



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

February 6, 2019

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

Some observers maintain that “Supreme Court justices should be bound by the [same code of ethics](#) that all other federal judges are required to follow.” To that end, some Members of the 116th Congress have [introduced legislation](#) that would require the Judicial Conference to “issue a code of conduct[] which applies to each justice” on the Court. Some commentators have questioned, however, [whether Congress should—or even could](#)—impose a code of ethical conduct upon the Supreme Court.

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

The Code of Conduct for United States Judges

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

- Uphold the [integrity and independence](#) of the judiciary;
- Avoid not only [impropriety](#), but the appearance thereof;
- Perform the duties of their offices [fairly, impartially, and diligently](#);

Congressional Research Service

<https://crsreports.congress.gov>

LSB10255

- Avoid [extrajudicial activities](#) that would be inconsistent with the obligations of judicial office; and
- Refrain from [political activity](#).

Notably, the Code is [not a binding set of laws](#) *per se*—the Code “contains [no enforcement mechanism](#)” of its own, and it “is not designed or intended as a basis for [civil liability or criminal prosecution](#).” Rather, the Code is predominantly a set of [aspirational guidelines](#) by which federal judges should strive to abide. Nonetheless, judges who fail to abide by the Code risk [judicial discipline](#) (such as being [temporarily barred](#) from hearing new cases) or [disqualification](#) from an existing case.

Ethics and the Supreme Court

By its explicit terms, however, the Code only governs the judges of the [lower federal courts](#)—it does not apply to [Supreme Court Justices](#). Nor has the Supreme Court formally promulgated its own ethical code. As a result, there is presently [no singular body](#) of ethical canons with which the highest court in the nation must comply when discharging its judicial duties. That is [not to say](#), of course, that Supreme Court Justices are wholly unconstrained by ethical norms and guidelines. Even though the Code [does not formally apply](#) to Supreme Court Justices, the Justices nevertheless “[consult the Code of Conduct](#)” and [other authorities](#) “to resolve specific ethical issues.” Moreover, although Congress has not yet enacted legislation mandating the adoption of a Supreme Court code of conduct *per se*, several statutes do purport to impose [various other ethical requirements](#) upon the Justices. [28 U.S.C. § 455](#), for example, requires Supreme Court Justices to [recuse themselves](#) from particular cases under specified circumstances, such as when the Justice “has a personal bias or prejudice concerning a party” or “a financial interest in the subject matter in controversy.” Congress has also [directed Supreme Court Justices](#) to comply with certain [financial disclosure](#) requirements that apply to [federal officials generally](#). Moreover, the Court has voluntarily [resolved to comply](#) with certain [Judicial Conference regulations](#) pertaining to the receipt of gifts by judicial officers, even though those regulations would otherwise [not apply to Supreme Court Justices](#). The fact remains, however, that Supreme Court Justices—unlike their counterparts on the lower federal courts—are [not subject](#) to a specific comprehensive body of ethical rules.

A Code of Conduct for the Supreme Court?

In response to [calls](#) to mandate a code of ethics for the Supreme Court, a group of Members of the 116th Congress has introduced the [For the People Act of 2019](#) (H.R. 1), which, among other things, would require “the Judicial Conference [to] issue a [code of conduct](#), which applies to each justice . . . of the United States.” H.R. 1 thus echoes [similar bills](#) from [past Congresses](#) that would have likewise [subjected the Supreme Court](#) to a code of judicial conduct. As of the date of this Sidebar, H.R. 1 remains [pending](#) before the House of Representatives.

Legal Considerations for Congress

Legislative proposals to impose a code of conduct upon the Supreme Court raise an array of legal questions. The first is a question of statutory design: which institution will Congress charge with formulating the ethical standards to govern the Justices? A legislative proposal introduced in the 115th Congress, for instance, would have entrusted [the Supreme Court itself](#) with the task of “promulgat[ing] a code of ethics,” and would have given the Justices substantial (albeit not unbounded) freedom to design the rules that would govern their own conduct. [H.R. 1](#), by contrast, would not allow the Court to design its own ethical code; the act would instead bestow that responsibility upon the [Judicial Conference](#).

A more difficult question is whether legislative efforts to require the Supreme Court to abide by a code of judicial conduct would [violate the constitutional separation of powers](#). To ensure that federal judges

would decide cases impartially without fear of political retaliation, the Framers of the Constitution purposefully insulated the federal judiciary from political control. Some observers have therefore argued that imposing a code of conduct upon the Supreme Court would amount to an unconstitutional legislative usurpation of judicial authority. Others, however, emphasizing the significant extent to which Congress may validly regulate the Supreme Court (such as Congress's authority to impeach Justices and decide whether Justices are entitled to salary increases), have advanced the contrary argument that forcing the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress's authority to regulate the Court's practices.

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

Distinct from this separation-of-powers issue is whether Congress may validly authorize the Judicial Conference—which is composed almost exclusively of judges from the inferior federal courts—to promulgate ethical rules to govern their counterparts on the High Court. The Constitution explicitly contemplates that the Supreme Court will remain “supreme” over any “inferior” courts that “Congress may from time to time ordain and establish,” such as the federal district and appellate courts. Some observers—including, most notably, Senior Associate Justice Anthony Kennedy—have therefore suggested that it would be unconstitutional—or at least “inappropriate”—“for district and circuit judges to make rules that Supreme Court judges have to follow.”

A Supreme Court code of conduct could raise additional issues to the extent that it requires Justices to disqualify themselves from particular cases. Unlike in the lower courts, where a district or circuit judge from the same court may step in to take a recused judge's place, neither retired Justices of the Supreme Court nor lower court judges may hear a case in a recused Justice's stead. Thus, the disqualification of a Supreme Court Justice from a particular case could leave the Court with an even number of Justices to decide the case—and, by extension, increase the likelihood that the Court will be evenly divided and therefore unable to create binding precedent for future litigants.

As a practical matter, however, the aforementioned legal questions arising from these proposals may ultimately be purely academic. For one, if Congress opted to compel the Supreme Court to comply with a code of judicial conduct, the Justices might simply comply with its mandates without challenging Congress's constitutional authority to impose them. The Court has often acquiesced to congressional attempts to subject Justices to specific ethical standards. For example, when Congress decided to subject the Justices to financial disclosure requirements, for example, the Justices opted to comply with those provisions rather than challenge their constitutionality in court. Justices have likewise recused themselves pursuant to 28 U.S.C. § 455 discussed above without questioning whether Congress possesses the constitutional authority to enact a judicial disqualification statute. In any event, a federal court would probably lack an opportunity to adjudicate the validity of a congressionally imposed code of conduct unless one or more of the Justices filed a formal lawsuit to invalidate it—an eventuality that, while possible, appears remote.

If one or more of the Justices refused or failed to comply with a newly created code of conduct, however, Congress might encounter difficulties enforcing its tenets. The Constitution forbids Congress from reducing Supreme Court Justices' salaries or removing them from office except via the extraordinary and

blunt remedy of [impeachment](#). Thus, Congress may lack precise tools to induce recalcitrant Justices to behave ethically. That said, promulgating an ethical code for the Supreme Court could nonetheless establish norms for proper judicial behavior that guide the Justices' actions.

Author Information

Kevin M. Lewis
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.