

# The Supreme Court Adopts a Code of Conduct

November 17, 2023

On November 13, 2023, the U.S. Supreme Court announced the adoption of the [Code of Conduct for Justices of the Supreme Court of the United States](#) (Justices’ Code of Conduct). The Justices’ Code of Conduct is a set of five ethical canons and accompanying commentary adopted by the Supreme Court that will guide Justices in the performance of their duties. While Supreme Court Justices were already subject to some other ethics laws and regulations, the adoption of the Justices’ Code in November 2023 represents the first time that the Court has implemented and published a written code of conduct for Justices. This Legal Sidebar provides background on federal judicial ethics rules in effect before the adoption of the Justices’ Code of Conduct, then briefly outlines the substance of the Justices’ Code. The Sidebar closes with discussion of considerations for Congress related to Supreme Court ethics.

## Background on Federal Judicial Ethics

Since 1973, judges on the lower federal courts—that is, federal courts other than the Supreme Court—have been subject to a set of ethical canons now known as the [Code of Conduct for United States Judges](#) (Judges’ Code of Conduct). The [Judicial Conference of the United States](#) (Judicial Conference), the national policymaking body for the U.S. courts, adopted the Judges’ Code of Conduct to promote public confidence in the integrity, independence, and impartiality of the federal judiciary.

The Judges’ Code of Conduct is not a binding set of laws but rather a set of “[aspirational rules](#)” by which federal judges should strive to abide. The Code contains [no enforcement mechanism](#) of its own and it “is not designed or intended as a basis for [civil liability or criminal prosecution](#).” However, some violations of the Judges’ Code of Conduct may be [grounds for discipline](#) under a federal statute known as the [Judicial Conduct and Disability Act of 1980](#). The Judges’ Code of Conduct [contemplates the possibility of discipline](#) under the Act for judges who violate its tenets but also states that “[n]ot every violation of the Code should lead to disciplinary action.” Under the Act, a judge who engages in misconduct may be [publicly or privately reprimanded](#), temporarily barred from hearing new cases, [disqualified](#) from an existing case, or referred for possible impeachment. Formal discipline under the Act is [rare](#).

Neither the Judges’ Code of Conduct nor the Judicial Conduct and Disability Act applies to the Justices of the Supreme Court. Until November 2023, there was [no single body](#) of ethical canons with which the nation’s highest court was required to comply when discharging its judicial duties.

The absence of such a body of canons did not mean that Supreme Court Justices were unconstrained by ethical rules and guidelines. Prior to November 2023, Justices repeatedly [stated](#) that they would “[consult](#)

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the [Judges'] Code of Conduct" and other authorities "to resolve specific ethical issues." In addition, several federal statutes impose other ethical requirements on the Justices. For example, 28 U.S.C. § 455 requires federal judges, including Supreme Court Justices, to [recuse themselves](#) from particular cases under specified circumstances, such as when the judge or Justice "has a personal bias or prejudice concerning a party" or "a financial interest in the subject matter in controversy." Congress has also [directed Supreme Court Justices](#) to comply with certain financial disclosure requirements that apply to federal officials generally. In addition, since 1991, the Court has voluntarily [resolved to comply](#) with certain [Judicial Conference regulations](#) pertaining to outside earned income, outside employment, honoraria, and the receipt of gifts by judicial officers, even though those regulations would otherwise [not apply to Supreme Court Justices](#).

## Supreme Court Code of Conduct

On November 13, 2023, the Supreme Court issued the [Justices' Code of Conduct](#), which was adopted by the sitting Justices. According to a statement of the Court accompanying the Justices' Code of Conduct, the Code is intended to "set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court," and, for the most part, the "rules and principles are not new."

The new code contains five ethical canons:

1. A Justice Should Uphold the Integrity and Independence of the Judiciary.
2. A Justice Should Avoid Impropriety and the Appearance of Impropriety in All Activities.
3. A Justice Should Perform the Duties of Office Fairly, Impartially, and Diligently.
4. A Justice May Engage in Extrajudicial Activities that Are Consistent with the Obligations of the Judicial Office.
5. A Justice Should Refrain from Political Activity.

Canons 1 and 2 are broadly worded and are accompanied by brief notes explaining that each Justice should "maintain and observe high standards of conduct" and "should not allow family, social, political, financial, or other relationships to influence official conduct or judgment." Canon 3 governs disqualification, laying out circumstances in which Justices should recuse themselves from participating in cases because their impartiality might reasonably be questioned. (Ethical canons related to recusal are [distinct from, but related to](#), the federal recusal statute.) Canon 4 allows Justices to speak, write, and teach about the law and engage in other extrajudicial activities, subject to certain limitations. Canon 5 provides that Justices should not engage in political activities, such as holding a leadership role in a political organization, endorsing candidates for political office, political fundraising, making campaign contributions, and running for elected office.

The canons of the Justices' Code of Conduct and the Judges' Code of Conduct are nearly the same, but the two Codes have different explanatory notes, which may make a difference in how the Codes are applied in practice. In [commentary](#) on the Justices' Code of Conduct, the Supreme Court explains that the Justices' Code "is substantially derived from the Code of Conduct for U.S. Judges, but adapted to the unique institutional setting of the Supreme Court." Specifically, the Court states that much of the commentary on the Judges' Code is "inapplicable" to the Supreme Court, and that the Justices' Code and accompanying commentary are instead "tailored to the Supreme Court's placement at the head of a branch of our tripartite governmental structure."

One key difference between the Justices' Code and the Judges' Code is that the Supreme Court's new ethical rules expressly recognize Justices' "duty to sit"—the obligation to participate in cases unless disqualified. The assertion that Justices have a duty to sit reflects a practical difference between the Supreme Court and the lower federal courts. In the lower courts, another judge may step in to take a

recused judge's place; by contrast, current law [does not allow](#) another jurist to hear a case in a recused Justice's stead. The disqualification of a Justice from a particular case can thus leave the Court with an even number of Justices to decide the case and increase the likelihood that the Court would be evenly divided and unable to create binding precedent for future litigants. Because the judgment of the court below is affirmed when the Supreme Court divides evenly in a case, the commentary on the Justices' Code of Conduct—quoting a [memorandum](#) by former Associate Justice Antonin Scalia—states that the recusal of a Justice is “effectively the same as casting a vote against the petitioner.” In light of those considerations, the commentary explains, the recusal requirements in Canon 3 of the Justices' Code differ from the requirements in the Judges' Code, and recusal rules for Justices “should be construed narrowly.”

Like the Judges' Code of Conduct, the Justices' Code of Conduct itself contains no enforcement mechanism. Alleged violations of the Judges' Code can be the basis for a misconduct complaint under the Judicial Conduct and Disability Act. The Justices' Code cannot serve as the basis for a similar process because the Act [does not apply](#) to Supreme Court Justices.

## Considerations for Congress

Prior to November 2023, a number of commentators and legislators had called for the Supreme Court to be subject to a formal code of conduct. As a [previous Legal Sidebar](#) discussed in more detail, some proposals would have had an entity other than the Supreme Court, such as Congress or the Judicial Conference, impose a code of conduct on the high court. Those proposals potentially raised constitutional issues related to the separation of powers or the unique role of the Supreme Court within the federal judiciary. By electing to adopt its own code of conduct, the Supreme Court avoided those legal questions and removed a possible source of interbranch conflict.

One key question that remains following the adoption of the Justices' Code of Conduct is whether the new Code will visibly affect the Justices' behavior. Even [before adopting the Justices' Code](#), Supreme Court Justices were subject to certain ethics laws, regulations, and voluntary practices. The [statement of the Court](#) regarding the Justices' Code says that the Code “largely represents a codification of principles that we have long regarded as governing our conduct.” This statement suggests that the Justices may believe that they have been appropriately following those principles, including in certain instances that have prompted public discussion of the Court's ethics practices, and that the Code may not require them to make significant changes. On the other hand, the commentary on the Justices' Code states that “the Chief Justice has directed Court officers to undertake an examination of best practices” to facilitate compliance with the Code, and that the Court continues to consider issues including recusal review, disclosure obligations of parties and their counsel, and Justices' financial disclosures.

Related questions concern the extent to which Congress or the public will know whether Justices are complying with the Justices' Code, and what will happen if a Justice violates the Code. The Judicial Conduct and Disability Act does not apply to Supreme Court Justices, and there is currently no other formal mechanism to enforce the Justices' Code of Conduct. The Justices' Code also does not require Justices to disclose any information beyond what is already required by applicable laws and regulations. Congress does, however, have the [power to investigate](#) matters related to Supreme Court ethics. For example, the Senate Judiciary Committee has been [conducting an investigation](#) into transportation and gifts provided to members of the Court.

Any Congressional attempts to create enforcement mechanisms for the Justices' Code of Conduct would likely be subject to constitutional limits, though the exact scope of those limits is unclear. If Congress amended the Judicial Conduct and Disability Act to apply to Justices, it could raise issues under [Article III, section 1](#) of the Constitution, which states that the federal judiciary shall include “one supreme Court.” Misconduct complaints under the Act are currently [subject to initial review](#) by the chief judge of each federal judicial circuit, with further review by circuit judicial councils and the Committee on Judicial

Conduct and Disability within the Judicial Conference. Each stage of review is thus overseen by judges from the lower federal courts. Allowing lower court judges to review ethical decisions of Supreme Court Justices would arguably conflict with the constitutional status of the Supreme Court as the nation's single highest tribunal. In addition, some [commentators](#), [legislators](#), and [Justices](#) have asserted that legislation related to Supreme Court ethics may violate constitutional limits or norms related to separation of powers. Others [contend](#) that Congress has [significant constitutional authority](#) to regulate Supreme Court ethics.

If Congress wished to sanction a Justice who had allegedly violated the Justices' Code of Conduct or another applicable ethical rule, the Constitution would also impose limits. Article III [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 have limited means to induce Justices to behave ethically.

Because the Supreme Court possesses the [authority](#) to determine the constitutionality of legislative actions, the Supreme Court itself would likely play a critical role in determining whether Congress could validly impose or enforce ethics rules on the Court. There is limited legal precedent on this issue because Congress and the Supreme Court have historically taken an approach focused on interbranch comity, declining to test the full extent of their powers in order to avoid conflict between the legislative and judicial branches. Thus, Congress has at times [deferred to the Court](#) to set court rules and procedures, and the Court has at times [acquiesced to ethics legislation](#) without formally addressing its constitutionality. It is therefore difficult to predict whether or how the Court might address the constitutionality of possible Supreme Court ethics legislation.

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