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House Judiciary Committee

Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on

"Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules"

October 26, 2021

I am the Dwight Professor of Law at Columbia Law School, where I teach and write in the areas of constitutional law and comparative constitutional law. My expertise is not in legal or judicial ethics as such, but some of my prior research has explored congressional regulation of the federal judiciary, and of the Supreme Court in particular.

This testimony addresses the constitutionality of applying a code of judicial conduct and/or disqualification rules to the justices of the Supreme Court and enforcing such a code and such rules against them. I conclude that Congress has broad constitutional authority to provide that ethics rules apply to Supreme Court justices but that, apart from impeachment, remedies for violating such rules may require that the Court itself sit atop the chain of enforcement.

This testimony does not address whether—assuming its constitutionality—applying a code of conduct to the Supreme Court is necessary, is wise, or, if so, what form it should ideally take.

I. Text and Precedent Do Not Answer This Question

Before addressing the merits, it is important to make a preliminary point about the nature of the constitutional interpretative question before the Committee. Some constitutional questions are best answered by direct reference to the text of the Constitution. Others are best answered by reference to the prior opinions of the Supreme Court. Whether and how Congress may subject Supreme Court justices to ethical rules lends itself neither to interpretation via specific textual commands nor interpretation via judicial precedents.

The text of the Constitution provides that Article III judges are to hold their offices "during good Behaviour," that they are to be compensated, and that their compensation "shall not be diminished during their Continuance in Office," but the text does not otherwise specify the ways in which Congress may regulate the behavior of Supreme

Court justices. Except as just noted, the text also does not specify what immunities, if any, Supreme Court justices may enjoy from congressional regulation.

Likewise, prior judicial precedents offer no specific guidance on the question of whether and how Congress may regulate the ethics of Supreme Court justices. Although both the text of the Constitution and prior Supreme Court decisions support certain inferences about congressional power in this area, as discussed below, those sources cannot give definitive answers.

Two interpretive corollaries follow from the lack of textual specificity or prior judicial precedent. The first is that historical practice matters. "It is an inadmissibly narrow conception of American constitutional law," Justice Felix Frankfurter wrote in 1952, "to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[1] Especially in the separation of powers area, government lawyers, scholars, and courts alike have looked to historical practice to work out the division of power between the different branches of government.[2]

In the area of federal courts, historical practice has often been decisive for the Supreme Court. In *Stuart v. Laird*, the Court's earliest and most significant decision regarding the power of Congress to organize its power and jurisdiction, the Court upheld the practice of justices having to "ride circuit" on lower federal courts squarely and exclusively on the basis of historical practice:

> [I]t is sufficient to observe, that practice and acquiescence under [circuit riding] for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.[3]

As Justice William Paterson noted in his opinion, relevant historical practices include not only laws and practices of particular institutions but countermeasures and responses from other branches—or lack thereof.

The second and related interpretive corollary is that the judiciary is not the sole source of interpretive wisdom around this set of questions. The considered view of

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[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

[2] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). Prominent examples include Zivotofsky v. Kerry, 576 U.S. 1 (2015) (relying on historical practice to conclude that the President has exclusive authority to recognize foreign governments); NLRB v. Noel Canning, 573 U.S. 513 (2014) (relying on historical practice to determine the scope of the President's power to make recess appointments); and Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding executive orders transferring claims to an international tribunal based on historical practice of executive settlement).

[3] Stuart v. Laird, 5 U.S. 299 (1803).

Congress, reflected in legislation, bears significant interpretive weight, and it always has. It is neither necessary nor appropriate to understand congressional power in this area solely or even primarily through a prediction about how the current or a future Supreme Court would answer a particular question. Judges take an oath to support the Constitution of the United States, as do members of Congress. In this area, as in others, members of the legislature must reach their own judgments about what the Constitution permits.

II. Congress Has Broad Authority To Regulate the Ethics of Supreme Court Justices

Any discussion of the power of Congress to regulate the behavior of Supreme Court justices involves a two-pronged inquiry. There is an initial question of whether Congress has the power to impose rules of conduct on justices of the Supreme Court. There is a second and distinct question of what enforcement mechanisms Congress has the constitutional power to impose. This section addresses the first of these questions. The next section addresses the second.

Congress has broad power to regulate the ethical practices of Supreme Court justices. The constitutional source of this power is the Necessary and Proper Clause, which grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[4] The Supreme Court forms part of the Government of the United States, and Supreme Court justices are constitutional "Officer[s]."

The Court's canonical decision in *McCulloch v. Maryland* established that the Necessary and Proper Clause must be read broadly. The "discretion" Congress is permitted with respect to the means by which the powers the Constitution confers are to be carried into execution extends to "all means which are appropriate, which are plainly adapted to [a legitimate] end, which are not prohibited, but consist with the letter and spirit of the Constitution."[5]

Historical practice confirms that the Necessary and Proper Clause gives Congress broad power to order the Court's affairs.[6] Congress has used this power to require Supreme Court justices to sit on lower federal courts, as noted above. It has used this

[4] U.S. CONST. art. I § 8 cl. 18.

[5] 17 U.S. 316, 421 (1819).

[6] The Constitution does not expressly give the Supreme Court an administrative or rulemaking power, as it does with the House and the Senate. U.S. CONST. art. I § 5.

power to set the size of the Court,[7] which it has changed six times; to impose quorum rules on the Court;[8] and to define its term.[9] Indeed, Congress unilaterally eliminated the Supreme Court term just prior to its decision upholding circuit riding. Congress likewise has used its Necessary and Proper Clause power to provide for the Supreme Court's building;[10] to give the Court staff, including administrative assistants and law clerks;[11] to assign a wide variety of roles to the Chief Justice of the United States;[12] and to provide for a pension and seniority system that extends to Supreme Court justices.[13]

More to the point, Congress has since 1948 used its Necessary and Proper Clause authority specifically to impose ethics requirements on Supreme Court justices. Justices are required to swear a specific oath or affirmation wherein they pledge to "do equal right to the poor and to the rich" and to act impartially;[14] they are subject to a criminal prohibition on the practice of law;[15] they are subject to disqualification and financial disclosure rules;[16] and there are statutory limits on the outside income they may receive.[17] It is difficult to understand how the Necessary and Proper Clause could empower Congress to require justices to swear or affirm that they will act impartially but not allow Congress to subject the justices to any ethical requirements.[18]

It is important to note that these rules have never been enforced against Supreme Court justices. Chief Justice John Roberts suggested in his 2011 Year-End Report that there are doubts as to whether these rules may constitutionally be enforced.[19] The main objections center around a general concern for the separation of powers and the independence of the Supreme Court. Unlike the lower federal courts, the Supreme Court is a constitutionally distinct entity that sits atop a constitutionally distinct branch of the federal government. Disqualification and other ethics rules can be used to harass or intimidate the justices and as discussed below, they can be structured in a way that sits in tension with the structural superiority of the Supreme Court over lower federal courts.

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[7] 28 U.S.C. § 1.
[8] *Id*.
[9] 28 U.S.C. § 2.
[10] 40 U.S.C. §§ 6101, 6111.
[11] 28 U.S.C. §§ 671–677.
[12] *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006).
[13] 28 U.S.C. § 371.
[14] 28 U.S.C. § 453.
[15] 28 U.S.C. § 454.
[16] 28 U.S.C. § 455; 5 U.S.C. app. 4 § 102.
[17] 5 U.S.C. app. 4 §§ 501, 502.
[18] *See* Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEG. ETHICS 443, 461 (2013).
[19] 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

It is conceivable that there are certain ethical requirements that would compromise the Supreme Court's independence. But as Chief Justice Roberts noted in his 2011 Year-End Report, the current disqualification rules and the Code of Judicial Conduct are apparently not among them, as the Justices claim to voluntarily comply with these requirements already. Moreover, were it the case that a code of ethics in itself interfered with the judicial independence guaranteed by Article III of the Constitution, applying such a code to lower federal courts would also raise constitutional concerns, but Congress has regulated the ethics of lower court judges since 1792, nearly as long as such judges have existed.[20] While it is true that the Supreme Court is constitutionally distinct from lower federal courts, which exist at the pleasure of Congress, this distinction speaks more to the enforcement of ethics rules than to their existence.

III. Enforcing a Code of Conduct Requires the Supreme Court To Sit Atop the Chain of Enforcement

The fact that Congress has the power to provide for a code of conduct for the Supreme Court does not mean that any and all means of enforcement are permitted. Legal norms may be enforced through a variety of channels. Some, such as the Judicial Code of Conduct as applied to lower court judges, are enforced through judicial self-regulation. Others are the subject of federal criminal law. There are at least two constraints on enforcing a code of conduct or other ethical rules on Supreme Court justices.

First, to the extent a code of conduct is criminal in nature, it is conceivable that such a code could apply to Supreme Court justices only after an impeachment proceeding. The Constitution specifically contemplates criminal prosecution after impeachment,[21] but it is silent on whether an impeachable public official may be criminally convicted prior to impeachment.[22] Supreme Court justices are not, of course, above the law, and a wide variety of state and federal criminal statutes can and do apply to them. It is implausible that all constitutional officers must be impeached before being criminally prosecuted, and there is little reason to apply such a principle to judges alone. Federal courts that have addressed pre-impeachment criminal prosecution have therefore agreed that it is constitutionally permissible.[23]

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[20] Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792).

[21] U.S. CONST. art. I § 3 cl. 7.

[22] Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 224 (1993).

[23] McBryde v. Comm. to Review Cir. Council Conduct and Disability Orders of the Judicial Conference of the United States, 264 F.3d 52, 66 (D.C. Cir. 2001); United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984);

What makes the question more interesting in the context of potential application of a code of conduct to Supreme Court justices is that ethics violations implicate the performance of official judicial duties. The impeachment clause applies to "treason, bribery, and other high crimes and misdemeanors," which can be read to imply that the sorts of offenses for which impeachment is the appropriate remedy are those, like ethics violations, that undermine public trust. Again, federal courts have not accepted this argument, as they have repeatedly permitted criminal prosecution for impeachable offenses involving breaches of public trust. Moreover, even if impeachment were the sole means of removal for judges accused of such breaches, it could still be argued that the judiciary itself—or in the case of the Supreme Court, the Court itself—has the power to sanction certain judicial conduct through means short of impeachment.[24]

A second constraint on enforcing a code of conduct on Supreme Court justices is that ethics complaints are judicial proceedings and subject to appeal. The Constitution provides that "[t]he 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."[25] Although this language could be read to suggest that the federal system does not tolerate multiple courts of last resort, it cannot be taken in this literal sense. The Constitution provides Congress with the power to make exceptions to the Supreme Court's appellate jurisdiction, and it has historically exercised this power liberally.

It is another matter, however, to say that "inferior" judges may sit in judgment over the conduct of their superiors. Currently, disqualification motions are made to the relevant judges themselves and are subject to appeal; other alleged ethical violations may be referred to the Chief Judge of the Circuit and eventually to the Judicial Conference. This means that district court judges are sometimes required to rule on the conduct of appellate judges, but district and circuit court judges are not constitutionally distinct from one another. Supreme Court justices, on the other hand, are structurally superior to other federal judges. This constraint means that Supreme Court justices should not be bound to a ruling by a lower court judge on disqualification or violations of ethical rules.

Congress could consider at least three potential responses to this constraint, ordered from least to most confrontational. First, Congress could permit the Court itself to adjudicate ethics complaints or disqualification motions brought against its members. Assuming any sanction fell significantly short of removal, the better argument is that this

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United States v. Hastings, 681 F.2d 706 (11th Cir. 1982); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974).

[24] *See McBryde*, 264 F.3d at 67 ("[T]he claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification.").

[25] U.S. CONST. art. III § 1.

would be constitutionally permissible. Such sanctioning power has long been granted to the judicial council of the circuit for lower federal court judges.[26] Giving an analogous power to the Supreme Court raises no special constitutional concern.

A second possibility would be to allow complaints to be adjudicated by the Judicial Conference or another body of lower court judges but to provide for appeal or certiorari to the Supreme Court en banc, excluding the justice whose conduct is at issue. Concerns about awkwardness or gamesmanship of justices sitting in judgment of their colleagues would be mitigated by the fact that an initial decision will have been made by a different body. It would not be surprising if a norm of denying review in such cases were to develop, so as to avoid discomfort.

Finally, a more confrontational approach that might be equally effective would be for Congress simply to proceed with review by lower court judges of disqualification or other complaints made against Supreme Court justices notwithstanding the constitutional uncertainty of doing so. As noted, members of Congress have a duty not to go that route if they believe it is constitutionally unavailable, but if they believe otherwise, they may functionally bind the Court even if they do not do so in theory. Supreme Court justices are unlikely to test the limits of the law. They consistently claim to follow the Judicial Code of Conduct as well as the statutory rules around disqualification even without conceding that these rules constitutionally may apply to them. It is unlikely to be worth it to a justice to choose making a constitutional case out of a disqualification motion or ethics complaint rather than simply "voluntarily" obeying the decision of a body comprising lower court judges.

[26] 28 U.S.C. § 354.