear and extensive legislative history of § 1983 was still ultimately unpersuasive to the Court in *Pierson*. Despite the unambiguous language of § 1983, both on its face and in the

28. *See id.* at 550–51.

29. *Id.* at 559 (Douglas, J., dissenting).

30. *See id.* at 556–57.

31. *See* Nahmod, *supra* note 23, at 617 (arguing that § 1983 "on its face admits no immunities whatsoever"); Michael D. Simmons, *Section 1983 Litigation: History and Policy Spell the Demise of Qualified Immunity for Private Defendants*, 14 MISS. C. L. REV. 127, 133 (1993).

32. *Pierson*, 386 U.S. at 561 (Douglas J., dissenting).

33. 42 U.S.C.A. § 1983; *see Pierson*, 386 U.S. at 560–63.

34. *See Cong. Globe*, 42nd Cong., 1st Sess. 365 (1871) (explaining how the language of § 1983 was an overreach by the Federal Government because it would hold state and local government officials liable for deprivation of the rights of citizens).

35. *See id.* at 385 (arguing that § 1983 threatens to make liable the judge or officers of the court simply because the officer is carrying out the laws of the state).

36. *See id.* at 568.

37. *Pierson*, 386 U.S. at 563 (Douglas J., dissenting).

legislative history, the Court determined that the common law defense of good faith and probable cause for police officers could supersede the statutory language of § 1983.[38] While this conclusion was surprising, the reasoning in *Pierson* was not the only aspect of the case where the majority seemed to ignore particularly relevant considerations. What was arguably more unanticipated than the Court's legal reasoning in *Pierson,* was the apparent disconnect between the majority's framing of the issues and the public's perception of the case.

At the time of the arrest in 1961, this story was not simply a minor breach of the peace case in Mississippi that eventually turned into a major story as a result of the case reaching the Supreme Court.[39] This story received national attention from the very beginning, long before the case worked its way to the Supreme Court's doorstep.[40] Almost immediately, newspapers across the country covered the arrest of these clergymen as a civil rights event.[41] Following the arrests, the media focused on the clergymen's anti-segregation efforts throughout the South and how these arrests would ultimately play out in the national civil rights debate.[42] Furthermore, the clergymen also understood their lawsuit against the local Jackson police and judge as an attempt to ensure civil rights advocates' ability to protest free from suppression by the local governments in the South.[43] However, during oral arguments, it was almost as if this was a completely different case. Fortas, the famous civil rights defender, did not ask a single question about the civil rights implications of this decision.[44] In fact, the Justice chose not to address the arrest at all during oral arguments.[45] Even though Fortas's law clerk, Daniel Levitt, explained that the police immunity question required a more in-depth review, Fortas focused his inquiry squarely on the ways in which the decision in *Pierson v. Ray* would impact the Judiciary. Not once questioning how this decision might drastically limit civil rights protections or reduce police liability going forward.[46] The

38. *See Pierson*, 386 U.S. at 556–557.

39. The arrest was covered by various newspapers from Washington, to New York to Chicago. *See* Claude Sitton, *Episcopal Group Held in Jackson*, N.Y. TIMES, Sept. 14, 1961, PROQUEST HISTORICAL NEWSPAPERS; *Rocky In-Law, Two Chicagoans Draw Sentences, Fines in Integration Bid*, DAILY DEFENDER (Chicago), Sept. 18, 1961, PROQUEST HISTORICAL NEWSPAPERS [hereinafter *Rocky In-Law*]; *Judge Switches Ruling Ministers to be Tried*, THE EVENING STAR (Washington), Apr. 11, 1962, PROQUEST HISTORICAL NEWSPAPERS [hereinafter *Judge Switches*]; *Rocky's Kin Calls Mississippi Jim Crow Order Unjust*, CHICAGO DEFENDER, May 18, 1963, PROQUEST HISTORICAL NEWSPAPERS.

40. *See* Sitton, *supra* note 39; *Rocky In-Law*, *supra* note 39; *Judge Switches*, *supra* note 39; *Rocky's Kin Calls Mississippi Jim Crow Order Unjust*, *supra* note 39.

41. *See* Sitton, *supra* note 39; *Rocky In-Law*, *supra* note 39; *Judge Switches*, *supra* note 39; *Rocky's Kin Calls Mississippi Jim Crow Order Unjust*, *supra* note 39.

42. *See* Sutton, *supra* note 39; *Rocky's Kin Calls Mississippi Jim Crow Order Unjust*, *supra* note 39.

43. *See 4 Clergymen Sue Miss. Police*, N.Y. TIMES, Sept. 12, 1962, PROQUEST HISTORICAL NEWSPAPERS.

44. Oral Argument, *Pierson*, 386 U.S. 547 (Jan 11, 1967), https://www.oyez.org/cases/1966/79 [https://perma.cc/K36L-9XDJ] [hereinafter Oral Argument].

45. *See id.*

46. *See* Memorandum to Justice Fortas from Justice Fortas's Law Clerk Daniel Levitt, (Abe Fortas Papers, MS 858-box 34, folder 751) (on file with the Manuscripts and Archives, Yale University Library); *see also Oral Argument*, *supra* note 44.

final opinion followed the same lines as Fortas's questions during oral arguments. Not only did the opinion not acknowledge the context in which the officers arrested the clergymen, but to the extent the Court did discuss the arrest, the majority opinion chose to focus on the importance of protecting local law enforcement's ability to maintain law and order without fear of litigation.[47]

Some scholars might suggest that despite the newspaper accounts and the petitioners' perception of the case, Justice Fortas and the rest of the majority genuinely did not believe there were civil rights issues at stake in *Pierson*.[48] However, the evidence arguably indicates the opposite conclusion. Fortas seemed well aware of the case's civil rights implications and likely joined the majority opinion because it ignored the civil rights concerns while simultaneously reinforcing protections for police officers. Evidence that Fortas was aware of the civil rights issues in *Pierson* can first be seen in his conference notes.[49] In the margins of one of Justice Douglas's circulated draft opinions, Justice Fortas states the reasons he thinks Douglas's dissent is mistaken.[50] Fortas argued that it was misguided to directly apply nineteenth century understandings about the value of litigation against the government to a current case,[51] not because the law would be ineffective in protecting citizens' rights, but because an original interpretation of the law would give organizations like the "ACLU, NAACP, KKK, etc.," greater ability to bring litigation against government officials.[52] While placing the KKK in the same category as the ACLU and NAACP indeed may suggest that Fortas no longer believed in the goals of the civil rights movement, mentioning these three organizations together also seems to highlight how he perceived the radicalization of the civil rights movement by 1967. Fortas appears to specifically highlight these three organizations in his conference notes because of how much they had "changed" in recent years.[53] By suggesting that the NAACP and the ACLU had "changed" and were now similar to radical organizations like the KKK, Fortas seems to insinuate that these once moderate advocates had now become a disruptive threat to ordered society.[54] Therefore, the Court needed to avoid further empowering these organizations with the plain language of the Civil Rights Act of 1871. These views are likely why Justice Fortas enthusiastically joined in the

47. *See Pierson*, 386 U.S. at 555 (asserting that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

48. Janet C. Hoeffel, *The Warren Court and the Birth of the Reasonably Unreasonable Police Officer*, 49 STETSON L. REV. 289, 291 (2020).V

49. *See* Justice Abe Fortas's copy of Justice William O Douglas's Circulated Dissent in *Pierson v. Ray*, (Mar. 30, 1967) (Abe Fortas Papers, MS 858-box 34, folder 751) (on file with the Manuscripts and Archives, Yale University Library).

50. *See id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *See id.*

Chief Justice's "excellent opinion."[55] By joining in the majority's arguably faulty reasoning, Fortas was able to empower law enforcement, while also simultaneously limiting the influence of what he seemed to perceive as radical civil rights organizations. This decision is a somewhat strange outcome for Justice Fortas if one simply accepts Fortas's general reputation as a great liberal and progressive advocate.[56] However, these conference notes seem to indicate that by the time Justice Fortas reviewed the briefs and heard oral arguments on the *Pierson* case, he no longer had the same sympathies he once had for civil rights advocates and protesters.

One explanation for this change in perspective may simply be that Justice Fortas, like many other white Americans at the time, had become increasingly more pessimistic about the civil rights movement by 1967.[57] During the early 60's, the civil right movement had a "broad political alliance" with a substantial portion of Americans favoring Martin Luther King Jr. and his fellow demonstrator's non-violent fight for civil rights.[58] However, by 1967—when *Pierson* was decided—public support for the mainstream civil rights movement seemed to have withered.[59] Many civil rights activists were disappointed with the achievements of King and the Democratic party's compromise oriented politics.[60] As a result, some members of the civil rights movement became more willing to embrace the Black Power movement's more violent methods in order to achieve racial justice.[61] With Stokely Carmichael and the Black Power activists gaining legitimacy among the public as serious political actors in the movement, many white Americans became more hostile to the civil rights movement.[62] Despite the fact that "Black Power activists were not as violent" as their loudest critics suggested, many white Americans conflated the Black Power movement with the increasing riots and general fear of violence in the late 60's.[63] Consequently, as

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55. Memorandum to Chief Justice Warren, *supra* note 22.

56. *See Fortas is Praised by Jewish* Congress, *supra* note 14; MacKenzie, *supra* note 14; *Abe Fortas: Special to The New York Times*, *supra* note 14.

57. *See* MALCOLM MCLAUGHLIN, THE LONG HOT SUMMER OF 1967: URBAN REBELLION IN AMERICA VII-IX (2014); *see also* RICHARD VINEN, 1968: RADICAL PROTESTS AND ITS ENEMIES 100-03 (2018).

58. *See* VINEN, *supra* note 57, at 99–100 (explaining that at the beginning of the civil rights movement, liberals and even northern conservatives "supported the aims of civil rights" activists); *see also* Poll on the effectiveness of Martin Luther King's advocacy for equal rights, National Opinion Research Center, University of Chicago during April 1963 (explaining that Dr. King was moving at the appropriate pace in his work to achieve equal rights for African Americans).

59. *See* MCLAUGHLIN, *supra* note 57; VINEN, *supra* note 57.

60. *See* VINEN, *supra* note 57, at 101.

61. *See* VINEN, *supra* note 57, at 101; Lewis M. Killian, *Black Power and White Reactions: The Revitalization of Race-Thinking in the United States*, 454 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 42, 44 (1981).

62. VINEN, *supra* note 57, at 102-03; *see* African American Heritage, *Black Power*, NATIONAL ARCHIVES https://www.archives.gov/research/african-americans/black-power [https://perma.cc/C3LP-UDGE] (Feb 25, 2021, 3:30 PM); *see also* Poll on the effectiveness of protesting, National Opinion Research Center, University of Chicago, 1967.

63. *See* VINEN, *supra* note 57, at 105; Killian, *supra* note 61.

the riots increased in numerous cities across America, moderate and liberal support for civil rights began to waiver.[64] A substantial portion of white Americans felt the government needed to reimpose "law and order" upon the protesters to curtail the violence in America's cities rather than focus on social programs and civil rights.[65] Additionally, the Supreme Court itself was under more scrutiny by the public than ever before regarding issues of "law and order" and civil rights.[66] While the Warren Court certainly faced significant criticism about some of its earlier decisions, such as *Mapp v. Ohio* and *Gideon v. Wainwright*,[67] the Court was facing even more outcry from both the public and Congress for its most recent controversial decision in *Miranda v. Arizona*.[68] A decision that, in many people's opinion, indicated that the Court was soft on crime, and thus, a contributing factor to the increasing violence in America's cities.[69] According to a poll from the *New York Times*, nearly fifty percent of the United States viewed the Court poorly or unfavorably after the *Miranda* decision.[70] Thus, it could be possible that Fortas was simply in agreement with the public's criticism about the civil rights movement while also trying to protect the Court's legitimacy after backlash from *Miranda*.[71] While the current public sentiment may play at least some factor in any Justice's decision-making, the public perception and the impact that perception had on the Johnson administration seemed to play a direct role in Fortas's decision-making process.[72] According to one of Fortas's former law clerks, "whenever 'anything that could be viewed as criticism of . . . Johnson in particular or even the Executive [Branch] in general [arose] . . ., Fortas was probably the

64. *See* VINEN, *supra* note 57, at 78 (arguing that the increased violence of the civil rights movement and the radical left during the late 60's caused mainstream liberals to become disillusioned with the movement); MCLAUGHLIN, *supra* note 57.

65. Killian, *supra* note 61, at 44; *see* MCLAUGHLIN, supra note 57 (explaining that moderate and liberal support for the administration's social and civil rights programs were crumbling as a result of the riots and violence in the streets).

66. *See* GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT 108–09 (2020).

67. *See* Tony Freyer, *Hugo L. Black and the Warren Court in Retrospect*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 103–04 (Mark Tushnet ed., 1993).

68. *See* STONE & STRAUSS, *supra* note 66.

69. *See id.*

70. *High Court Found in Disfavor, 3 to 2*, N.Y. TIMES (July 10, 1968) https://timesmachine.nytimes.com/timesmachine/1968/07/1 [https://perma.cc/L3YM-UWUD].

71. *See* Freyer, *supra* note 67, at 103–04; Stone & Strauss, *supra* note 66, at 109; Eric Arnesen, *Long Hot Summers: Rethinking 1960s Urban Unrest Half a Century Later*, 14 Lab.: STUD. WORKING-CLASS HIST. 13, 13–15 (2017).

72. *See* Laura Kalman, *Abe Fortas: Symbol of the Warren Court?*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 155, 157 (Mark Tushnet ed., 1993); Barbra Rosewicz, *Abe Fortas Remembered*, UPI (Apr. 6, 1982) (explaining that Fortas's focus were primarily on the politics affecting the White House rather than the legal issues facing the Supreme Court) https://www.upi.com/Archives/1982/04/06/Abe-Fortas-remembered/3980386917200/ [https://perma.cc/ZE2K-XLVU]. *See generally* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010) (explaining that members of the Supreme Court takes public opinion into account to some degree).

most conservative judge on the Court.'"[73] Fortas scholars and his law clerks suggest that the White House was his primary concern, and therefore it seems that this focus arguably shaped Fortas's decision in *Pierson*.[74]

Long before he joined the bench, Justice Fortas was one of President Lyndon Johnson's foremost political advisors, not just on legal issues, but also on domestic policy in general.[75] Johnson relied on his friend for counsel throughout his tenure as President and even through Fortas's years on the Supreme Court.[76] Although there were some concerns regarding the two men's private communications at the time, it was not unheard of for a sitting Justice to counsel the President on the most pressing issues of the day.[77] As far back as John Jay, Justices have played the role of advisor and often friend to the president.[78] However, what made Johnson and Fortas's relationship unique, and consequently more problematic, was the complete disregard Johnson and Fortas had for the Supreme Court's independence. Fortas and Johnson spoke openly not only about general policy issues or judicial appointments, but also issues like the upcoming Court docket, or even how Fortas and the rest of the Court should decide substantive issues that were of importance to the President.[79] One of these calls between the two men in October of 1966 particularly demonstrates both Johnson's influence and Fortas's thinking in the *Pierson v. Ray* case.[80]

During a call shortly before the Court heard *Pierson v. Ray*, President Johnson and Justice Fortas were discussing their frustrations regarding the Black Power movement.[81] This conversation, however, was more than just a discussion of the current events of the day. During the conversation between the President and the Justice, Johnson asked Fortas candidly, "are y'all going to do anything on law and order this session?"[82] Fortas responded by explaining that he was having trouble convincing other Court members to take stronger positions when it came to "law and order" cases.[83] President Johnson, frustrated with the report, emphatically explained to Fortas that he needed to convince his fellow Justices to get tougher on issues involving law enforcement in civil rights cases because the radical nature of Stokely Carmichael and others in the Black Power movement were

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73. *See* Kalman, *supra* note 72, at 157 (quoting a confidential interview between Kalman and one of Justice Fortas's law clerks).

74. *See* Rosewicz, *supra* note 72.

75. *See* KALMAN, *supra* note 15, at 293–95.

76. *See* Rosewicz, *supra* note 72.

77. *See* Murphy, *supra* note 6.

78. *Cheney*, 541 U.S at 916–17.

79. *See* Audiotape: Telephone Conversation number 10912, sound recording, Lyndon Johnson and Abe Fortas, (Oct. 3, 1966)(Recordings and Transcripts of Telephone Conversations and Meetings, LBJ Presidential Library) https://www.discoverlbj.org/item/tel-10912 [https://perma.cc/97AY-G3FZ] (Feb. 25, 2021, 3:56 PM).

80. *See id.*

81. *See id.*

82. *Id.*

83. *See id.*

causing "rots in all our major cities."[84] Johnson even went further to say that as a result of the activists' disruption, the issue of civil rights and law and order had become the single most important factor causing the recent fifteen-percent drop in his approval rating.[85] Johnson argued that this issue was even more harmful to his presidency than the war in Vietnam.[86] Therefore, Johnson made clear, if the Court could win some cases which demonstrated that the Federal Government was maintaining order and keeping the radical sects of the civil rights movement under control, it would benefit the administration significantly.[87] Fortas seemed to agree completely.[88]

By all indications, Fortas was not merely placating the President during a moment of frustration either. In fact, Fortas went into detail on exactly how he had been working internally within the Court to improve the Johnson Administration's public perception regarding its handling of law and order around the civil rights movement.[89] To demonstrate to the President that he was doing all that he could inside the Court to improve the public perception of the administration on these issues, Fortas explained that he had been voting to grant cert on a large number of state criminal conviction cases despite the fact that there was no longer a serious legal issue at stake.[90] Fortas told the president that his goal was to review these non-controversial cases so that the Court could affirm them all at once and make some "publicity" around the event in order to demonstrate that the Court (and by extension the Johnson administration) was, in fact, tough on crime and also reigning in the radicals of the civil rights movement.[91] This phone conversation demonstrates that Fortas was looking beyond general public perception or even how that perception might impact the Court's integrity. Those considerations were ultimately shaped by his primary concern for his friend President Johnson and the Johnson administration's success. Fortas's dedication to improving the image of the Court was not limited to just a few Court decisions either.[92] Justice Fortas was also willing to go beyond the Court walls to demonstrate his allegiance to the administration position on controlling the chaos in the streets.

84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *Id.*
92. *See generally* ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968) (explaining the proper forms of protest); *Fortas Stand on Columbia Protest Hit: Parent Seek Probe by Congress*, CHICAGO TRIBUNE, June 26, 1968, PROQUEST HISTORICAL NEWSPAPERS (addressing the problem of student protests on College Campuses); Abe Fortas, *Dangers to the Rule of Law* 54 A.B. A. J. 957 (1968) (discussing the problem of protest on the rule of law).

In one of Fortas's articles published in the *American Bar Association Journal* titled, "Dangers to the Rule of Law," Fortas articulated a clear shift in disposition from strong civil rights advocate to a man fighting to end the "lawlessness" threatening the United States.[93] In the article, Justice Fortas explained that while he originally believed that most American respected the rule of law and that "violation[s] and violence were confined to hooligans and outlaws," or "for a fringe of communists and fascists," Fortas argued that this presumption could no longer exist in the United States.[94] According to Fortas, average Americans, including parents, teachers, and clergymen, "commend[ed]" the violence and thought the best way to achieve meaningful social change was through lawlessness.[95] Fortas clarified in this article that by the late 1960s modern protests and the fight for civil liberties in the United States were no longer noble causes that needed to be protected to the maximum extent possible in order to preserve democracy.[96] Consequently, these more disruptive forms of demonstration fell out of the protection of the Court.[97] Instead, according to this article, what was now important to Fortas was preserving law and order, as this was the surest way to preserve America's democratic values.[98] Fortas did not just appear less interested in protecting the civil liberties of activists, though. The article also seemed to reaffirm the new inclination to protect the police officers who were enforcing the rule of law.[99] Fortas went on to emphasize that America must do more to increase the resources and facilities available to police officers as well as expedite the administration of justice in the courts.[100] Although reinforcing police officers had little to do with the legal issues he was discussing, Fortas nevertheless felt compelled to highlight the importance of this policy issue.[101]

This piece is striking for a number of reasons. Not only is Fortas's change in position so drastic, but to publish an article like this while on the Court is quite unusual.[102] While most Justices would keep to themselves and avoid political controversies that might go before the Court, Justice Fortas addressed the issues directly.[103] Fortas had little personal need to publish this article given that Justices are under no obligation to engage in political dialogue or articulate a vision of the legal system once they are on the bench.[104] Thus, the decision to

93. *See* Abe Fortas, *Dangers to the Rule of Law* 54 A.B.A. J. 957, 958 (1968).
94. *Id.* at 957.
95. *Id.*
96. *See id. at 958.*
97. *See id.* at 957.
98. *Id.* at 958.
99. *See id.*
100. *Id.*
101. *See id.*
102. Kalman, *supra* note 72, at 158.
103. *See id.*
104. Sheldon L. Snook, *Thank Goodness for the independence of America's Judiciary*, THE ATLANTIC (DEC. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/12/america-judiciary-independence/617289/ [https://perma.cc/H2H9-X2GP].

publish this article along with his two other publications further suggests that Fortas was even willing to use the press to help the Johnson administration reinforce the idea that the Federal Government was strong on "law and order" and would not tolerate chaos in the streets.

Therefore, it seems Justice Fortas was not simply trying to fall in line with public opinion on these issues. By considering Fortas' article, his conference notes, and his close relationship and conversation with the President prior to the 1966-1967 Term, it becomes clear that Justice Fortas's primary concern was improving the perception of the Johnson administration when deciding *Pierson v. Ray*. With this knowledge in mind, it is therefore not all that surprising that one of the Court's strongest supporters of the civil rights movement and one of its better legal minds was willing to affirm a position that was in opposition to both his moral values and sound legal reasoning. True to his legal realist roots, Fortas appeared to be convinced that the law was merely another means to shape social policy in President Johnson's image.[105]

II. WHY THE HISTORY MATTERS

It may be easy to dismiss the Fortas-Johnson relationship as a historical remnant of a by-gone era that needs little consideration beyond that of historians. Many Supreme Court scholars would likely point out that following Justice Fortas's failed Chief Justice confirmation, Presidents no longer base their appointments to the Supreme Court on purely political considerations such as popularity among the public and proximity to the president.[106] In fact, a number of the recent appointments have had no prior relationship with the President or any political experience at all.[107] Instead, it has become typical for Justices to primarily stay in the world of academia and then serve on a circuit court for a few years before receiving the nomination from the President.[108] Additionally, because of the amount of scrutiny modern Supreme Court nominees receive during confirmation, it may be assumed that it would be nearly impossible for a modern President to appoint a friend or political ally to the Supreme Court.[109] Nevertheless, there is still arguably reason for concern.

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105. *See* KALMAN, *supra* note 15, at 271–72 (highlighting how Fortas "consistently tried to legalize his personal prejudices").

106. *See* Terri L. Peretti, *Where Have All The Politicians Gone—Recruiting for the Modern Supreme Court*, 91 JUDICATURE 112, 112, 120 (2007); *see also* CONGRESSIONAL BUDGET OFFICE, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 10-12 (2021) (highlighting that modern Presidents now largely focus on merit and previous judicial experience when nominating a Supreme Court Justice).

107. *See* Peretti, *supra* note 106, at 112–13; Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401, 407 (2015).

108. *See* Peretti, *supra* note 106.

109. *See* Anthony J. Madonna et al., *Confirmation Wars, Legislative Time, and Collateral Damage: The Impact of Supreme Court Nominations on Presidential Success in the U.S. Senate*, 69 POL. RES. Q. 639, 639 (2016) (comparing a supreme court nomination to war).

One recent example of potential improper communication between a sitting Justice and the White House occurred as recently as 2004.[110] During on-going litigation involving Vice President Cheney, Justice Scalia and the Vice President along with a few other friends, went on a duck hunting trip together.[111] Although this event generated a significant amount of controversy and concerns over impropriety, Justice Scalia chose not to recuse himself based on his determination that there was no ethical issues that would preclude him from hearing the case.[112] Given that the current Model Code of Judicial Conduct does not apply to members of the Supreme Court, Scalia's decision not to recuse himself was subject to his complete discretion.[113] Therefore, no matter what conversations occurred, it was ultimately his personal view that became the barometer of his own ethical conduct. While Scalia was appointed by a prior administration and the communications at issue in the case were between Justice Scalia and the Vice President,[114] this event highlights the lack of control Congress and the public have on maintaining a clear separation between the Judiciary and the highest levels of the Executive branch. More recent events also give potential cause for concern that future Presidents and Justices could have a relationship similar to Johnson and Fortas.

During his final Supreme Court nomination, President Trump seemed to indicate that he was potentially willing to return to the classical model of Supreme Court Justice appointments.[115] Just before Justice Ruth Bader Ginsburg passed, President Trump chose to expand his list of potential candidates for the new vacancy.[116] The expanded list included three of President Trump's close political allies in the Senate—Senator Ted Cruz, Senator Tom Cotton, and Senator Josh Hawley.[117] Additionally, the list also included a "top Trump White House lawyer and two top officials from the Trump Justice Department."[118] Although none of these officials were ultimately selected to fill the Ginsburg vacancy, the fact that these officials were included on the list indicated the President's willingness to

110. Foertsch, *supra* note 10, at 469.

111. *Id.*

112. *See Cheney*, *supra* note 6, at 926–27.

113. *See* Madeleine Case, Note, *A Case for the Status Quo in Supreme Court Ethics*, 33 GEO. J. LEGAL ETHICS 397, 398 (2020).

114. *See* Foertsch, *supra* note 10, at 469; *see also Antonin Scalia*, OYEZ https://www.oyez.org/justices/antonin_scalia#:~:text=He%20taught%20at%20Chicago%20until,legal%20writing%20and%20natural%20wit [https://perma.cc/9NXC-Q6ET] (February 27, 2021, 12:34 PM) (explaining that President Regan appointed Justice Antonin Scalia).

115. *See* Nina Totenberg, *20 Names Added to Trump's List of Potential Supreme Court Nominees*, NPR (Sept. 10, 2020), https://www.npr.org/2020/09/10/911369426/trump-adds-20-names-to-his-list-of-potential-supreme-court-nominees [https://perma.cc/X9M4-8QJ7].

116. *See id.*

117. *See id.*

118. *Id.*

bring classic politics back into the Supreme Court's nomination process.[119] Consequently, the door arguably may have been reopened for future Presidents to once again return to the practice of appointing friends and political allies to the nation's highest Court. Given that the end of this practice and the relationships between the President and a sitting Justice have disappeared based on tradition rather than any explicit rule or statutory prohibition, it is necessary to consider ways to proactively ensure the long-term independence of the Court.[120]

III. POSSIBLE SOLUTIONS

After seeing the problems that arise from a Supreme Court Justice beholden to the President, it is necessary to consider possible solutions moving forward that would limit the ethical and constitutional concerns of the President having such influence on members of the Court. One possible solution would be for Congress to simply enact and enforce the Judicial Code of Conduct that currently governs and impose it on members of the Supreme Court. Under Rule 2.4(B), External Influences on Judicial Conduct, "a judge shall not permit family, social, political, financial, or other interests or relationship to influence the judge's judicial conduct or judgement."[121] Furthermore, under Rule 2.9(C), a judge is required to "consider only the evidence presented and any facts that may properly be judicially noticed."[122] In addition, under Canon 3.1 of the Judicial Code of Conduct, which addresses extrajudicial activities, a judge shall not:

> (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
> (B) participate in activities that will lead to frequent disqualification of the judge;
> (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;
> (D) engage in conduct that would appear to a reasonable person to be coercive; or
> (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.[123]

All of these judicial conduct provisions, combined, would prohibit a Supreme Court Justice from discussing policy issues or general substantive issues that are

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119. Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg's Seat on the Supreme Court*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html [https://perma.cc/7JW9-G33H].

120. *See* Peretti, *supra* note 106, at 114.

121. MODEL CODE OF JUDICIAL CONDUCT R. 2.4.

122. MODEL CODE OF JUDICIAL CONDUCT R. 2.9.

123. MODEL CODE OF JUDICIAL CONDUCT R. 3.1.

before the Court. However, as it currently stands, there is no binding code of ethics for members of the Court.[124] Although the current Judicial Code of Conduct is enforceable on lower court judges, Justices on the Supreme Court are not required to follow the same ethical standards.[125] While members of the Court insist that they consult the Judicial Code of Conduct and use it as guidance when ethical issues arise, the Justices are under no obligation to follow any directives therein, and thus can justify their behavior based on their own internal ethical standards.[126] This lack of enforcement creates serious concerns, because as Judge Posner put it, Supreme Court Justices are "[c]ocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring an exaggerated opinion of their ability and character."[127] While the discretion of the Justices can still be checked through the impeachment process,[128] generating sufficient support for articles of impeachment is quite difficult when there is not an objective standard in which members of Congress can evaluate a Justice's conduct.

Neither do confirmation hearings solve the ethical questions created by the fact that the Supreme Court does not operate under an official code of conduct either. For example, during Justice Fortas's confirmation hearings, he explained that his conversations with the President were not problematic, unethical, or inappropriate because even though he admittedly advised the President on matters of policy, "[Fortas] argued that the President only consulted him on matters about which [Fortas] lacked 'any expertise.'"[129] Therefore, since the senators had no objective ethical standards to evaluate Fortas's conversations with the President, the senators were unable to address the problematic and unethical communications between Justice Fortas and President Johnson.

Congress, however, is not limited to these somewhat vague and still somewhat subjective standards already written into the current Model Code. Additionally, Congress could be even more specific on certain ethical standards and thus ensure greater judicial independence by explicitly prohibiting all communication involving matters of policy and internal administration affairs between the President and members of the Supreme Court. While a number of scholars and even some members of the Court question Congress's ability to impose all the ethical standards on the Supreme Court (specifically standards for recusal), those same limitations may not apply to a prohibition on general judicial conduct such as a prohibition on substantive policy commutations with the President given that this

124. *See* Case, *supra* note 113, at 398.

125. *Id.*

126. *See* Frost, *supra* note 10, at 446.

127. Kristen L. Henke, *If It's Not Broke, Don't Fix It: Ignoring Criticisms of Supreme Court Recusals*, 57 ST. LOUIS U. L.J. 521, 531 (2013) (citing Judge Posner, How Judges Think 306 (2008)).

128. *See* Case, *supra* note 113, at 399.

129. *See* Johnson, *supra* note 1, at 111.

type of prohibition would seem to more closely resemble overall court operation procedure than they do conduct in a given case.[130]

Unlike questions involving recusal, a statutory prohibition on certain types of communication between the President and members of the Court would not give rise to separation of power's concerns or the encroachment of the Court's judicial power if Congress were to impose this type of ethical restriction on members of the Supreme Court. Although scholars argue that Congress does not have the constitutional authority to impose requirements and regulations when it comes to a Justice's decision to recuse themselves,[131] that is only because recusals have a direct effect on the ultimate outcome of a particular case and thus the recusal power is arguably a judicial power.[132] Consequently, since recusal could be seen as a judicial power, Congress arguably has significantly less authority to regulate recusal decisions by members of the Supreme Court. Prohibiting certain kinds of communication between the President and members of the Court, on the other hand, does not raise the same constitutional questions. The reason ethical standards such as the one this Note proposes are not beyond the scope of Congress is that Congress has broad authority over judicial administration.[133] Unlike the House and Senate, which have the authority to create their own internal rules and procedures under the Constitution, the Judiciary does not have similar control.[134] Instead, many things such as funding, how many Justices will make up the Court, and several other administrative issues are ultimately left up to Congress to decide.[135] A prohibition on policy communications with the President would surely fall beyond the scope of the Judiciary and well within the powers of Congress to regulate the administration of the Court. Therefore, by enacting this statute individually, Congress would avoid many of the larger questions having to do with Supreme Court ethics while still bolstering the Court's integrity and independence.

CONCLUSION

After considering Justice Fortas's role in *Pierson v. Ray*, it becomes clear that Justice Fortas was not simply applying the law as he and numerous other Justices claim to do. Justice Fortas was trying to shape the law in the President's image without regard for text or precedent. Because of his loyalty to the President, Fortas was willing to engage in behavior that threatened to undermine the integrity and the legitimacy of the Supreme Court. In a time where American institutions have been challenged by the Commander-in-Chief more than ever before, we must have mechanisms and clear procedures in place that ensure the integrity

130. *See* Frost, *supra* note 10, at 446; Virelli III, *supra* note 10, at 1562.
131. *See* Virelli III, *supra* note 10, at 1562.
132. *See id.* at 1562–65.
133. *See* Frost, *supra* note 10, at 457.
134. *Id.*
135. *See e.g.*, 28 U.S.C §§ 671–675 (2012); 28 U.S.C. §§ 1–2 (2012); 28 U.S.C. § 453 (2012).

and legitimacy of the Judiciary while also preserving the constitutional vision of our Founders. By imposing a binding Judicial Code of Conduct on the Supreme Court and prohibiting members of the Court from discussing policy and substantive legal issues with the President of the United States, we will ensure that the Supreme Court is not unduly influenced by the political branches. Providing statutorily enforced ethical rules establishes a clear objective standard that allows the government to hold the Court accountable, and thus guarantees a fair, just, and equitable administration of justice.