A CODE TOO EASILY BROKEN: CONTINUING CONCERNS REGARDING THE UNITED STATES SUPREME COURT'S NEW CODE OF CONDUCT

Benjamin Pomerance[*]

TABLE OF CONTENTS

"The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling."
–United States Supreme Court Chief Justice John G. Roberts, Jr.[1]

[*] Deputy Counsel, New York State Department of Veterans' Services. Albany Law School, *summa cum laude* (2013); State University of New York at Plattsburgh, *summa cum laude* (2010). All research and opinions stated here are the author's own, and are not necessarily the findings and opinions of the New York State Government. The author owes the utmost thanks to the staff of the *Albany Law Review* for their high level of professionalism and their meticulous editing; to Professor Vincent M. Bonventre, whose Professional Responsibility course during the author's law school years sparked interest in this subject; and to Doris and Ronald Pomerance for their inspiration in all things.

[1] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447 (2015).

I. INTRODUCTION

On November 13, 2023, the United States Supreme Court issued a Code of Conduct.[2] To an outside observer, the fact that this action fell under the heading of news may have come as the first and greatest surprise. For a century, all other courts within the federal judiciary have received foundational guidance—at minimum—from written canons of ethics.[3] The notion that these principles applied to every federal court except for the court at the apex of the judicial pyramid would likely seem, to a neutral party observing these facts for the first time, to be unusual at best and misguided at worst.[4] Throughout all of this time, however, this peculiar picture did indeed accurately reflect the state of the federal government's judicial branch.[5] For all of these years, neither the Code of Conduct for

[2] SUP. CT. OF THE U.S., CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES statement (2023) [hereinafter Supreme Court Code of Conduct].

[3] JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FED. JUDICIARY 2 (2011) [hereinafter 2011 YEAR-END REPORT]; *see, e.g.*, 2 JUD. CONF., *Code of Conduct for United States Judges*, *in* GUIDE TO JUDICIARY POLICY (2019) [hereinafter *Code of Conduct for United States Judges*]; *see* Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 449–455 (2013); Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 410–12 (providing historical context regarding the creation of the Code of Judicial Conduct that continues to guide federal judges outside of the United States Supreme Court to this day); *see also* Amanda Robert, *Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, A.B.A. J. (Feb. 6, 2023, 7:38 PM), https://www.abajournal.com/web/article/resolution-400-supreme-court-justices-ethics-code [https://perma.cc/95AA-AGM7]; James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PRO. LAW. 10, 10–11 (2012).

[4] *See, e.g.*, Joan Biskupic, *Why the Supreme Court's Wasted Time on Ethics May Cost It*, CNN, https://www.cnn.com/2023/11/01/politics/supreme-court-ethics/index.html [https://perma.cc/A7XY-MRGH] (Nov. 1, 2023, 7:44 AM); Lauren Camera, *Lapses in Judgments*, U.S. NEWS & WORLD REP. (June 16, 2023, 5:08 AM), https://www.usnews.com/news/the-report/articles/2023-06-16/supreme-court-ethics-questions-reach-far-beyond-clarence-thomas [https://perma.cc/FNW8-USNL]; Steven Lubet, *Why Won't John Roberts Accept an Ethics Code for Supreme Court Justices?*, SLATE (Jan. 16, 2019, 9:00 AM), https://www.slate.com/news-and-politics/2019/01/supreme-court-ethics-code-judges-john-roberts.html [https://perma.cc/RQ3Q-XLVV]; Lincoln Caplan, *Does the Supreme Court Need a Code of Conduct?*, NEW YORKER (July 27, 2015), https://www.newyorker.com/news/news-desk/does-the-supreme-court-need-a-code-of-conduct [https://perma.cc/73UX-XG27]; Nan Aron, *An Ethics Code for the High Court*, WASH. POST (Mar. 13, 2011, 7:50 PM), https://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT_story.html [https://perma.cc/9XP9-LRA4].

[5] *See, e.g.*, Rowdy Kowalik, Note, *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*, 34 GEO. J. LEGAL ETHICS 1095, 1108 (2021); see Frost, *supra* note 3, at 456–57; Bob Bauer, *The Supreme Court Needs an Ethics Code*, ATLANTIC (May 18, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-roe-leak-ethics-code/629884/ [https://perma.cc/J62P-ZV9H]; Veronica Root Martinez, *A Weakened Supreme Court Needs a Code of Ethics*, BLOOMBERG L.: U.S. L. WK. (Nov. 5, 2020, 4:00 AM), https://news.bloomberglaw.com/us-law-week/a-weakened-supreme-court-needs-a-code-of-ethics [https://perma.cc/42ZL-HABE].

United States Judges adopted by the Judicial Conference of the United States nor any other specific written compilation of ethical precepts was adopted as official ethical guidance by the single most powerful court in the land.[6] Thus, the development by the Supreme Court of its first-ever Code of Conduct did indeed qualify as newsworthy.[7]

Equally notable was the fact that this Code came into existence grudgingly, prepared amid fervent pressures from a questioning populace.[8] Ethical concerns regarding certain justices of the Court, as well as an apparent diminution of the Court's overall reputation among American citizens,[9] peppered the news cycle long before the Court eventually took this historic step.[10] Six months before the

[6] *See* Michael J. Gerhardt, *Supreme Myth Busting: How the Supreme Court Has Busted Its Own Myths*, 2023 WIS. L. REV. 603, 622–23; Brandon A. Mullings, Comment, *Impropriety of Last Resort: A Proposed Ethics Model for the U.S. Supreme Court*, 58 HOW. L.J. 891, 893 (2015); JOHANNA KALB & ALICIA BANNON, BRENNAN CTR. FOR JUST., SUPREME COURT ETHICS REFORM: THE NEED FOR AN ETHICS CODE AND ADDITIONAL TRANSPARENCY 1, 3 (2019) ("Today, the nine justices on the Supreme Court are the only U.S. judges—state or federal—not governed by a code of ethical conduct.").

[7] *See, e.g.*, Melissa Quinn, *Supreme Court Adopts Formal Code of Conduct amid Scrutiny over Ethics Practices*, CBS NEWS, https://www.cbsnews.com/news/supreme-court-code-of-conduct-ethics-justices/ [https://perma.cc/V932-D8TD] (Nov. 13, 2023, 4:49 PM); John Fritze, *Amid Blowback over Clarence Thomas Travel, Supreme Court Says It Will Adopt First-Ever Code of Conduct*, USA TODAY, https://www.usatoday.com/story/news/politics/2023/11/13/supreme-court-code-of-conduct-clarence-thomas/71569902007/ [https://perma.cc/38E3-G8CH] (Nov. 14, 2023, 3:09 PM) ("The Supreme Court announced Monday that it will honor a code of conduct for the first time in its 234-year history . . . .").

[8] *See* Quinn, *supra* note 7; Fritze, *supra* note 7; Bill Blum, *Unequal Justice: A Supreme Court Ethics Code Without Enforcement Is No Code at All*, PROGRESSIVE (Nov. 21, 2023, 4:00 PM), https://progressive.org/latest/supreme-court-ethics-code-blum-20231121/ [https://perma.cc/6CBK-FWRQ] ("After years of public complaints, the United States Supreme Court finally promulgated a code of ethics on November 13."); Henry Gass, *Supreme Court Adopts Ethics Code. Will It Restore Public Trust?*, CHRISTIAN SCI. MONITOR (Nov. 14, 2023), https://www.csmonitor.com/USA/Justice/2023/1114/Supreme-Court-adopts-ethics-code.-Will-it-restore-public-trust [https://perma.cc/V7J5-GPBQ] ("The [fourteen]-page document, issued this week and signed by all nine justices, comes after months of public pressure over alleged ethical lapses.").

[9] *See, e.g.*, Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/ [https://perma.cc/YGM2-9UVW] (finding that fifty-four percent of Americans have an unfavorable view of the United States Supreme Court); Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP, https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/NPU9-XDKB] (Oct. 6, 2022) (finding that only forty-seven percent of Americans surveyed trust the federal judiciary, a drop of twenty percent in two years); *Nearly 7 in 10 Favor a Limit on How Long SCOTUS Justices Can Serve, Quinnipiac University National Poll Finds; 85 Percent of Americans Expect Economic Recession in Next Year*, QUINNIPIAC UNIV. (May 18, 2022), https://poll.qu.edu/poll-release?releaseid=3846 [https://perma.cc/Y6V8-7CW2] (stating that sixty-three percent of Americans believe that "the Supreme Court is mainly motivated by politics.").

[10] *See, e.g.*, Camera, *supra* note 4; Biskupic, *supra* note 4.

Court released its new Code, the Judiciary Committee of the United States Senate had convened a hearing to discuss this subject, a discussion for which Chief Justice John Roberts declined to provide testimony.[11] Around this same period, the Chairman of the Senate Finance Committee launched a separate inquiry into the activities of one specific Justice, Clarence Thomas, in relation to gifts of luxurious vacations, school tuition payments,–and other items and services purportedly provided to him by "billionaire real estate magnate"—and Republican Party megadonor—Harlan Crow.[12] In at least some of these financial interactions, the outcome presented Thomas with opportunities to be directly influenced politically, such as the multiple meetings that Crow arranged at his resort between Thomas and Leonard Leo, a leader of The Federalist Society,[13] one of the

[11] *See* Nina Totenberg, *Chief Justice Roberts Declines to Testify Before Senate Panel*, NPR, https://www.npr.org/2023/04/25/1172083875/chief-justice-roberts-declines-to-testify-before-senate-panel [https://perma.cc/54DN-HG5P] (Apr. 25, 2023, 8:39 PM).

[12] *See* Press Release, U.S. Senate Comm. on Fin., Wyden Letter to Harlan Crow Seeks Complete Account of Gifts to Justice Clarence Thomas (Apr. 24, 2023), https://www.finance.senate.gov/chairmans-news/wyden-letter-to-harlan-crow-seeks-complete-account-of-gifts-to-justice-clarence-thomas [https://perma.cc/3CLU-H5RM]; Press Release, U.S. Senate Comm. on Fin., Wyden Statement on Harlan Crow's Gifts to Clarence Thomas (May 4, 2023), https://www.finance.senate.gov/chairmans-news/wyden-statement-on-harlan-crows-gifts-to-clarence-thomas [https://perma.cc/FD98-922G] (responding to the ProPublica report that found that Crow had paid multiple private school tuitions for Thomas's grandnephew, whom the Justice was raising as his own child (*see* Joshua Kaplan, Justin Elliot & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA, https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/P9HD-R3MX] (May 4, 2023))); *see also* Martin Pengelly, *US Ethics Watchdog Calls on Clarence Thomas to Resign over Undisclosed Gifts*, GUARDIAN (May 9, 2023, 7:52 PM), https://www.theguardian.com/us-news/2023/may/09/clarence-thomas-supreme-court-resignation-crow [https://perma.cc/F798-FJ22]; Kaplan et al., *supra*. Notably, this is far from the first time that Thomas's conduct came under scrutiny for potential ethical violations relating to financial ties to Crow. *See, e.g.*, Zoe Tillman, *Justice Thomas Ethics Review Queried by US Court Leader in 2012*, BLOOMBERG L.: U.S. L. WK. (May 5, 2023, 7:46 PM), https://news.bloomberglaw.com/us-law-week/justice-thomas-ethics-review-queried-by-us-court-leader-in-2012 [https://perma.cc/SG9N-CYBA].

[13] *See The Ethics of Nine of the Most Powerful People in America*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/opinion/editorials/clarence-thomas-trips-supreme-court.html [https://perma.cc/N7NH-CGKM]; Emma Brown, Shawn Boburg & Jonathan O'Connell, *Judicial Activist Directed Fees to Clarence Thomas's Wife, Urged 'No Mention of Ginni'*, WASH. POST (May 4, 2023, 7:15 PM), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway/ .[https://perma.cc/3JYN-EDLX]; *see also* Alison Durkee, *Clarence Thomas: Here Are All the Ethics Scandals Involving the Supreme Court Justice amid Unpaid RV Loan Revelations*, FORBES, https://www.forbes.com/sites/alisondurkee/2023/09/22/clarence-thomas-here-are-all-the-ethics-scandals-involving-the-supreme-court-justice-amid-koch-network-revelations/?sh=99733455df75 [https://perma.cc/4X9D-E58W] (Oct. 26, 2023, 4:56 AM); Kaplan et al., *supra* note 12.

Nation's most active interest groups in grooming future jurists and in attempting to influence the outcomes of Court decisions.[14]

In the surrounding months, further allegations of a similar scent—but concerning different justices—emerged on the media's radar. Claims arose that Justice Samuel Alito had accepted but failed to properly "disclose gifts of travel and lodging valued in the tens of thousands of dollars."[15] Staff members of Justice Sonia Sotomayor, according to another report, urged universities to purchase Sotomayor's books before hosting her on campus, purchases from which Sotomayor would gain financially.[16] According to a complaint raised by one of her former colleagues in a letter to Congress, the spouse of Chief Justice Roberts received millions of dollars in commissions for placing lawyers in jobs at law firms that frequently represented their clients before the Court.[17]

The summer of 2023 was hardly the first time that concerns of this ilk—and the lack of a Code of Conduct at the Supreme Court to address them—came to the forefront. In 2004, Justice Antonin Scalia, for instance, refused to recuse himself from a Supreme Court case directly involving the papers of Vice President Dick Cheney, Scalia's personal friend with whom he had gone on a hunting trip after the Court agreed to hear arguments in the case.[18] In the decade

[14] *See The Ethics of Nine of the Most Powerful People in America*, *supra* note 13; MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM THE LIBERALS 21 (2013).

[15] *E.g.*, Kaelan Deese, *Samuel Alito Faces Supreme Court Complaint from Whitehouse for Panning Ethics Bill*, WASH. EXAM'R (Sept. 5, 2023, 6:23 PM), https://www.washingtonexaminer.com/policy/courts/supreme-court-alito-complaint-whitehouse-ethics [https://perma.cc/PD93-C35V]; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/K6CT-Z6PH].

[16] Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, AP (July 11, 2023, 5:14 AM), https://www.apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/J3UX-EJKX]; *e.g.*, Walter Shapiro, *Sonia Sotomayor's Book Scandal Is Banal and Troubling*, NEW REPUBLIC (July 19, 2023), https://newrepublic.com/article/174418/sonia-sotomoyors-book-scandal-banal-troubling [https://perma.cc/GB2D-JYNT].

[17] Steve Eder, *At the Supreme Court, Ethics Questions over a Spouse's Business Ties*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html [https://perma.cc/2SRE-E6H7]; *e.g.*, Zach Schonfeld, *Ethics Concerns Raised over Business Ties of Supreme Court Chief Justice's Wife*, HILL (Jan. 31, 2023, 8:46 PM), https://www.thehill.com/regulation/court-battles/3838609-ethics-concerns-raised-over-business-ties-of-supreme-court-chief-justices-wife/ [https://perma.cc/YNT9-FN4C].

[18] *See* Cheney v. U.S. U.S. Dist. Ct., 541 U.S. 913, 914, 915–16, 918 (2004) (Scalia, J.) (denying motion to recuse and stating that recusal, in Scalia's judgment, would harm the Court in rendering a decision in this case, and that no conflict of interest between Scalia and Cheney

that followed, from 2004 to 2014, Scalia took a reported 258 subsidized trips to locales ranging from Hawaii to Ireland to Switzerland.[19] When Scalia passed away in 2016, he was staying at a hunting lodge as the guest of a Texas businessman whose company had recently appeared before the Supreme Court.[20]

At various times, when news organizations reported on the activities of right-leaning justices, political conservatives responded with a critique of their own: the fact that the politically liberal Justice Ruth Bader Ginsburg had accepted an award in 2010 from the Women's National Democratic Club, an organization that frequently conducts high-profile functions in support of the Democratic Party.[21] Years later, questions about Ginsburg's alleged partisanship rose once more when the Justice publicly criticized Republican Party presidential candidate Donald Trump, calling him a "faker," declaring that she "[could not] imagine what [the] country would be" if Trump became president, and even joking that she would "move to New Zealand" if Trump were elected.[22] After Trump did become president, multiple cases came before the Supreme Court in which

existed); Claire Landsbaum, *Scalia's West Texas Vacation Courtesy of Businessman with Prior Supreme Court Case*, N.Y. INTELLIGENCER (Feb. 17, 2016), https://nymag.com/intelligencer/2016/02/was-scalias-west-texas-vacation-morally-suspect.html [https://perma.cc/JXM5-ALYC].

[19] Camera, *supra* note 4; Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html [https://perma.cc/WG9Q-YEJF].

[20] *See* Landsbaum, *supra* note 18.

[21] *See, e.g.*, Jared Gans, *Conservatives Criticize Liberal Supreme Court Justices for Ethics Issues*, HILL (May 4, 2023, 4:35 PM), https://thehill.com/regulation/court-battles/3988846-conservatives-criticize-liberal-supreme-court-justices-for-ethics-issues/ [https://perma.cc/6D5L-8HHD]; Mark Paoletta, *On Mark Stern's Smear of Clarence Thomas*, NAT'L REV. (Jan. 3, 2023, 4:222 PM), https://www.nationalreview.com/bench-memos/on-mark-sterns-smear-of-clarence-thomas/ [https://perma.cc/Y5EB-SKKF]; Mark Paoletta, *If Democrats Are Worried About SCOTUS Ethics Rules, They Should Look into Lefty Justices First*, FEDERALIST (July 20, 2023), https://thefederalist.com/2023/07/20/democrats-concerned-with-scotus-ethics-rules-should-look-into-leftist-justices-first/ [https://perma.cc/R4FN-YR2F] [hereinafter Paoletta, *Look into Lefty Justices First*]; Mark Paoletta, *Ruth Marcus' Alito Attack Is Grossly Hypocritical Considering Her Endorsement of Nina Totenberg's Work*, FEDERALIST (Aug. 15, 2023), https://thefederalist.com/2023/08/15/ruth-marcus-attack-on-justice-alito-is-grossly-hypocritical-considering-her-endorsement-of-nina-totenbergs-work/ [https://perma.cc/YM2H-RZRX].

[22] *See* Will Drabold, *Ruth Bader Ginsburg Doubles Down on Donald Trump Criticism: 'He Is a Faker'*, TIME (July 12, 2016, 11:55 AM), https://www.time.com/4402787/ruth-bader-ginsburg-doubles-down-on-donald-trump-criticism-he-is-a-faker/ [https://perma.cc/8G5Y-N25Z]; Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html [https://web.archive.org/web/20240630190140/https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html] ("ruefully" supposing what her late husband would have said).

the Trump Administration was a party.[23] Ginsburg, however, did not recuse herself from any of these disputes.[24]

Furthermore, Ginsburg did not remove herself from the decision-making process in more than twenty cases involving businesses in which her husband held stock through an Individual Retirement Arrangement (IRA) account.[25] This, too, was far from the only time that a Supreme Court justice sat in judgment on a case where they or a member of their immediate family possessed at least the appearance of a financial stake in the outcome. In 2015, for example, Justice Stephen Breyer did not recuse himself from hearing a dispute involving an energy company in which his wife owned more than thirty thousand dollars of stock.[26] More recently, Justice Neil Gorsuch and Justice Sotomayor both declined to recuse themselves from copyright infringement cases involving the "publishing conglomerate" Penguin Random House—even though both Justices have received lucrative deals for publishing their own books through this powerhouse company.[27]

Of course, public condemnations about a perceived lack of impartiality at the Supreme Court are hardly a twenty-first century phenomenon. The most infamous instance of ethical lapses from ages

---

[23] *See, e.g.*, Charlie Dunlap, *Why Justice Ginsburg Should Recuse Herself from the Travel Ban Cases, and Why Ban Supporters Might Not Want Her To*, LAWFIRE (June 26, 2017), https://sites.duke.edu/lawfire/2017/06/26/why-justice-ginsburg-should-recuse-herself-from-the-travel-ban-cases-and-why-ban-supporters-might-not-want-her-to/ [https://perma.cc/8V6Y-JZLS]; *see also* Michael J. Broyde, *The Case for Ginsburg to Recuse Herself*, WALL ST. J. (Mar. 4, 2020, 7:18 PM), https://www.wsj.com/articles/the-case-for-ginsburg-to-recuse-herself-11583367515 [https://web.archive.org/web/20240630193801/https://www.wsj.com/articles/the-case-for-ginsburg-to-recuse-herself-11583367515]; Krishnadev Calamur, *Trump Says Sotomayor, Ginsburg Should Recuse Themselves from Cases Involving Him*, KUOW (Feb. 25, 2020, 4:36 AM), https://www.kuow.org/stories/trump-says-sotomayor-ginsburg-should-recuse-themselves-from-cases-involving-him [https://perma.cc/4GJW-APGH].

[24] *See, e.g.*, sources cited *supra* note 23.

[25] Camera, *supra* note 4; Robert D. Hershey Jr., *The Husband of a Justice Sells His Stock After Scrutiny*, N.Y. Times, July 11, 1997, at A19; *see Individual Retirement Arrangements (IRAs)*, IRS, https://www.irs.gov/retirement-plans/individual-retirement-arrangements-iras [https://perma.cc/9LWS-CHY4] (Mar. 20, 2024).

[26] *See* Greg Stohr, *Supreme Court Justice Hears Case Unaware of Stock Conflict*, BLOOMBERG (Oct. 15, 2015, 11:46 PM), https://www.bloomberg.com/news/articles/2015-10-16/u-s-supreme-court-justice-hears-case-unaware-of-stock-conflict [https://web.archive.org/web/20240630234014/https://www.bloomberg.com/news/articles/2015-10-16/u-s-supreme-court-justice-hears-case-unaware-of-stock-conflict].

[27] *See* Madison Hall, *2 Supreme Court Justices Failed to Recuse Themselves from Cases Involving Their Publisher After Receiving Large Amounts in Book Advances and Royalties*, BUS. INSIDER (May 10, 2023, 5:11 PM), https://www.businessinsider.com/justices-didnt-recuse-themselves-from-cases-with-their-book-publisher-2023-5 [https://perma.cc/J38D-UPV5]; Debra Cassens Weiss, *Sotomayor and Gorsuch Didn't Recuse in Cert Denials Involving Their Publisher*, A.B.A. J. (May 8, 2023, 12:09 PM), https://www.abajournal.com/news/article/sotomayor-and-gorsuch-didnt-recuse-in-cert-denials-involving-their-publisher [https://perma.cc/GB2A-96UU].

past surfaced when Justice Abe Fortas resigned from the Court following revelations that he had accepted "a secret retainer [of twenty thousand dollars] a year for life [] from a Wall Street financier"—the final blow for a jurist who also enjoyed a close friendship with President Lyndon B. Johnson and repeatedly lobbied members of Congress to adopt policy positions that Johnson supported.[28] In the shadows of American history, though, plenty of other questionable judgment calls reside. When he was president, John Quincy Adams repeatedly hosted Supreme Court justices at his dinner parties, a fact that Scalia highlighted in defense of his hunting trip with Cheney.[29] Justice William Douglas commonly took part in President Franklin Delano Roosevelt's poker games.[30] Chief Justice Frederick Vinson was a fixture at the poker tables headed by President Harry Truman.[31] Justice Byron White took skiing vacations with Robert Kennedy while Kennedy was serving as Attorney General.[32] These stories, and more, demonstrate that closeness between Supreme Court justices, leading federal politicians, business executives, and other people in positions of power who appear before the Court is hardly something that arose from nowhere in modern times.[33]

---

[28] *See* Camera, *supra* note 4; Kowalik, *supra* note 5, at 1095, 1104; Ron Elving, *Congress Has Clashed with Supreme Court Justices over Ethics in the Past*, NPR (Apr. 22, 2023, 10:18 AM), https://www.npr.org/2023/04/22/1171289725/congress-has-clashed-with-supreme-court-justices-over-ethics-in-the-past [https://perma.cc/7T5T-WN6A].

[29] Cheney v. U.S. Dist. Ct., 541 U.S. 913, 916 (2004) (Scalia, J.).

[30] *See* Jeffrey Rosen, *The Nation: Social Court; The Justice Who Came to Dinner*, N.Y. TIMES (Feb. 1, 2004), https://www.nytimes.com/2004/02/01/weekinreview/the-nation-social-court-the-justice-who-came-to-dinner.html [https://web.archive.org/web/20240701194628/https://www.nytimes.com/2004/02/01/weekinreview/the-nation-social-court-the-justice-who-came-to-dinner.html]; C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. STATE L. REV. 895, 897, 899 (2008).

[31] *See* Camera, *supra* note 4.

[32] *See* Janet Roberts, Joan Biskupic & John Shiffman, *Special Report: In Ever-Clubbier Bar, Eight Men Emerge as Supreme Court Confidants*, REUTERS (Dec. 8, 2014, 5:57 AM), https://www.reuters.com/article/idUSKBN0JM11D/ [https://web.archive.org/web/20240701212200/https://www.reuters.com/article/idUSKBN0JM11D/] (noting that one of these ski trips in 1963 took place only a few weeks before Kennedy argued before the Court, a case in which White did not recuse himself).

[33] For example, Justice Oliver Wendell Holmes and his wife frequently dined at the White House as a guest of Theodore Roosevelt, yet Holmes did not recuse himself from cases before the Court involving Roosevelt's "trust busting initiative[s]." *See Cheney*, 541 U.S. at 917. Justice Harlan Stone was friends with Herbert Hoover and members of Hoover's family and spent plenty of time at the White House at their invitation but sat in judgment on cases involving the Hoover Administration's favored causes. *See id.*; Don Whitehead, *Hoover Cleans Up the Mess*, ORLANDO SENTINEL, Feb. 3, 1957, at 12E; *Sailfish Still Elude Hoover*, NEWARK EVENING NEWS, Jan. 31, 1929, at 4; Craig Wright, *Herbert Hoover and the Supreme Court*, HERBERT HOOVER PRESIDENTIAL LIBR. & MUSEUM: BLOG (Oct. 7, 2020), https://hoover.blogs.archives.gov/2020/10/07/herbert-hoover-and-the-supreme-court/ [https://perma.cc/P8ZE-5K6M]. In 1942, Justice Robert Jackson spent a weekend in Virginia

Articles regarding judicial ethics can too easily adopt a holier-than-thou tone, as if the author has lived a life of spotless purity.[34] This author makes no such claim and hopes to adopt no such tone in this Article. Nor is this Article designed to argue sanctimoniously that every behavior by the justices described above merits absolute censure and condemnation.[35] What this Article does do, though, is twofold. On one hand, this Article praises the justices of this Supreme Court in finally doing what their predecessors have never done by adopting this unprecedented Code of Conduct. Despite being pressured and harangued into existence, the Court's step forward was the correct one,[36] for the citizenry of the United States of America deserves to—and needs to—live in a Nation with far greater confidence about the impartiality of decisions rendered from its highest federal judicial body. The incongruous picture of every other federal court being governed by a set of ethical precepts while the Supreme Court doggedly insisted that they were far too untainted to need an ethical code[37] failed to instill this necessary confidence, particularly as reports of judicial misbehaviors mounted.[38] While detractors have long argued that calls for a code of ethics at the Supreme Court were politically motivated,[39] the examples described

with President Roosevelt—just one month before the Court heard a case involving the extent of the president's powers, a case for which Jackson himself wrote an opinion favoring Roosevelt's Administration. Roberts et al., *supra* note 32.

[34] *See, e.g.*, *The Ethics of Nine of the Most Powerful People in America*, *supra* note 13; Shapiro, *supra* note 16; Paoletta, *Look into Lefty Justices First*, *supra* note 21.

[35] Indeed, this Article quite consciously *does not* take a stance on whether any of the behaviors by the justices described herein are indisputably ethical or unethical. Instead, this Article outlines the reports of these issues in a manner that aspires to be balanced in nature and addresses the concern, which reasonable Americans could feel, that there is at least an appearance of impropriety in justices continuing to sit in judgment over these cases despite the presence of these potential conflicts. On this point, plenty of people, including the justices themselves, may find reasons to disagree with the views of many Americans. Still, the crisis of the Court's decreasing legitimacy in the eyes of the majority of Americans, *see supra* note 9 and accompanying text, signals that this issue can no longer be ignored by dismissing the views of so many people about the potential for conflicts of interests among justices of the Court.

[36] *See* Simon Lazarus, *Liberals Are Wrong to Trash the Supreme Court's New Code of Ethics*, NEW REPUBLIC (Nov. 30, 2023), https://newrepublic.com/article/177152/supreme-courts-ethics-code-good [https://perma.cc/8XFN-L5NH].

[37] *See id.*

[38] *See* Durkee, *supra* note 13; *see also* David J. Sachar, *Judicial Misconduct and Public Confidence in the Rule of Law*, UNODC, https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html [https://perma.cc/NY65-3JLN].

[39] *See, e.g.*, Carrie Campbell Severino, *For the Court's Critics, It's Never Truly Been About Ethics*, NAT'L REV. (Nov. 16, 2023, 11:50 AM), https://www.nationalreview.com/bench-memos/for-the-courts-critics-its-never-truly-been-about-ethics/ [https://perma.cc/J54U-FTKN]; *see also* Gerhardt, *supra* note 6, at 604–05 ("A longstanding concern has been that subjecting justices to a code of ethics would unleash countless partisan attempts to misuse the code to harass them for purely partisan reasons."); Ashley Murray, *GOP Senators Walk Out of Vote on*

above encompass justices who are known to be politically liberal and justices who are known to be politically conservative, all of whose actions further eroded public confidence in the Supreme Court regardless of their political affiliation. Far from being partisan in nature, the mandate for an ethical code at the Supreme Court is actually as politically neutral as anything in the United States can be today.

On the other hand, this Article combines praise for a first step forward with critique of this new instrument that the Court has crafted. A close reading of this Code of Conduct reveals that this document is incomplete. Several issues that observers hoped this ethical code would address remain unanswered or inadequately resolved, creating a code that too easily may be broken without penalty by the justices whose conduct it purports to regulate.[40] This Article highlights areas of this Code that the Court could—and should—amend if the justices truly wish to lead by example, to restore public trust in their decisions, and to ensure that the justices of the Supreme Court are indeed held to the same ethical standards as the judges of "lower" federal courts. Without these changes, the equivalent concerns that led to the generation of this Code of Conduct

Subpoenas in U.S. Supreme Court Ethics Inquiry, KAN. REFLECTOR (Nov. 30, 2023, 2:25 PM), https://kansasreflector.com/2023/11/30/gop-senators-walk-out-of-vote-on-subpoenas-in-u-s-supreme-court-ethics-inquiry/ [https://perma.cc/7B3Q-SLQ5].

[40] Criticism of the Court's new Code of Conduct came swiftly, and certainly is not limited to this Article. *See, e.g.*, Jeannie Suk Gersen, *The Supreme Court's Self-Excusing Ethics Code*, NEW YORKER (Nov. 21, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-courts-self-excusing-ethics-code [https://web.archive.org/web/20240705044349/https://www.newyorker.com/news/daily-comment/the-supreme-courts-self-excusing-ethics-code]; Tonja Jacobi, *Supreme Court's 'New' Ethics Code Won't Actually Change a Thing*, BLOOMBERG L.: U.S. L. WK. (Nov. 17, 2023, 4:30 AM), https://news.bloomberglaw.com/us-law-week/supreme-courts-new-ethics-code-wont-actually-change-a-thing [https://perma.cc/6GWZ-YCHR]; Erwin Chemerinsky, *Opinion: The Supreme Court Finally Has a Code of Ethics, but It Has a Fatal Flaw*, L.A. TIMES (Nov. 14, 2023, 3:03 PM), https://www.latimes.com/opinion/story/2023-11-14/supreme-court-justices-recusal-code-of-ethics [https://web.archive.org/web/20240705044822/https://www.latimes.com/opinion/story/2023-11-14/supreme-court-justices-recusal-code-of-ethics]; Jesse Wegman, *We Waited 200 Years for This Supreme Court Ethics Code?*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/opinion/supreme-court-ethics-code.html [https://web.archive.org/web/20240705045425/https://www.nytimes.com/2023/11/14/opinion/supreme-court-ethics-code.html]; Ian Millhiser, *The Supreme Court's New Ethics Code Is a Joke*, VOX (Nov. 14, 2023, 3:45 PM), https://www.vox.com/scotus/2023/11/14/23960027/supreme-court-new-ethics-code-clarence-thomas-unenforceable [https://perma.cc/B5GM-ETW3]. *But see* Dan McLaughlin, *The Supreme Court's New Ethics Code Rebukes Its Critics*, NAT'L REV. (Nov. 13, 2023, 9:13 PM), https://www.nationalreview.com/2023/11/the-supreme-courts-new-ethics-code-rebukes-its-critics/ [https://perma.cc/4T8N-NRMB] (stating that the Court's Code of Conduct "is a positive step . . . that deprives [critics] of a bad-faith talking point" and will "help[] fortify the justices against such abuses going forward").

will persist across the United States, continuing to leave Americans questioning whether the decisions that this Court issues are truly judicial outcomes into which they should place their full faith, respect, and adherence.

II. BEYOND POLITICS AND PRESSURES: REMOVING THE STIGMAS OF REASONABLE JUDICIAL RECUSALS

Amid the longstanding calls for an ethical code at the Supreme Court, no jurist in the Nation has resisted this move more than the Court's present Chief Justice.[41] In 2011, for instance, Roberts devoted his entire *Year-End Report on the Federal Judiciary* to countering calls that the Supreme Court adopt the Judicial Conference's Code of Conduct for United States Judges.[42] In his narrative, Roberts argued that the Code of Conduct for United States Judges was intended by Congress to apply only to the federal courts that Congress created.[43] As the Judicial Conference is a body designed to manage the lower federal courts, Roberts wrote, the committees of that conference "have no mandate to prescribe rules or standards for any other body," including the United States Supreme Court—a Court created not by the actions of Congress but by Article III of the United States Constitution itself.[44]

Nevertheless, Roberts added, justices of the Supreme Court "do in fact consult the Code of Conduct in assessing their ethical obligations."[45] "Every [j]ustice seeks to follow high ethical standards," Roberts stated, "and the Judicial Conference's Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary."[46] Still, Roberts continued, the Code of Conduct "is not . . . the *only* source" that a justice could consult when ethical questions arose.[47] Like their lower court counterparts, justices could

[41] *See* 2011 YEAR-END REPORT, *supra* note 3, at 5 ("[T]he Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance."); Joan Biskupic, *When John Roberts Wants Things Done, He Acts. What that Means for Ethics Rules*, CNN (Sept. 1, 2023, 5:03 AM), https://www.cnn.com/2023/09/01/politics/john-roberts-supreme-court-ethics-thomas-alito/index.html [https://perma.cc/BLE8-78GD]; Andrew Perez & Julia Rock, *Chief Justice John Roberts Is Resisting Enforcement of Ethics Rules on the Supreme Court*, JACOBIN (Apr. 27, 2023), https://jacobin.com/2023/04/john-roberts-ethics-memo-clarence-thomas-corruption [https://perma.cc/ZB6P-ZLUN].

[42] *See* 2011 YEAR-END REPORT, *supra* note 3.

[43] *Id.* at 3–4.

[44] *Id.* at 4.

[45] *Id.*

[46] *Id.* at 5.

[47] *Id.* (emphasis added).

also "turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues."[48] Accordingly, Roberts concluded, "the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance. But as a practical matter, the Code remains the starting point and a key source of guidance for the [j]ustices as well as their lower court colleagues."[49]

On their face, Roberts's statements are sensible. The Chief Justice is accurate in his depiction of the Judicial Conference's Code of Conduct as providing a century's worth of ethical guidance rather than a set of absolute mandates.[50] Likewise, Roberts correctly observed that judges of lower federal courts can rely on a variety of sources beyond the Judicial Conference's Code of Conduct when making ethical judgements.[51] No one appears to hold any quarrel over these concepts. The framework of using the Judicial Conference's Code of Conduct as a starting point of ethical guidance, with the option of utilizing other credible sources of information before making an ethical decision, feels reasonable and plausible overall.

Realistic situations, however, illustrate cracks in this outwardly sound armor. As an example, one can look to the above-discussed issue of Justice Ginsburg publicly criticizing presidential candidate Donald Trump and then failing to recuse herself from sitting in judgment in cases where the Trump Administration was a party.[52] The "rules of reason" put forward by the Judicial Conference in its Code of Conduct are structured around five central Canons,[53] at least two of which appear to be implicated by Ginsburg's public statements. These five Canons of ethics read as follows:

> Canon [One]: A Judge Should Uphold the Integrity and Independence of the Judiciary[.]

---

[48] *Id.*

[49] *Id.*

[50] *See id.* at 3–5; *Developments in the Law: Court Reform*, 137 HARV. L. REV. 1619, 1684 (2024). Roberts provides a good summation of this history in his 2011 Report. *See* 2011 YEAR-END REPORT, *supra* note 3, at 1–3; *see also* Martineau, *supra* note 3, at 410–12.

[51] *See* 2011 YEAR-END REPORT, *supra* note 3, at 5; *Developments in the Law: Court Reform*, *supra* note 50, at 1684–85.

[52] *See supra* text accompanying notes 22–24.

[53] *See Code of Conduct for United States Judges*, *supra* note 3, Canon 1 & cmt., Canons 2–5 ("The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances.").

> . . . .
> Canon [Two]: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities[.]
> . . . .
> Canon [Three]: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently[.]
> . . . .
> Canon [Four]: A Judge May Engage in Extrajudicial Activities [t]hat Are Consistent [w]ith the Obligations of Judicial Office[.]
> . . . .
> Canon [Five]: A Judge Should Refrain [f]rom Political Activity.[54]

From this list, at least two canons appear to be implicated by Ginsburg's public statements regarding presidential candidate Trump and her subsequent failure to recuse herself from cases involving President Trump. In the third Canon, the Judicial Conference writes that: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party."[55] A reasonable observer hearing Ginsburg's public statements about candidate Trump[56] could rationally conclude that Ginsburg possessed "a personal bias or prejudice" against Trump and the policies that he proposed to implement as president.[57] This reasonable observer could likewise question why Ginsburg did not disqualify herself from remaining on the bench for cases in which the Trump Administration was a party, given that her remarks could rationally call into question her impartiality toward Trump and the Trump Administration.[58]

Questions could also arise regarding Ginsburg's comments about Trump in relation to Canon Five. "A judge should not . . . make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office," reads the text of one of the "[g]eneral [p]rohibitions" under this Canon.[59] Importantly, Ginsburg

[54] *Id.* Canons 1–5.
[55] *Id.* Canon 3(C).
[56] *See supra* text accompanying note 22.
[57] *See, e.g.*, Broyde, *supra* note 23; Dunlap, *supra* note 23.
[58] *See, e.g.*, Broyde, *supra* note 23; Dunlap, *supra* note 23.
[59] *Code of Conduct for United States Judges*, *supra* note 3, Canon 5(A)(2).

never delivered a political speech against Trump.[60] Nor did Ginsburg formally oppose Trump or formally endorse any other political candidate in that presidential election.[61] However, Ginsburg did deliver public statements in interviews that openly opposed Trump's candidacy for the White House and that openly revealed her misgivings about the policies of a prospective Trump Administration.[62] A reasonable person hearing these remarks would recognize that Ginsburg disfavored the notion of a Trump presidency and felt that a Trump-run administration could harm the Nation.[63] As this could cause a reasonable person to question whether Ginsburg could remain impartial when judging cases involving Trump and the Trump Administration, recusal from such cases again would seem to be the ethically sound course of action.[64]

If Ginsburg had started her ethical analysis with the Judicial Conference's Code of Conduct—utilizing the process that Roberts claimed in his 2011 annual Report that all justices followed[65]—then it is difficult to understand why her recusal never occurred. Under both of the ethical canons discussed in this section, recusal from cases before the Court in which the Trump Administration was a party appears to be the most obvious answer. The same outcome results from analysis under Title 28, Section 455, of the United States Code, another area to which Roberts pointed as a guiding star in his 2011 Report.[66] Title 28, Section 455, calls for a judge's recusal "in any proceeding in which [the judge's] impartiality might reasonably be questioned."[67] "That objective standard focuses the recusal inquiry

[60] *See* Dunlap, *supra* note 23.

[61] *See id.*

[62] *See id.*

[63] *See, e.g.*, Broyde, *supra* note 23; Dunlap, *supra* note 23.

[64] *See, e.g.*, Daniel Leddy, *Ginsburg Should Recuse Herself in Trump's Taxes Case (Commentary)*, SILIVE.COM (Mar. 24, 2020, 12:00 PM), https://www.silive.com/news/2020/03/ginsburg-should-recuse-herself-in-trumps-taxes-case-commentary.html [https://web.archive.org/web/20240708174127/https://www.silive.com/news/2020/03/ginsburg-should-recuse-herself-in-trumps-taxes-case-commentary.html]; Mike Rappaport, *A Problematic Decision: Ruth Bader Ginsburg's Failure to Recuse Herself in the Travel Ban Case*, LAW & LIBERTY (July 3, 2018), https://www.lawliberty.org/a-problematic-decision-ruth-bader-ginsburg-failure-to-recuse-trump-hawaii/ [https://perma.cc/NK5J-MHWK]; Broyde, *supra* note 23; Dunlap, *supra* note 23. *But see* Ed Whelan, *Will Justice Ginsburg Recuse in Trump Tax Cases?*, NAT'L REV. (Dec. 19, 2019, 10:24 AM), https://www.nationalreview.com/bench-memos/will-justice-ginsburg-recuse-in-trump-tax-cases/ [https://perma.cc/3QJE-WWVN].

[65] *See* 2011 YEAR-END REPORT, *supra* note 3, at 4–5 ("But as a practical matter, the Code remains the starting point and a key source of guidance for the [j]ustices as well as their lower court colleagues.").

[66] *See id.* at 7–8.

[67] 28 U.S.C. § 455(a).

on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts," Roberts wrote in his 2011 analysis.[68] Again, for the reasons noted in the prior two paragraphs, it is difficult to see how a person "who is knowledgeable about the legal process and familiar with the relevant facts" on this matter would not—regardless of their political affiliation—reasonably question Ginsburg's impartiality toward Trump and the Trump presidential Administration, given the nature and tone of her public comments about Trump as a political candidate.

One can apply this same analytical framework to each scenario described in the first portion of this Article, i.e., the situation involving Justice Scalia and Vice President Cheney.[69] The Supreme Court case in question involved Cheney's efforts to block the release of documents relating to his energy policy task force.[70] In December 2003, the Court agreed to hear the case.[71] On January 5, 2004, Scalia and the Justice's son and son-in-law flew as Cheney's guests aboard a jet designated as Air Force Two to an airfield in Patterson, Louisiana.[72] Scalia and Cheney then went hunting at a camp owned by Wallace Carline, an entrepreneur who "provides services and equipment rental to oil rigs in the Gulf of Mexico."[73] Later, amid calls for Scalia to recuse himself from the case involving Cheney's documents,[74] Scalia reported that he had "never hunted in the same blind with the Vice President" and never was "alone with [Cheney] at any time during the trip, except, perhaps, for instances so brief and unintentional that I [Scalia] would not recall them—walking to or

---

[68] 2011 YEAR-END REPORT, *supra* note 3, at 7.

[69] *See supra* text accompanying note 18.

[70] *See* Bill Mears, *High Court Hears Arguments on Cheney Task Force*, CNN: L. CENTER (June 24, 2004, 10:26 AM), https://www.cnn.com/2004/LAW/04/27/scotus.cheney/index.html [https://perma.cc/DF4R-D8FD].

[71] *Court Upholds Secrecy for Cheney's Energy Task Force*, CHI. TRIB., https://www.chicagotribune.com/news/ct-xpm-2005-05-11-0505110246-story.html [https://web.archive.org/web/20240710193112/https://www.chicagotribune.com/2005/05/11/court-upholds-secrecy-for-cheneys-energy-task-force/] (Aug. 22, 2021, 11:18 PM).

[72] Christopher Riffle, Note, Ducking Recusal: Justice Scalia's Refusal to Recuse Himself from Cheney v. United States District Court for the District of Columbia, 541 U.S. 913 (2004), and the Need for a Unique Recusal Standard for Supreme Court Justices, 84 NEB. L. REV. 650, 652–53 (2005); Dana Milbank, Scalia Joined Cheney on Flight, WASH. POST (Feb. 5, 2004, 7:00 PM), https://www.washingtonpost.com/archive/politics/2004/02/06/scalia-joined-cheney-on-flight/a405ac22-0380-4ca9-b14a-8d444a2aa2da/ [https://perma.cc/YQ7Q-PS4Z]; Monroe H. Freedman, Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case, 18 GEO. J. LEGAL ETHICS 229, 231 (2004).

[73] *When the Vacation Gets Tricky*, CHI. TRIB., https://www.chicagotribune.com/news/ct-xpm-2004-01-27-0401270335-story.html [https://perma.cc/E67T-MYZQ] (Aug. 19, 2021, 4:53 PM); Cheney v. U.S. Dist. Ct., 541 U.S. 913, 914 (2004).

[74] *See* Motion to Recuse at 3–4, *Cheney*, 541 U.S. 913 (No. 03-475), 2004 WL 3741418, at *3–4.

from a boat, perhaps, or going to or from dinner."[75] "Of course we said not a word about the present case," Scalia wrote.[76] The Justice further stated that the Vice President was his "personal friend[]", but that their friendship did not overlap with official business, and that their friendship would not cloud his ability to remain impartial in the case before the Court.[77]

Taking all of Scalia's statements as truthful, we turn first to the Judicial Conference's Code of Conduct, just as Roberts described in his 2011 Report.[78] As with Ginsburg, the conduct of Scalia seems to rationally point toward recusal. First, Scalia's insistence that he could remain impartial in a case involving Cheney despite their longstanding personal friendship[79] does not end the analysis sought by the Judicial Conference. The Code of Conduct asks in Canon Three not whether the judge feels confident that they can remain impartial, but whether "the judge's impartiality might reasonably be questioned."[80] Scalia proclaimed that his "impartiality c[ould not] reasonably be questioned" in this case.[81] However, just as a reasonable person could wonder if Ginsburg could rule without bias in cases invoking a president whom she had publicly condemned as a candidate, a reasonable person could likewise wonder whether Scalia could rule without bias in cases involving a vice president who was his longtime personal friend—and who had just recently flown him and members of his family on Air Force Two to enjoy a recreational opportunity not readily available to members of the general public.[82]

---

[75] *Cheney*, 541 U.S. at 915.

[76] *Id.*

[77] *See id.* at 915, 928–29. "If it is reasonable to think that a Supreme Court [j]ustice can be bought so cheap, the Nation is in deeper trouble than I had imagined," Scalia concluded. *Id.* at 929.

[78] *See* 2011 YEAR-END REPORT, *supra* note 3, at 4–5.

[79] *See Cheney*, 541 U.S. at 926–27 (citing Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000)).

[80] *See Code of Conduct for United States Judges*, *supra* note 3, Canon 3(C)(1).

[81] *Cheney*, 541 U.S. at 926–27 (citing *Microsoft*, 530 U.S. at 1302). Friendship with a party before the Court, Scalia opined, is not a reasonable basis to expect a justice to recuse themselves from participation in a case "where *official action* is at issue." *Cheney*, 541 U.S. at 916.

[82] *See, e.g.*, Freedman, *supra* note 72, at 230 ("The close and long-standing friendship between Scalia and Cheney might cause a reasonable person to question Scalia's impartiality in a case of such importance to Cheney, especially in a presidential election year in which energy and environmental issues are being debated."). In his memorandum, Scalia downplayed the importance of the case to Cheney. *See Cheney*, 541 U.S. at 918–19. However, it is difficult to reasonably believe that Cheney had no desire to achieve a victory for his side in a case involving disclosure of documents from a federal government committee that he headed. *See, e.g.*, Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of* Cheney v. United States District Court, 84 N.C. L. REV. 181, 200 (2005) (noting that even Scalia himself recognized that the outcome of the case could have political consequences for Cheney).

In addition, Canon Four of the Judicial Conference's Code of Conduct states that while a judge is not barred from all "extrajudicial activities, . . . a judge should not participate in . . . activities that . . . reflect adversely on the judge's impartiality."[83] Flying on Air Force Two to go hunting at the same time and in the same overall location where the Vice President was hunting reasonably qualifies as activities that "reflect adversely on the judge's impartiality," especially when these activities occurred with an upcoming Supreme Court case directly involving the Vice President.[84] Again, these statements do not reject Scalia's insistence that he could put aside his friendship with Cheney when sitting in judgment on a case involving Cheney. The notion that no reasonable observer could question the impartiality of a judge under these circumstances, however, defies logic and human nature.[85]

As with the earlier-described situation involving Ginsburg,[86] the language of the Judicial Conference's Code of Conduct pointed toward recusal in this matter. Likewise, using Roberts's own language, a "person who is knowledgeable about the legal process and familiar with the relevant facts" in this case[87]—even if that person adopted Scalia's statements about "never hunt[ing] in the same blind" as Cheney, never engaging in personal conversations with Cheney, etc.[88]—could reasonably question whether the Justice who had just flown with a member of his family on Air Force Two and who was known to be a longtime friend of the Vice President could rule in this matter with impartiality.[89] However, just as Ginsburg did not recuse

[83] *Code of Conduct for United States Judges*, *supra* note 3, Canon 4.

[84] Scalia accurately pointed out that the hunting trip was scheduled prior to the Court receiving the petition for certiorari in this case. *See Cheney*, 541 U.S. at 915. However, this does not overcome the fact that the petition for certiorari had been granted by the Court by the time Scalia went on this hunting trip, flying to Louisiana on Air Force Two with his son and son-in-law at the invitation of the Vice President. *See* Riffle, *supra* note 72, at 653.

[85] *See, e.g.*, Freedman, *supra* note 72, at 230; Stephen Gillers, *Scalia's Flawed Judgment*, NATION, Apr. 19, 2004, at 21, 21; *see also* Goodson, *supra* note 82, at 220; Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a* Per Se *Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 611 (2006) ("Justice Scalia dismisses the negative press views on his non-recusal. This, of course, ignores the very standard itself—impartiality might reasonably be questioned. The widespread press criticism indicates a doubt as to his impartiality.").

[86] *See supra* text accompanying notes 52–68.

[87] 2011 YEAR-END REPORT, *supra* note 3, at 7 (discussing the standard under Title 28, Section 455).

[88] *See Cheney*, 541 U.S. at 915.

[89] *See, e.g.*, Gillers, *supra* note 85, at 21; *see also* Miller, *supra* note 85, at 611; Riffle, *supra* note 72, at 666 n.99. "[T]he virtual absence of language referencing § 455(a) in his memorandum raises serious doubt whether Justice Scalia even considered the statutory recusal standard in reaching his final decision." Riffle, *supra* note 72, at 661.

herself from the cases involving the Trump administration, Scalia adamantly refused to recuse himself from this case involving the interests of Vice President Cheney.[90]

Yet Scalia did indicate that he may have recused himself from this case if he were a judge on a lower federal court rather than a Supreme Court Justice.[91] The problem with recusals on the Supreme Court arose from a numbers game, he pointed out.[92] A justice's recusal from a Supreme Court case could leave the Court with only eight justices to vote on the ultimate decision, creating the possibility of a four-four tie.[93] Ginsburg, during the same year as the public controversy surrounding Scalia and Cheney,[94] repeated this concern, stating that recusal of one justice creates "the attendant risk that we will be unable to decide the case."[95]

Seven years later, in his 2011 annual Report, Roberts described this same fear of an eight-justice panel yet again. "Lower court judges can freely substitute for one another," the Chief Justice explained,

> If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge's place. But the Supreme Court consists of nine [m]embers who always sit together, and if a [j]ustice withdraws from a case, the Court must sit without its full membership.[96]

---

[90] *See Cheney*, 541 U.S. at 929. In 2006, Scalia continued his adamant defense of his decision, declaring that refusing to recuse himself from this case was "the proudest thing [he] ha[d] done on the bench." Stephanie Reitz, *Scalia Says He's Proud He Didn't Recuse Himself in Cheney Case*, SAN DIEGO UNION-TRIB. (Apr. 13, 2006, 12:00 AM), https://www.sandiegouniontribune.com/sdut-scalia-says-hes-proud-he-didnt-recuse-himself-in-2006apr13-story.html [https://perma.cc/BPQ5-Q7AD]. "For Pete's sake, if you can't trust your Supreme Court [J]ustice[ ]more than that, get a life," he declared. *Id.*

[91] *See Cheney*, 541 U.S. at 915. "That might be sound advice if I were sitting on a Court of Appeals," Scalia wrote in response to the respondent's recommendation that Scalia ought to "resolve any doubts in favor of recusal." *Id.* at 913, 915. "There, my place would be taken by another judge, and the case would proceed normally." *Id.* at 915.

[92] *See id.* at 915.

[93] *Id.* ("On the Supreme Court, however, the consequence is different: The Court proceeds with eight [j]ustices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.").

[94] *See supra* text accompanying note 72.

[95] RYAN C. BLACK, RYAN J. OWENS, JUSTIN WEDEKING & PATRICK C. WOHLFARTH, THE CONSCIENTIOUS JUSTICE: HOW SUPREME COURT JUSTICES' PERSONALITIES INFLUENCE THE LAW, THE HIGH COURT, AND THE CONSTITUTION 293 (2020).

[96] 2011 YEAR-END REPORT, *supra* note 3, at 9.

Not said in either Scalia's statement rejecting recusal, Ginsburg's remarks, or Roberts's annual Report, however, is the fact that the Court has indeed decided cases with eight justices throughout its history.[97] In the aftermath of Scalia's death, for instance, a protracted battle within the Senate prevented the appointment of Scalia's successor for most of a Supreme Court term, leaving the Court to render multiple decisions with only eight justices on the bench.[98] While some justices stated that these were less than optimal circumstances, the Court never ground to a standstill during this period, and even received praise from some commentators for its ability to reach consensus and issue appropriately narrow rulings more effectively during this period.[99] In short, nothing apocalyptic occurred simply because the Court was forced for this stretch of time to decide cases without its full membership voting on the outcome.[100]

"A [j]ustice accordingly cannot withdraw from a case as a matter of convenience or . . . to avoid controversy," Roberts concluded in his 2011 annual Report, "Rather, each [j]ustice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case."[101] Purely as a matter of institutional process, Roberts's statement makes sense.[102] Yet when weighed against the national

[97] *See Cheney*, 541 U.S. at 915–16; *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1038–39 (2004); 2011 YEAR-END REPORT, *supra* note 3, at 9; *see, e.g.*, Adam Liptak, *Rulings and Remarks Tell Divided Story of an 8-Member Supreme Court*, N.Y. TIMES (May 30, 2016), https://www.nytimes.com/2016/05/31/us/politics/rulings-and-remarks-tell-divided-story-of-an-8-member-supreme-court.html [https://web.archive.org/web/20230623001740/https://www.nytimes.com/2016/05/31/us/politics/rulings-and-remarks-tell-divided-story-of-an-8-member-supreme-court.html]; *see also* Lois Beckett, *What Happens When the Supreme Court Has Eight Justices—And It Deadlocks?*, GUARDIAN (Feb. 14, 2016, 12:58 PM), https://www.theguardian.com/law/2016/feb/14/supreme-court-vote-eight-justices-deadlock-nomination-scalia-obama [https://perma.cc/Q8RF-ZBS6].

[98] *See* Benjamin Pomerance, *Inside a House Divided: Recent Alliances on the United States Supreme Court*, 81 ALB. L. REV. 361, 361–62, 366–409 (2018) (discussing outcomes on the Supreme Court during the 2016 term in the immediate aftermath of Scalia's passing).

[99] *See* Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html [https://web.archive.org/web/20240727193906/https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html].

[100] Although Alito called the eight-member Court "unusual and awkward," the Court nevertheless issued decisions on such controversial issues as religious liberty, immigration, allegations of racially motivated actions within the criminal justice system, intellectual property protections, and voting rights during this term, demonstrating that the Court could indeed still function with an even number of justices taking part in the outcome of cases. Pomerance, *supra* note 98, at 363.

[101] 2011 YEAR-END REPORT, *supra* note 3, at 9.

[102] *See* Lisa Weiner, *Examining What's Involved with a Supreme Court Justice's Recusal*, NPR (Apr. 15, 2022, 5:16 AM), https://www.npr.org/2022/04/15/1093005963/examining-whats-involved-with-a-supeme-court-justices-recusal [https://perma.cc/RXY4-748X] ("When you recuse a Supreme Court justice, that justice cannot be replaced. Lower court judges are

interest of Supreme Court justices avoiding the appearance of impropriety and averting reasonable inferences of bias, a Court of eight justices provides a far better public image than a Court of nine justices when one or more are rationally perceived to have a prejudicial interest in the outcome of the case.[103] A Court of eight justices is, at worst, an institutional inconvenience, but at best a vehicle for encouraging less-sweeping decision-making[104] and promoting compromise to reach a conclusive outcome.[105] A Court where one or more justices fail to recuse despite ample cause to do so, by contrast, is a Court in which the public loses faith, lacks confidence, and accuses of illegitimacy.[106] On balance, the lesser of the two evils seems to be clear.

Potential solutions exist for addressing the fear of an eight-justice Court, too. One solution is to expand the total number of justices who

replaceable. So you change the number and makeup of the [C]ourt when you recuse a justice from a decision.").

[103] *See id.* (discussing how a justice's decision to recuse themselves "as an ethical matter" should be an "easy question[]" due to the fact that their failure to recuse could erode "people's faith in the [C]ourt" and "[p]ublic perception of the [C]ourt's legitimacy"). "[A] justice has to decide whether it's more important to have a fully constituted [C]ourt for a given case, or it's more important for them to make an ethical decision about their involvement and re[cuse] themselves." *See id.*

[104] *See* Beckett, *supra* note 97 ("With an eight-justice [C]ourt, a majority decision requires a 5-3 vote. If the [S]upreme [C]ourt is deadlocked 4-4, the lower court's decision in the case is upheld but it does not create a legal precedent.").

[105] At least one scholar has even raised a proposal for the Court to be reduced to eight justices permanently, arguing that this would require justices to cross ideological lines more frequently and, as a result, become "better received by the public" as an institution rising above politics. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 553, 562 (2018). This proposal goes on to argue for a requirement that the Court be comprised of an equal number of Republicans and Democrats, similar to the requirement that the Federal Election Commission be comprised of no more than three members from each of the two major political parties. *Id.* at 553. To guard against party-hopping to improve one's likelihood of being appointed, this proposal calls for a two-thirds vote of the Senate to approve any candidate who changed political parties within the prior five years. *See id.* at 554–55. If a candidate for the Court had no known political party affiliation, this proposal states that such a candidate could likewise be confirmed to the Court's bench by a two-thirds vote of the Senate. *Id.* at 555. While this Article takes no position endorsing or opposing Professor Segall's proposal, this concept once again demonstrates that creative solutions to the current problems impacting the Court can be available and should not be overlooked simply because they are novel.

[106] See sources cited *supra* notes 9–10, for reasons why the majority of Americans seem to have lost trust in the Supreme Court, many of which would be directly addressed if justices felt freer to recuse themselves from cases where a reasonable person would perceive that a conflict of interest exists.

sit on the Court's bench.[107] Contrary to popular belief,[108] the United States Constitution does not require a nine-member Court.[109] On the contrary, Article III of the Constitution is silent about the number of justices on the Court, implicitly leaving this decision in the hands of Congress.[110] Only since 1869 has Congress consistently maintained the number of justices at nine.[111] An increase by Congress in the total number of justices on the Court would decrease the likelihood that only eight justices would be able to issue a decision, although the concern of an overall split decision would remain.[112]

A better fix, potentially, is the establishment of a pool of substitute justices who were not members of the nine-member Court but who were willing, ready, and able to serve as a replacement for a justice who withdraws from consideration of a case.[113] Congress could develop legislation describing a process by which these substitute justices could be appointed, a process that should involve checks and

---

[107] *See, e.g.*, Amelia Thomson-DeVeaux & Michael Tabb, *Is It Time to Expand the Supreme Court?*, FIVETHIRTYEIGHT (Apr. 27, 2022), https://fivethirtyeight.com/videos/is-it-time-to-expand-the-supreme-court/ [https://perma.cc/P2LK-X6U5]; Elizabeth Warren, *Expand the Supreme Court*, BOS. GLOBE, https://www.bostonglobe.com/2021/12/15/opinion/expand-supreme-court/ [https://perma.cc/V277-J6LG] (Dec. 15, 2021, 10:00 AM); Tonja Jacobi & Matthew Sag, *The Supreme Court Needs 15 Justices*, BLOOMBERG L.: U.S. L. WK. (May 4, 2021, 4:01 AM), https://news.bloomberglaw.com/us-law-week/the-supreme-court-needs-15-justices [https://perma.cc/T2Y9-BCTG]; Jacob Hale Russell, *The Supreme Court Doesn't Need 9 Justices. It Needs 27*, TIME (July 16, 2018, 8:17 AM), https://time.com/5338689/supreme-court-packing/ [https://web.archive.org/web/20240727194319/https://time.com/5338689/supreme-court-packing/].

[108] *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 139 (1995).

[109] *See* U.S. CONST. art. III.

[110] *See id* ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[111] Steve Vladeck, *Why Does the Supreme Court Have Nine Justices? And Why Can't Democrats Add More?*, NBC NEWS: THINK (Apr. 10, 2019, 4:31 AM), https://www.nbcnews.com/think/opinion/why-does-supreme-court-have-nine-justices-why-can-t-ncna992851 [https://perma.cc/K29N-NRBH].

[112] *See* Russell, *supra* note 107 ("Larger bodies have some inherent features that are more democratic and effective: they are more representative, and they can include a more diverse group; they can do more work; their splits are less likely to be narrow and therefore arbitrary; they have more regular, natural turnover, and any one vacancy would not dominate the political scene as it does today. . . . With a larger body, more natural coalitions can develop, yielding richer dynamics than the 5-4 decisions that have become all too common these days."); *see also* Jacobi & Sag, *supra* note 107.

[113] This mechanism would—as the Supreme Court itself noted in its new Code of Conduct—make the Court similar to other federal courts. *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, cmt., at 10 ("Lower courts can freely substitute one district or circuit judge for another."); *see also supra* text accompanying note 91 (noting Scalia's comments that he may have felt freer to recuse himself from the case in which Cheney's political interests were at least partially implicated, *see supra* note 82 and accompanying text, if he were a lower court judge rather than a Supreme Court Justice); *supra* text accompanying notes 92–96 (noting concerns from Scalia, Ginsburg, and Roberts regarding the impacts of a Supreme Court justice recusing themselves from a case, leaving only an eight-justice bench behind).

balances between the executive and legislative branches,[114] similar to how Supreme Court justices are currently selected and confirmed.[115] When a justice has to recuse themselves from sitting in judgment on a particular case, the Chief Justice of the Court would draw at random the name of one of the substitute justices to take the original justice's seat. For that specific case, the substitute justice would participate fully in the review of briefs, oral arguments, post-argument conference(s), and all other aspects of helping the Court arrive at an ultimate decision. Safeguards could be added to the process to ensure that the same substitute justice is not always chosen for this role, such as preventing chosen substitute justices' names from being put back into the metaphorical hat until every substitute justice has served once. This system would prevent a tie among the justices from ever occurring.

Such a system would not always produce perfect outcomes.[116] One could imagine litigants waging campaigns to disqualify one justice so that justice would be replaced with a potential substitute who might be more sympathetic to that litigant's cause. Still, if one of the principal concerns of the Court's justices regarding recusals is winding up with a deadlocked bench, this solution would provide a mechanism to allow recusals to occur without any worries about a tie vote. Most importantly, it would be far more effective in instilling public trust in the Court than having justices decline to recuse themselves in cases where their impartiality is reasonably in question.[117]

---

[114] For some examples of how this type of process could function, see Don Willett, *How the States Avoid Supreme Stalemates*, 100 JUDICATURE 8, 8, 9 (2016) (comparing and contrasting the processes in thirty-four states that have some sort of "substitute-justice procedure" to avoid the possibility of a deadlocked court when a judge or justice recuses). Another concept proposes the use of willing retired justices "sitting by designation" on the Supreme Court in place of justices who have rightfully recused themselves from a case. *See* Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 83 (2011).

[115] *See* U.S. CONST. art. II, § 2, cl. 2 (giving the president the power to appoint Supreme Court justices and Congress the power to "[a]dvi[s]e and [c]onsent" to such appointments"). "While the process of appointing [j]ustices has undergone some changes over two centuries, its most essential feature—the sharing of power between the President and the Senate—has remained unchanged: To receive appointment to the Court, one must first be formally selected . . . by the President and then approved . . . by the Senate." BARRY J. MCMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 1 (2022).

[116] See Willett, *supra* note 114, at 9, for a description of certain states' substitution procedures that function better, and in a fairer manner, than others, in the view of the author.

[117] See sources cited *supra* notes 9–10, for a description of trends and reasons why the majority of Americans say that they have lost trust in the Supreme Court. Another recent proposal, presented by a student at Harvard Law School and by the director of the Eisenhower Institute's Fielding Center, calls for a "float[ing]" number of Supreme Court justices. Scott S. Boddery &

At present, though, this unwarranted stigma against justices recusing themselves still persists. In the commentary accompanying its new Code of Conduct, the Supreme Court devotes considerable space to this hand-wringing.[118] "The loss of even one [j]ustice may undermine the 'fruitful interchange of minds which is indispensable' to the Court's decision-making process," declares one section of the Code's commentary, citing to a dissent from Justice Felix Frankfurter in 1959.[119] The text goes on to fret about the effects of recusal on the process by which the Court decides whether to grant a writ of certiorari, and then declares that "the loss of one [j]ustice is 'effectively the same as casting a vote against the petitioner'" when deciding a case on the merits.[120] "In short," the passage concludes, "much can be lost when even one [j]ustice does not participate in a particular case."[121]

Thus, even in the Court's new Code of Conduct, meant to rebuild the institution's legitimacy in the eyes of the populace,[122] the pressure for justices not to recuse themselves remains a feature. With all respect to the justices, from Chief Justice William H. Rehnquist to Roberts, who have purportedly lost sleep over this issue,[123] it need not remain such a central concern. History tells us that the boogeyman of a Court evenly divided is not quite as bleak as these declarations indicate.[124] Certainly, if Congress shares the Court's concern, this new Code of Conduct delivers an opportunity for

Benjamin R. Pontz, *Don't Pack the Court. Allow the Number of Justices to Float.*, POLITICO (Jan. 15, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/01/15/supreme-court-reform-justices-527111 [https://web.archive.org/web/20240806140103/https://www.politico.com/news/magazine/2022/01/15/supreme-court-reform-justices-527111]. Under this proposal, each president would appoint either one or two Supreme Court justices per term. *Id.* "Vacancies aris[ing] by death or retirement . . . would not . . . be filled." *Id.* This would guard against one president having "the opportunity . . . to make more nominations than another," and would, in theory, reduce the likelihood of a justice delaying their retirement while waiting for the election of a president who better matched that justice's political persuasion. *Id.* In the views of the authors, this would lead to a more balanced Court, and prevent the current trend of presidential candidates using judicial appointments as a mighty political bargaining chip. *Id.*

[118] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, cmt., at 10–12.

[119] *Id.* cmt., at 10 (quoting Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 459 (1959) (Frankfurter, J., dissenting)); *see also* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 943 n.96 (2022).

[120] SUPREME COURT CODE OF CONDUCT, *supra* note 2, cmt., at 10.

[121] *Id.* cmt., at 11.

[122] The Court prefaced the Code of Conduct by stating that "[t]he absence of a Code . . . has led in recent years to the misunderstanding that the [j]ustices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules. To dispel this misunderstanding, we are issuing this Code." *Id.* statement.

[123] *See, e.g.*, SUP. CT. OF THE U.S., STATEMENT OF RECUSAL POLICY 1–2 (1993); 2011 YEAR-END REPORT, *supra* note 3, at 7–10.

[124] *See supra* notes 97–100 and accompanying text.

Congress to draft and enact legislation removing this issue through the substitute-justice system or some other creative solution that passes constitutional muster, offers a fair process, and removes the burden on justices to remain on the bench for cases where even the justices themselves reasonably question the propriety of doing so.

The Court's issuance of its new Code of Conduct sets the stage for another new day in its history: the removal at last of this stigma against recusals. Certainly, as Roberts stated in his 2011 Year-End Report, justices should never shirk their duty to decide cases simply because their participation would be inconvenient or controversial.[125] Yet when reasonable people would rationally question a justice's impartiality to sit in judgment over a particular case, the entire Nation would benefit from that justice recusing themselves from that case rather than staying on the bench out of fear of their recusal producing a deadlocked Court.

III. NEGLIGENCE, NOT KNOWLEDGE: APPLYING A MORE SENSIBLE *MENS REA* TO PROHIBITIONS ON USING JUDICIAL OFFICE TO ADVANCE PRIVATE INTERESTS

A subtle, yet vital, distinction presently exists between the Judicial Conference's Code of Conduct and the new Code of Conduct put forward by the Supreme Court. Under the Judicial Conference's Code of Conduct, judges of the lower federal courts are told that they should not exploit "the prestige of the judicial office to advance" their personal interests or the private interests of others.[126] By contrast, the Supreme Court's new Code of Conduct specifies that a justice should not *knowingly* engage in such conduct.[127]

The difference between these two standards is startling. The guidelines of the Judicial Conference essentially apply a strict liability standard in which a federal judge would be in violation if they used "the prestige of the judicial office" for the personal gain of themselves or others, regardless of the judge's mindset when doing so.[128] A federal judge would breach this standard even if they argued successfully that they never intended to abuse "the prestige of the judicial office" in this manner.[129] On the other hand, a Supreme

[125] 2011 YEAR-END REPORT, *supra* note 3, at 9.

[126] *Code of Conduct for United States Judges*, *supra* note 3, Canon 2(B).

[127] SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B).

[128] *See Code of Conduct for United States Judges*, *supra* note 3, Canon 2(B).

[129] *See* W. Robert Thomas, Note, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free World*, 110 MICH. L. REV. 647, 650 (2012) (describing how a strict liability statute renders the mindset of the accused irrelevant when determining whether

Court justice who used "the prestige of the judicial office to advance" the personal interests of themselves or others would be able to avoid a finding of ethical violation as long as they could provide evidence that they did not *knowingly* commit these actions.[130]

The Court's new Code of Conduct does not appear to specifically define the term *knowingly*.[131] However, one can obtain reasonable guidance from the Model Penal Code, which classifies the state of mind for culpability into four categories: acting purposefully, acting knowingly, acting recklessly, and acting negligently.[132] According to the Model Penal Code, acting knowingly requires proof that the individual in question "is practically certain that [their] conduct will cause [a particular] result."[133] Commonly, criminal codes assign steep penalties for crimes committed knowingly, given the high level of intentionality that the prosecution must prove to earn a conviction under a criminal statute requiring this *mens rea*, or state of mind.[134]

The recent history surrounding the Supreme Court perhaps provides context around this decision to depart from the Judicial

the accused is guilty of the crime covered by the statute); John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 745 (2016) (describing strict liability in the law of torts as requiring payment of damages without any consideration of whether the individual or entity in question "met, or failed to meet, an applicable standard of conduct"); Keith N. Hylton, *A Positive Theory of Strict Liability*, 4 REV. L. & ECON. 153, 154 (2008) (noting that strict liability can cause individuals "to take externalized costs into account" when making decisions about their behaviors, given that strict liability does not take the actor's state of mind into account).

130 *See* Patrick M. Hagan, Jennifer Orr Mitchell & Joseph D. Wheeler, *The Supreme Court Clarifies the Meaning of "Knowingly" Under the False Claims Act*, NAT'L L. REV. (June 4, 2023), https://www.natlawreview.com/article/supreme-court-clarifies-meaning-knowingly-under-false-claims-act [https://perma.cc/WXE7-3SYT] (pointing out that the United States Supreme Court itself recently determined that the term *knowingly* refers to an individual's "subjective knowledge and beliefs at the time" when they take the action(s) in question). A *mens rea* on knowingly does not excuse "willful blindness" of intentionally going out of one's way to avoid knowing about an essential element or fact. *See* Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023, 1023–24 & n.1 (2014). Nevertheless, this is a substantially higher standard of proving state of mind at the time of committing an act than provisions of law that do not assign any intentionality requirement. *See* Jonathan Snyder, Comment, *Back to Reality: What "Knowingly" Really Means and the Inherently Subjective Nature of the Mental State Requirement in Environmental Criminal Law*, 8 MO. ENV'T L. & POL'Y REV. 1, 7–8 (2001) (demonstrating that although *knowingly* is not the most rigorous *mens rea* requirement that a law can impose, it is still a much higher bar to reach than strict liability provisions that do not require any showing of mental culpability).

131 *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B) (using the term *knowingly* without providing a precise definition for this term).

132 MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1962) ("General Requirements of Culpability").

133 *Id.* § 2.02(2)(b)(ii).

134 *See* Luis E. Chiesa, Mens Rea *in Comparative Perspective*, 102 MARQ. L. REV. 575, 579 & n.23 (2018) ("This hierarchical approach to mental states allows for more granularity in the grading of criminal offenses. By allowing offenses to be punished more or less severely depending on the mental state with which the crime is committed, the [Model Penal] Code allows for up to four distinct grading schemes for each generic offense.").

Conference in assigning the *mens rea* of *knowingly* to allegations of exploiting "the prestige of the judicial office." Many of the recent claims plaguing justices of the Court[135] center on this area of the Code of Conduct. The accusations that Thomas used the prestige of his position to curry favors from his friend Harlan Crow, for instance, fall within this category.[136] Contentions include that Crow provided Thomas with trips on Crow's private yacht, flights on Crow's private jet, and annual summer visits to Crow's luxurious private camp in the Adirondacks—gifts that total millions of dollars in value.[137] Reports criticizing Thomas's acceptance of these longstanding gifts focus on two central areas: a Watergate-era law governing financial disclosure statements—which Thomas reportedly failed to reveal the extent and value of these gifts from Crow—and the provisions of the Judicial Conference's Code of Conduct that guide federal judges against using the prestige of their office for personal gain or the gain of others.[138]

Similar critiques on both of these grounds focus on evidence that Crow paid tuition costs for Thomas's grandnephew at private boarding schools for two years, payments that Thomas likewise did not report on his financial disclosure forms.[139] During the summer of

---

[135] *See supra* notes 12–27 and accompanying text.

[136] *See supra* notes 12–14 and accompanying text.

[137] *E.g.*, Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/MA76-ZDFB]; Anisha Kohli, *What to Know About Justice Clarence Thomas Accepting Luxury Vacations Without Reporting Them*, TIME (Apr. 8, 2023, 3:40 PM), https://time.com/6269743/supreme_court_clarence_thomas_luxury_vacations/ [https://web.archive.org/web/20240727204447/https://time.com/6269743/supreme_court_clarence_thomas_luxury_vacations/]; Dave Goldiner & Michael McAuliff, *Supreme Court Justice Clarence Thomas Took Free Luxury Vacations Worth Millions from GOP Donor, Didn't Disclose Trips: Report*, N.Y. DAILY NEWS, https://www.nydailynews.com/2023/04/06/supreme-court-justice-clarence-thomas-took-free-luxury-vacations-worth-millions-from-gop-donor-didnt-disclose-trips-report/ [https://perma.cc/MAQ2-SBSW] (Apr. 6, 2023, 9:06 PM).

[138] *See* Kaplan et al., *supra* note 137; *see also* Martin Pengelly, *Supreme Court Justice Thomas Took 38 Undisclosed Vacations from Rich Friends—Report*, GUARDIAN (Aug. 10, 2023, 12:32 PM), https://www.theguardian.com/law/2023/aug/10/clarence-thomas-gift-vacation-supreme-court [https://perma.cc/74H6-SUKA]. The Ethics in Government Act, passed in 1978, requires specific government employees, including Supreme Court justices, to annually report "a full and complete statement" regarding their income, gifts, property, liabilities, etc. 5 U.S.C. §§ 13101(10), 13103(f)(11), 13104(a); *see also* Delaney Marsco, *At 40 Years Old, the Ethics in Government Act Is in Need of a Tune-Up*, CAMPAIGN LEGAL CTR. (Oct. 26, 2018), https://campaignlegal.org/update/40-years-old-ethics-government-act-need-tune [https://perma.cc/GKJ7-FVA6] (The Act's "creation of the Office of Government Ethics . . . and the requirement that public officials disclose their financial interests[] helped restore some confidence in government after Watergate showcased the ugly underbelly of abuse of public trust.").

[139] Kaplan et al., *supra* note 12; Durkee, *supra* note 13.

2023, another Justice—Samuel Alito—likewise entered the spotlight with news reports claiming that billionaire Paul Singer, a man whose hedge fund came before the Court multiple times in the subsequent years, had flown Alito to Alaska on a private plane for a luxury fishing vacation in 2008.[140] Alito did not recuse himself from these cases, most notably voting with the Court's seven-one majority in a decision ruling for Singer's hedge fund in a dispute with the nation of Argentina in 2014.[141] Nor did Alito report the luxury fishing trip with the private jet flight on his financial disclosure paperwork.[142]

Both Thomas and Alito responded to these allegations with statements that Crow and Singer, respectively, provided them with these gifts as personal friends, not as individuals seeking to curry favor with the Court.[143] Crow went to bat for Thomas before the press, stating that these gifts were simply the types of offerings that he gave to many "dear friends" and that no Court business ever entered their discussions.[144] In an op-ed rebutting claims that he had violated the reporting statute, Alito declared his belief "that accommodations and transportation for social events were not reportable gifts."[145] Debatably, Alito was correct, as the law regarding financial disclosures does have a "personal hospitality" exception, where disclosure is not always required for personal gifts of "food, lodging or entertainment."[146] On the other hand, however, some ethics experts responded to Alito's op-ed with the insistence

[140] *See* sources cited *supra* note 15.

[141] Elliott et al., *supra* note 15. The victory of Singer's hedge fund in this case resulted in Singer's hedge fund ultimately being paid $2.4 billion. *Id.*

[142] *Id.*

[143] *See* Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Defends Undisclosed "Family Trips" with GOP Megadonor. Here Are the Facts.*, PROPUBLICA (Apr. 7, 2023, 8:20 PM), https://www.propublica.org/article/clarence-thomas-response-trips-legal-experts-harlan-crow [https://perma.cc/L7VY-P6JZ]; Elliott et al., *supra* note 15.

[144] Kaplan et al., *supra* note 12; Todd J. Gillman, *Harlan Crow, Who Gave Lavish Trips to Clarence Thomas, Has Donated $13M to GOP*, DALL. MORNING NEWS (Apr. 8, 2023, 10:00 AM), https://www.dallasnews.com/news/politics/2023/04/08/harlan-crow-who-gave-lavish-trips-to-clarence-thomas-has-donated-13m-to-gop/ [https://perma.cc/8NNX-EBYH] (noting that Crow, despite these contributions to the Republican Party and Republican Party-favored causes, maintains that his relationship with Thomas is purely friendship, and that the two men do not converse about any issues presently before the Court).

[145] Samuel A. Alito Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://web.archive.org/web/20240806173243/https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda] (discussing his interpretation of the Ethics in Government Act's filing requirements).

[146] *See* WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10949, FINANCIAL DISCLOSURE AND THE SUPREME COURT 3 (2023).

that, at minimum, the gift of a flight on a private jet should have been disclosed.[147]

In the specific context of the ethics codes, however, one central question lingers: What role, if any, did the Justices' prestigious position play in the decisions by Crow and Singer to offer these gifts in the first place? A painting at Crow's camp in the Adirondacks shows Thomas sitting outside at the camp alongside politically conservative activists.[148] Sitting close to him are Leo, the Federalist Society guru;[149] Peter Rutledge, one of Thomas's former law clerks who, according to his Federalist Society biography, "regularly files briefs and advises lawyers in matters before the Supreme Court and lower courts;" and Mark Paoletta, who would go on to serve as the General Counsel for the Office of Management and Budget in the Trump Administration.[150] Would a reasonable person seeing this painting genuinely believe that Crow invited Thomas to this exclusive gathering in the wilderness solely out of friendship?[151]

---

[147] *See, e.g.*, Igor Derysh, *"Beyond Parody": Experts Pound Alito for Pre-Buttal Op-Ed Defending Luxury Trip with GOP Billionaire*, SALON (June 21, 2023, 9:15 AM), https://www.salon.com/2023/06/21/beyond-parody-experts-pound-alito-for-pre-buttal-op-ed-defending-luxury-trip-with-billionaire/ [https://perma.cc/L3VW-2A28]; Li Zhou, *The Supreme Court Has an Ethics Problem. Justice Alito's Fishing Trip Is the Latest Proof.*, VOX (June 21, 2023, 2:30 PM), https://www.vox.com/scotus/2023/6/21/23768710/supreme-court-samuel-alito-luxury-fishing-trip-propublica-wsj-ethics-problem [https://web.archive.org/web/20240806141509/https://www.vox.com/scotus/2023/6/21/23768710/supreme-court-samuel-alito-luxury-fishing-trip-propublica-wsj-ethics-problem]; *see also* Dahlia Lithwick & Mark Joseph Stern, *The Timing of Alito's Private Jet Scandal Couldn't Be More Damning*, SLATE (June 26, 2023, 5:25 PM), https://slate.com/news-and-politics/2023/06/alito-private-jet-defense-supreme-court-hypocrisy.html [https://perma.cc/KYL7-FMT6].

[148] Kaplan et al., *supra* note 137.

[149] *See supra* text accompanying note 13.

[150] Kaplan et al., *supra* note 137; *Prof. Peter B. Rutledge*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/peter-rutledge [https://web.archive.org/web/20240806141730/https://fedsoc.org/contributors/peter-rutledge]; *Mark R. Paoletta*, SCHAERR JAFFE LLP, https://www.schaerr-jaffe.com/attorneys/mark-r-paoletta/ [https://perma.cc/JW93-4VNG].

[151] *See, e.g.*, Jonathan Zasloff, *The Way to Respond to the Alito and Thomas Gift and Recusal Scandals*, WASH. MONTHLY (Aug. 1, 2023), https://washingtonmonthly.com/2023/08/01/the-way-to-respond-to-the-alito-and-thomas-gift-and-recusal-scandals/ [https://perma.cc/MC8J-GEV9] (urging the federal government to present these issues before a jury, as "jurors are ideally suited to determine whether a reasonable person would question the impartiality of a [J]ustice who ruled on a case in which one party was a billionaire friend who took him on a luxury vacation"); Eric Foster, *Justice Thomas Had to Know His Decades of Pricey Favors from Harlan Crow Crossed the Line: Eric Foster*, CLEVELAND.COM (May 24, 2023, 5:48 AM), https://www.cleveland.com/opinion/2023/05/justice-thomas-had-to-know-his-decades-of-pricey-favors-from-harlan-crow-crossed-the-line-eric-foster.html [https://perma.cc/8WLC-LJYQ] ("What is the reasonable conclusion we are to take from these facts? Crow did all of this for a man that he met (who just happened to be a U.S. Supreme Court [J]ustice) because of friendship? Though possible, I would not call that a reasonable conclusion."); Dahlia Lithwick, *Clarence Thomas, Harlan Crow, and Leonard Leo's Defenders Cannot Be Serious*, SLATE (May

Would an observer rationally be expected to believe that Crow's invitation to Thomas was not at least partially influenced by a desire for these politically conservative leaders to talk shop with the Justice[152] largely credited for leading today's politically conservative wing on the Court?[153]

The Supreme Court's new Code of Conduct indicates that the answer is irrelevant. While the Judicial Conference's Code of Conduct would find that Thomas crossed ethical lines if he received any of these gifts from Crow due to "the prestige of the judicial office," the Supreme Court's version of these guidelines would find Thomas's conduct unethical only if Thomas were "practically certain" that Crow offered these gifts because of the prestige of Thomas's judicial position and accepted them anyway.[154] In the same vein, the new Supreme Court Code of Conduct would find Alito's conduct unethical only if he were "practically certain" that Singer flew him to Alaska

9, 2023, 10:20 AM), https://slate.com/news-and-politics/2023/05/clarence-thomas-harlan-crow-leonard-leo-corruption.html [https://perma.cc/HJA8-ZRLE] ("This creates an appearance of bias, an appearance of impropriety, and I think reasonable people from both parties—all parties, no parties—on hearing about Clarence Thomas' relationship with Crow, the trips, the tuition, and more, are rightfully shocked that any Supreme Court justice, let alone a judge on any court, would engage in such behavior."); Ruth Marcus, *Clarence Thomas Should Get Out His Checkbook and Reimburse Harlan Crow*, WASH. POST (May 4, 2023, 3:52 PM), https://www.washingtonpost.com/opinions/2023/05/04/clarence-thomas-tuition-payments-harlan-crow/ [https://perma.cc/RZH7-FS8Y] ("No reasonable person can be comfortable with this kind of lopsidedly beneficial relationship between a justice and an activist."); Liza Batkin, *Clarence Thomas's Friend of the Court*, NEW YORKER (Apr. 21, 2023), https://www.newyorker.com/news/our-columnists/clarence-thomass-friend-of-the-court [https://web.archive.org/web/20240727233133/https://www.newyorker.com/news/our-columnists/clarence-thomass-friend-of-the-court] (suggesting that it was unreasonable to view Crow's lavish gifts to Thomas as merely tokens of friendship that could not possibly influence Thomas's rulings on cases involving issues in which Crow had a known political stance). As previously discussed, the key question that should govern a judge's decision to recuse or not to recuse is: "Would a reasonable person, knowing all of the circumstances, question the judge's impartiality?" *See supra* text accompanying notes 55, 67–68; Zoe Tillman, *Thomas's Billionaire Friend Had Business Before Supreme Court*, BLOOMBERG L.: U.S. L. WK. (Apr. 24, 2023, 2:54 PM), https://news.bloomberglaw.com/us-law-week/thomass-billionaire-friend-had-business-before-supreme-court [https://perma.cc/U7M6-4PDL] (quoting Arthur Hellman, a scholar of judicial ethics from the University of Pittsburgh School of Law).

[152] *See, e.g.*, Kaplan et al., *supra* note 137 ('Crow's access to the justice extends to anyone the businessman chooses to invite along. Thomas' frequent vacations at [Crow's Adirondack camp] have brought him into contact with corporate executives and political activists.").

[153] *See* David Smith, *The 'Thomas Court': After Biding His Time, Rightwing Justice Finds His Power*, GUARDIAN, https://www.theguardian.com/us-news/2022/jul/10/clarence-thomas-supreme-court-justice [https://perma.cc/6TUE-V95W] (June 20, 2024, 2:45 PM).

[154] As mentioned above, while the Judicial Conference's Code of Conduct for United States Judges prohibits judges from "lend[ing] the prestige of the judicial office," the Supreme Court Code of Conduct prohibits justices from "*knowingly* lend[ing] the prestige of the judicial office," a *mens rea* that requires being "practically certain" of the result under the Model Penal Code. *See supra* text accompanying notes 126–27, 133; *Code of Conduct for United States Judges*, *supra* note 3, Canon 2(B); SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B) (emphasis added); MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. L. INST. 1962).

because Singer wanted to use the prestige of Alito's position to gain an advantage in future Supreme Court litigation. Applied to a third example, the new Code of Conduct would deem the actions of Sotomayor's staff in pushing universities to purchase the Justice's books[155] to be unethical only if Sotomayor were "practically certain" that she could strongarm the universities into buying more of her books because they enjoyed the prestige of her speaking appearances on their campuses.

This is, therefore, a definite dilution of the standards established for lower federal court judges through the Judicial Conference's Code of Conduct. Under the Supreme Court's Code of Conduct, it is no longer unethical if a justice uses "the prestige of the[ir] judicial office to advance the[ir] private interests."[156] Such behavior, according to the Court's Code of Conduct, is unethical *only if* the justice is "practically certain" that they are exploiting the prestige of their judicial position to gain these gifts, favors, or advantages.[157] This opens the door widely for justices of the Court to claim that what they have received from another party was bestowed upon them solely through personal friendship, with no relationship to their official duties.[158] For an American populace that is already disillusioned with the behavior of several individual justices and the Court as a whole,[159] establishing such a flimsy framework for regulating this sort of conduct will not go far toward restoring the public's trust.

It is fair to argue that strict liability may be too severe a standard to impose.[160] A strict liability standard could indeed punish an honest judge who genuinely does not recognize that they are receiving gifts from an apparent friend due to "the prestige of the[ir] judicial office" rather than from unadulterated friendship.[161]

---

155 *See supra* text accompanying note 16.

156 *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B).

157 *See id.*; MODEL PENAL CODE § 2.02(2)(b)(ii).

158 Indeed, this is exactly what Thomas and Alito have done with their respective relationships with Crow and Singer. *See supra* notes 143–44 and accompanying text.

159 *See* sources cited *supra* notes 9–10.

160 *See, e.g.*, Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 115 (2023) (criticizing strict liability statutes in criminal law); Cristina Carmody Tilley, *Just Strict Liability*, 43 CARDOZO L. REV. 2317, 2319–20 (2022) (explaining how strict liability statutes in the law of torts can lead to seemingly unjust outcomes by punishing individuals who acted reasonably yet still wind up liable to pay damages). While neither of these commentaries directly address strict liability in judicial ethics provisions, the critiques that the authors levy at strict liability statutes in both criminal law and tort law could equally be raised as reasons not to apply a strict liability standard to justices of the United States Supreme Court. *See generally* Serota, *supra*; Tilley, *supra*.

161 *See* Serota, *supra* note 160, at 114 (noting the potential for strict liability statutes to punish an individual and brand them for life as a criminal even if that person had no intention to

Therefore, it seems equitable to require some showing of mental culpability—some level of intent—before finding that a Supreme Court justice has acted in an unethical way.[162] Yet, stating that a justice may have run afoul of the ethical parameters only if that justice takes a gift or favor that they are "practically certain" is due to the prestige of their position on the Court provides too much leeway for undue influence to occur. A middle ground between the high bar of a *mens rea* of *knowingly* and the strict liability standard that requires no showing of intent is, therefore, necessary to reach here.

The fairest compromise seems to come from replacing the current *mens rea* of acting knowingly with the *mens rea* of acting negligently. Under the Model Penal Code, an individual is culpable for acting negligently when they reasonably "should [have been] aware of a substantial and unjustifiable risk," and their failure to perceive this risk "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[163] This is a far lower threshold than the Supreme Court's current knowingly standard, yet it is also a higher threshold than the strict liability standard that the Judicial Conference imposes.[164] It also is a significantly better fit for the objective of restoring legitimacy to the Court in the eyes of American citizens.[165] A *mens rea* of acting negligently removes the ability of justices to deem their actions ethical because they were not "practically certain" that their conduct involved exploitation of their judicial prestige.[166] Instead, it would deem actions by justices to be unethical if those actions grossly deviated from reasonable efforts to safeguard against "a substantial and unjustifiable risk."[167] A justice could no longer claim that they were unaware of any risk,[168] nor could a justice simply state that they believed a gift or favor to be bestowed upon them solely out of friendship.[169] The analysis would probe deeper, asking not only

commit the acts that violated the statute(s) in question); SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B).

[162] *See also* Thomas, *supra* note 129, at 650 & n.10 (stating that "a longstanding presumption against strict liability" exists in the criminal law context, with preference given to statutes requiring proof of some level of *mens rea*).

[163] MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1962).

[164] *Compare* MODEL PENAL CODE § 2.02(2)(d), *with* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B), *and Code of Conduct for United States Judges*, *supra* note 3, Canon 2(B).

[165] *See supra* note 122 and accompanying text.

[166] *Compare supra* note 154 and accompanying text, *with supra* text accompanying note 163.

[167] *See* MODEL PENAL CODE § 2.02(2)(d).

[168] *See id.*

[169] *See supra* notes 143–44 and accompanying text.

whether the justice was aware of the risk posed by their actions but also whether the justice reasonably "should [have been] aware" of this "substantial and unjustifiable risk."[170]

It is this type of standard for which the contemporary public hungers, yet this type of standard is precisely what Canon Two of the Court's new Code of Conduct lacks.[171] A rational observer can look at the Court's new demand that a justice act knowingly before they can possibly be deemed to be acting unethically[172] and see how, amid the backdrop of recent events,[173] this language could be easily finessed to show that none of these justices possibly could have done anything wrong.[174] This same observer could examine this language and understandably want to know why, once again,[175] the justices of the federal judiciary's highest court appear to be held to a standard that is considerably less strict than the ethical guidelines for the federal courts below them.[176] Neither of these outcomes is what the Court should want in these turbulent times. Instead, by shifting the requisite *mens rea* from acting knowingly to acting negligently, the Court will strike a desirable balance: a standard fairer than the strict liability of the Judicial Conference's Code of Conduct, yet simultaneously a standard strict enough to ensure that willful blindness toward obvious risks will not permit wrongdoers to escape culpability for their actions.

---

170 *See* MODEL PENAL CODE § 2.02(2)(d).

171 *Compare* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B), *with* MODEL PENAL CODE § 2.02(2)(d).

172 *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B).

173 *See supra* text accompanying notes 12–17.

174 *See, e.g.*, Virginia Canter & Gave Lezra, *The Supreme Court's Toothless Code of Conduct Is an Important Step, but Leaves Much to Be Desired*, CITIZENS FOR RESP. & ETHICS IN WASH. (Nov. 17, 2023), https://www.citizensforethics.org/news/analysis/the-supreme-courts-toothless-code-of-conduct-is-an-important-step-but-leaves-much-to-be-desired/ [https://perma.cc/Y6X7-QFQ5]; Zoe Tillman, *Supreme Court Rules Depart from Ethics Code for Other Judges*, BLOOMBERG L.: U.S. L. WK. (Nov. 14, 2023, 5:00 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-rules-depart-from-ethics-code-for-other-judges [https://web.archive.org/web/20240806151309/https://news.bloomberglaw.com/us-law-week/supreme-court-rules-depart-from-ethics-code-for-other-judges]; Rebecca Buckwalter-Poza, *The Insufficiencies of the Supreme Court's So-Called Code of Conduct*, ALL. FOR JUST. (Nov. 17, 2023), https://afj.org/article/the-insufficiencies-of-the-supreme-courts-so-called-code-of-conduct/ [https://perma.cc/5G3S-JDKJ].

175 *See supra* text accompanying note 3.

176 *See, e.g.*, sources cited *supra* note 174.

IV. DEMANDING EFFORTS THAT ARE BEST, NOT JUST REASONABLE

Commercial agreements frequently include language defining the standard of effort that parties must employ when trying to meet the terms of the contract.[177] No magic phrases or uniform definitions exist nationwide regarding these standard of effort clauses.[178] Over time, however, an overall commonly used hierarchy of language evolved.[179] In general, although not always, courts and commentators recognize the term *best efforts* as demanding the highest level of effort for the parties involved.[180] Frequently, though not absolutely, the hierarchy of obligation diminishes from there, with the phrase *reasonable efforts* occupying a lower portion of the pyramid, imposing a far lower set of expectations on the parties than the phrase *best efforts* requires.[181]

---

[177] Ryan Aaron Salem, Comment, *An Effort to Untangle Efforts Standards Under Delaware Law*, 122 PENN STATE L. REV. 793, 795 (2018); *see* Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1000 (1992); *see also* E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 3 (1984).

[178] Rob Park, Comment, *Putting the "Best" in Best Efforts*, 73 U. CHI. L. REV. 705, 705 (2006).

[179] *See* D.C. Toedt III, *Commercially Reasonable Efforts: A Recent Delaware Supreme Court Holding Might Motivate Contract Drafters to Define the Term for Themselves*, 81 TEX. BAR J. 338, 338 (2018) (stating that "if pressed," individuals would likely rank *best efforts* as requiring the highest level of effort, followed by *commercially reasonable efforts*, and lastly *reasonable efforts*, which is generally (although not uniformly) accepted as being the formal construction of "I'll give it a shot").

[180] *E.g.*, CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU § 5:2.4 (2d ed. 2008) ("Although the case law on the subject is mixed, most practitioners take the view that an obligation to use best efforts includes the obligation to make every possible effort, and to use all possible financial resources, to achieve the . . . goal."); Charles Thau, Note, *Is This Really the Best We Can Do? American Courts' Irrational Efforts Clause Jurisprudence and How We Can Start to Fix It*, 109 GEO. L.J. 665, 671 (2021) (quoting the American Bar Association's Committee on Mergers and Acquisitions as determining that the term *best efforts* references "the highest standard, requiring a party to do essentially everything in its power to fulfill its obligation (for example, by expending significant amounts or management time to obtain consents)"); David Shine, *"Best Efforts" Standards Under New York Law: Legal and Practical Issues*, M&A LAW., Mar. 2004, at 15, 15 ("'Best efforts' is at the top of the scale and is generally perceived to mean that a party must do all that can possibly be done to seek and obtain an end, even if the impact would be materially adverse to the seeking party and even if there is a material monetary cost to the action.").

[181] *See* Thau, *supra* note 180, at 671–72 (citing the ABA Committee on Mergers and Acquisitions); Shine, *supra* note 180, at 15. *Compare Best Efforts*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *best efforts* as "all actions rationally calculated to achieve a . . . stated objective, to the point of leaving no possible route to success untried"), *with Reasonable Efforts*, BLACK'S LAW DICTIONARY (11th ed. 2019) (describing *reasonable efforts* as being "actions rationally calculated to achieve a . . . stated objective, but not necessarily with the expectation that all possibilities are to be exhausted"). The eleventh edition of *Black's Law Dictionary* was the most current edition of *Black's Law Dictionary* in print at the time of the 2023 Supreme Court Code of Conduct. *See Thomson Reuters Publishes 11th Edition of Black's Law Dictionary,* THOMSON REUTERS (June 4, 2019), https://www.thomsonreuters.com/en/press-releases/2019/june/thomson-reuters-publishes-11th-edition-of-blacks-law-dictionary.html [https://perma.cc/9Q48-8KYQ]; *Thomson Reuters Releases 12th Edition of* Black's Law

In the Court's new Code of Conduct, this linguistic battle erupts somewhat subtly within the discussion of when justices should disqualify themselves from hearing a case.[182] "A [j]ustice should keep informed about the [j]ustice's personal and fiduciary financial interests," reads the language in question, "and make a *reasonable effort* to keep informed about the personal financial interests of the [j]ustice's spouse and minor children residing in the [j]ustice's household."[183] In adopting this specific phrase, the Court offers its own members an all-too-convenient escape clause.[184] Rather than holding justices to the higher standards, the Court opted to use a lower standard under which a justice could avoid recusal without rigorously evaluating whether their household's financial relationships could call their impartiality into question.[185]

The examples provided earlier in this Article[186] are replete with questionable conduct surrounding the "personal and fiduciary financial interests" of justices and members of their households.

Dictionary, THOMSON REUTERS (June 5, 2024), https://www.thomsonreuters.com/en/press-releases/2024/june/thomson-reuters-releases-12th-edition-of-black-s-law-dictionary.html [https://perma.cc/ZV28-6HSS].

[182] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 3(B).

[183] *Id.* Canon 3(B)(5) (emphasis added). If "the [j]ustice's impartiality might reasonably be questioned" due to their "personal and fiduciary financial interests," the justice should recuse themselves. *See id.* Canon 3(B).

[184] *See* Toedt III, *supra* note 179 (equating the commonplace interpretation of *reasonable efforts* to be "I'll give it a shot," a far less rigorous standard of effort than *best efforts*).

[185] Members of the Court objecting to this critique of their new Code of Conduct could argue that they did not intend for the term *reasonable efforts* to be viewed as subordinate to *best efforts* in the context of the Code. Indeed, a significant number of courts across the United States have for some time argued for a blurring of the lines between *best efforts and reasonable efforts*, with some even saying that no line whatsoever exists between these two terms. *See, e.g.*, Gary M. Rosenberg, Alexander Lycoyannis & Michael A. Pensabene, *'Best Efforts' Clauses in Commercial Leases*, N.Y.L.J. (Jan. 31, 2023, 2:00 PM), https://www.law.com/newyorklawjournal/2023/01/31/best-efforts-clauses-in-commercial-leases/ [https://perma.cc/DHS5-CDLF]; *see also* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1119–26 (1981). However, there is a central flaw in such an argument if the Court were to raise it. The Court seems to leave the term *reasonable effort* undefined within its new Code of Conduct. *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 3(B)(5). One can reasonably expect the justices of the Court to be aware of the current jurisprudential debates regarding whether reasonable efforts is a lower level of effort than best efforts, and one could likewise expect the justices of the Court to be aware of the substantial authorities—including *Black's Law Dictionary*, reportedly the most cited law book on the planet, *see Thomson Reuters Releases 12th Edition of* Black's Law Dictionary, *supra* note 181 (stating that *Black's Law Dictionary* is "the most widely cited law book in the world")—that continue to define *reasonable efforts* as a level of effort subordinate to the requirements of *best efforts*, *see supra* note 181 and accompanying text. If the Court wished to use a definition of *reasonable efforts* that equated with the standard of effort generally necessitated by a best efforts requirement, then the Court, as the drafters of this Code of Conduct, should have specified this point within the Code itself, rather than leaving this matter up to the guesswork of the reader.

[186] *See supra* notes 12, 15–17, 19, 25–27 and accompanying text.

Many of these issues, particularly those regarding Thomas, Alito, and Sotomayor,[187] have taken center stage among the recent debates about whether a formal code of ethics should govern the Court's conduct.[188] Even the questions about the financial benefits earned by the Chief Justice's wife from recruiting attorneys to law firms with business before the Court[189] are implicated by this topic area.[190] In each of these situations, members of the public have raised understandable concerns about the legitimacy of decisions authored by these justices based on the financial relationships in which they have engaged.[191]

Adding to these doubts from many observers are the excuses that some of these justices proffered when confronted with these issues. Thomas, for instance, claimed that he did not believe he had to report Harlan Crow's purchase of his home in Savannah, Georgia, where Thomas's mother still lives, because "the sale resulted in a capital loss."[192] Through this insistence, Thomas evidently expected the American public to believe that there was no reasonable possibility that he could be partial toward the politically conservative causes that Crow ardently supports—simply because Thomas apparently spent more money in home repairs at this property than he ultimately received when he sold the property to Crow. Likewise, Thomas evidently expected the American public to believe that there was no possibility of his partiality toward Crow and Crow's favored interests even though Crow made tuition payments on behalf of Thomas's grandnephew and covered the costs of luxury vacations that brought Thomas together with other high-profile conservative interest group leaders.[193]

Similar justifications came from Alito, who saw no reason why the American people should wonder if he would be partial toward Singer

---

[187] *See supra* notes 12, 15–16, 27 and accompanying text.

[188] *See, e.g.*, Camera, *supra* note 4.

[189] *See supra* text accompanying note 17.

[190] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 3(B)(5).

[191] *See, e.g.*, Pengelly, *supra* note 12; Elliott et al., *supra* note 15; Schonfeld, *supra* note 17; Hall, *supra* note 27; Camera, *supra* note 4.

[192] Nina Totenberg, *Now-Released Forms Reveal More Trips Gifted to Justice Clarence Thomas by Harlan Crow*, NPR, https://www.npr.org/2023/08/31/1196993118/justices-thomas-alito-financial-disclosures [https://perma.cc/JZK6-MW3E] (Sept. 1, 2023, 10:33 AM); *Clarence Thomas Discloses Trips on Harlan Crow's Plane*, SVLOOK.COM (Aug. 31, 2023), https://svlook.com/clarence-thomas-discloses-trips-on-harlan-crows-plane/ [https://perma.cc/AW4R-87BU]; *see* Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Acknowledges Undisclosed Real Estate Deal with Harlan Crow and Discloses Private Jet Flights*, PROPUBLICA (Aug. 31, 2023, 4:25 PM), https://www.propublica.org/article/clarence-thomas-disclosure-filing-harlan-crow-real-estate-travel-scotus [https://perma.cc/ET2L-4F3B].

[193] *See supra* text accompanying notes 12–14, 139, 148–50.

after Alito flew on Singer's private plane, at the Republican megadonor's expense, to enjoy a fishing trip in Alaska.[194] According to Alito, the seat on Singer's private jet "would have otherwise been vacant" if Alito had not accepted Singer's invitation.[195] Therefore, Alito argued, accepting the flight on Singer's private plane imposed no extra cost on Singer.[196] Since Singer paid nothing extra out-of-pocket to fly Alito to Alaska, the Justice argued that the American public should not believe that he would show any partiality toward Singer and Singer's business interests in cases brought before the Court.[197] In addition, Alito argued that he was unaware of Singer's connection to these cases subsequently appearing on the Court's docket, because Singer's name did not appear in any of the briefs or other filings.[198]

A third example comes from Sotomayor.[199] Some commentaries attempt to downplay the fact that Sotomayor sat in judgment over cases that involved her book publisher and allegedly "'prodded' libraries, universities and other public institutions to buy her books" prior to her appearances at these venues.[200] Others, though, have asked the critical question of whether Sotomayor could render impartial judgments in disputes involving the business that published her book, a business arrangement that has earned the Justice more than three million dollars.[201] Given that Sotomayor's

194 *See supra* text accompanying note 140; sources cited *supra* note 15; Alito Jr., *supra* note 145.

195 Alito Jr., *supra* note 145.

196 *Id.* Additionally, Alito argued that he would have unnecessarily spent taxpayer dollars had he *not* received the flight on Singer's private plane. *See id.* "Had I taken commercial flights, that would have imposed a substantial cost and inconvenience on the deputy U.S. Marshals who would have been required for security reasons to assist me," he wrote. *Id.*

197 *See id.*

198 *Id.* ("Mr. Singer was not listed as a party in any of the cases listed by ProPublica. Nor did his name appear in any of the corporate disclosure statements or the certiorari petitions or briefs in opposition to certiorari.").

199 *See supra* text accompanying note 16.

200 *See* Zeeshan Aleem, *Don't Downplay Sonia Sotomayor's Poor Conduct. Fix It.*, MSNBC (July 13, 2023, 6:00 AM), https://www.msnbc.com/opinion/msnbc-opinion/sonia-sotomayor-ethics-book-supreme-court-rcna93864 [https://perma.cc/TQ4D-PFYQ] ("The response from some liberal commentators has been to downplay the matter. . . . But a purely comparative lens distracts from the problem. Once again we're seeing that the Supreme Court has no guardrails against exploitation of power, whether large or small, liberal justice or conservative.").

201 *See, e.g.*, *Justice Sotomayor's Staff Urged Schools and Libraries to Buy Her Memoir or Kid's Books*, NPR (July 11, 2023, 1:01 PM), https://www.npr.org/2023/07/11/1187005372/sonia-sotomayor-supreme-court-staff-book-sales-signings-memoir [https://perma.cc/C7SB-2DW9]; Nick Mordowanec, *Conservatives Call Out Sotomayor's $3M from Publisher amid Thomas Reports*, NEWSWEEK, https://www.newsweek.com/conservatives-out-sotomayor-3-million-dollar-publisher-thomas-reports-1798460 [https://perma.cc/NR2P-GRUY] (May 4, 2023, 4:52 PM).

publisher would suffer financial damage if the Court ruled against them in the copyright infringement cases on which Sotomayor sat, [202] one could question whether the American public should accept Sotomayor's judgment in these cases to be impartial.

Nothing in this Article is meant to conclude that Thomas, Alito, Sotomayor, or any other justice discussed in these pages *did* employ partiality in any of these cases. The critical issue here is that a reasonable observer of any of these situations could rationally question whether these financial relationships *could* have prevented the administration of impartial justice.[203] A reasonable American could wonder whether a justice could sit in impartial judgment over her book publisher, or over business interests involving the man who had flown him on a private plane for a deluxe fishing trip in Alaska, or over the various politically conservative causes championed by someone who bought the home where that justice's mother lived, paid for that justice's luxury vacations, and covered tuition costs for one of that justice's relatives. A reasonable American could question whether a Chief Justice, whose wife made millions recruiting lawyers to firms that practice before the Court,[204] could act with impartiality toward these attorneys. A reasonable American could question whether Breyer was impartial in 2015 toward the energy company in which his wife owned more than thirty thousand dollars of stock,[205] or whether Ginsburg was impartial in more than twenty cases involving businesses in which her husband held stock through an IRA account,[206] or whether Gorsuch was impartial in the copyright infringement matters involving the publishing conglomerate with which he had his own lucrative book deal.[207] Each of these plausible questions, coupled with the excuses or lack of any comment at all from some of these justices, represents another blow to the reputation of the Court. Enough of these blows taken together create the crisis of lack of legitimacy in the eyes of the public that the Court—and, in particular, the Chief Justice—has openly sought to avoid.[208]

---

[202] *See* Mordowanec, *supra* note 201.

[203] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 3(B)(2); *Code of Conduct for United States Judges*, *supra* note 3, Canon 3(C)(1); 28 U.S.C. § 455(a).

[204] *See supra* text accompanying note 17.

[205] *See supra* text accompanying note 26.

[206] *See supra* text accompanying note 25.

[207] *See supra* text accompanying note 27.

[208] *See* Benjamin Pomerance, *Uneasy Lies the Head that Wears the Crown: A Chief Justice's Struggle for His Court*, 85 ALB. L. REV. 315, 337–48 (2022) (discussing Roberts's concerns with his own reputation and with the public's perceptions of the Court); JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 130–31 (2019) (describing

This section of the new Code of Conduct provided the chance for the Court to show the public that they took seriously matters of potential financial conflicts of interest.[209] However, the Court fumbled—whether intentionally or inadvertently—by failing to hold itself to the highest standards.[210] Had the justices imposed upon themselves a requirement to use best efforts when ascertaining their own finances and the financial affairs of their household, this would have sent a clear message that the Court recognized the need to prevent these potential conflicts in the future. Instead, though, the Court left the door open for continued issues of this nature, all justified by a justice's statement that they made some "reasonable effort" to determine whether a possible financial conflict existed and found none.[211]

The rebuttal from the Supreme Court regarding this issue is obvious: the fact that the reasonable effort standard applies to all other federal judges through the Code of Conduct for United States Judges.[212] The Supreme Court could, therefore, argue that if this standard is sufficient for the rest of the federal judiciary, it should be sufficient for it as well. However, this argument comes with flaws. First, the Code of Conduct for United States Judges use of a reasonable effort standard rather than a best effort standard is faulty for the same reason that the Supreme Court's choice of this standard is faulty.[213] The use of this standard for one judicial ethics code does not inherently mean that it is the correct standard, nor does it mean that this is the proper standard for all other judicial bodies to adopt. Additionally, even if the Code of Conduct for United States Judges remains unamended and continues to use this weaker-than-desirable reasonable effort standard, the Supreme Court remains the most visible federal court in the Nation, as well as the court under the intense public scrutiny at present.[214] If the Court took seriously the public's concerns regarding potential conflicts of interest among the

Roberts's lifelong efforts to avoid public controversies and to cultivate what he perceives to be the proper public image).

[209] As this Article has already shown, concerns about justices sitting in judgment over cases involving individuals or entities who have some sort of financial relationship with that justice is one of the key concerns that the majority of the American public raises about the Court today. *See supra* text accompanying notes 12, 15–17, 25–27.

[210] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 3(B)(5) (calling for a "reasonable effort," not a best effort, *see supra* text accompanying note 181).

[211] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 3(B)(5).

[212] *See Code of Conduct for United States Judges*, *supra* note 3, Canon 3(C)(2).

[213] *See supra* notes 178–85 and accompanying text (discussing the deficiencies in the reasonable efforts standard).

[214] *See* sources cited *supra* note 10 (describing many of the recent perceived ethical issues that have cast public doubts upon the Court).

justices, they would adopt a Code of Conduct that holds their own behavior to the highest possible standard, rather than a standard that leaves plenty of open doors through which justices engaging in dubious behavior could escape.[215]

Theoretically, justices of the Court could justify most of the behaviors discussed here under this reasonable effort standard. Thomas, for instance, could prevail with his claims that he saw no issues in Crow buying a home from the Justice, because he made a "reasonable effort" to review the finances involved and concluded that the property represented a capital loss, due to the expenses that Thomas had already poured into it.[216] He could do the same with the luxury vacations for which Crow paid and for the tuition costs that Crow covered,[217] again by saying that he saw no existence of a conflict after making a "reasonable effort" to review the situation. Alito, likewise, could prevail with the argument that he already put forward in print, claiming that after making a "reasonable effort" to study all factors involved, he had no knowledge that Singer had any interest in cases appearing before the Court and the trip on Singer's private jet represented no additional cost to Singer.[218] Sotomayor and Gorsuch could state that sitting on cases where the publisher of their books was one of the parties was acceptable,[219] as they had made a "reasonable effort" to examine all factors and came up with no apparent conflict. Scalia, Ginsburg, Breyer,[220] and virtually all of the other justices mentioned here could have followed a similar pattern to reach an equivalent result.

None of this will alleviate the concerns currently rising from the majority of Americans.[221] Those who are concerned with the potential for partisan or biased judging from justices of the Court will not have these concerns eased by a Code of Conduct that leaves open the door for continued misconduct. Americans with substantial doubts about the Court's impartiality will not have those doubts assuaged by a

[215] *See supra* notes 178–85 and accompanying text (discussing the weaknesses and inconsistencies of the reasonable efforts standard). One of the underlying problems, though, seems to be the current Court's dismissive, or at least doubtful, attitude toward the public's concerns. *See, e.g.*, SUPREME COURT CODE OF CONDUCT, *supra* note 2, statement (providing, in the opening Statement of the Court, a declaration that any public beliefs of the justices not conforming to standards of ethics is merely a "misunderstanding" by the public).

[216] *See supra* text accompanying note 192.

[217] *See supra* text accompanying note 12.

[218] *See* Alito Jr., *supra* note 145.

[219] *See supra* text accompanying note 27.

[220] *See supra* text accompanying notes 19, 25–26.

[221] *See, e.g.*, *supra* notes 9–10 and accompanying text (describing multiple surveys showing the degree to which Americans have lost faith in the current Supreme Court and the leading reasons why this loss of faith has occurred).

promise merely of reasonable efforts. A higher standard exists, and it is this higher standard that the justices should require for themselves.[222] A best efforts obligation is the proper standard to set here. In ensuring impartial justice from the Nation's most powerful Court, the American people deserve—and rightfully expect—the best efforts that each justice can provide.

V. ENFORCEMENT AND OVERSIGHT: QUESTIONS STILL UNANSWERED

The most glaring absence in the Court's new Code of Conduct is the lack of any language taking seriously the question of oversight.[223] A Code of Conduct without any substantive way to evaluate the conduct in question, and to put an end to conduct that runs afoul of the Code, is a document that ultimately could amount to little more than window dressing.[224] For many early readers and reviewers of the Court's new creation, this concern remains paramount.[225]

Indeed, certain members of the Court have recently defended the Court's ability to police itself.[226] Alito, for example, ardently declared

[222] *See supra* note 180 and accompanying text.

[223] *See* Jess Bravin & Jan Wolfe, *Supreme Court's New Code of Ethics Unlikely to Change Justices' Practices*, WALL ST. J. (Nov. 15, 2023, 9:08 AM), https://www.wsj.com/us-news/law/supreme-courts-new-code-of-ethics-unlikely-to-change-justices-practices-d35cefaa [https://web.archive.org/web/20240805143828/https://www.wsj.com/us-news/law/supreme-courts-new-code-of-ethics-unlikely-to-change-justices-practices-d35cefaa]; Michael Waldman, *New Supreme Court Ethics Code Is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail [https://perma.cc/H46A-EZCS]; Adam Liptak, *Supreme Court's New Ethics Code Is Toothless, Experts Say*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html [https://web.archive.org/web/20240805143831/https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html].

[224] *See* Charles Gardner Geyh, *The Architecture of Judicial Ethics*, 169 U. PA. L. REV. 2351, 2384 (2021) ("[T]he need to remedy macroethics problems with microethics rules is tempered by a relational ethics interest in assuring that the cure is proportionate to the disease—that enforcement of a given rule achieves a net gain for the judiciary's institutional legitimacy."); Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L., ETHICS & PUB. POL'Y 25, 41 (2000) ("At a minimum, an ethics rule should be understandable, memorable, predictable, and capable of efficient enforcement."); Waldman, *supra* note 223 ("The idea behind an ethics code is simple: nobody is wise enough to be the judge in their own case.").

[225] *See, e.g.*, sources cited *supra* note 223; Joshua Kaplan, Justin Elliott, Brett Murphy & Alex Mierjeski, *The Supreme Court Has Adopted a Conduct Code, but Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, 4:47 PM), https://www. propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow [https://perma.cc/ZBE4-RGJ8]; Chemerinsky, *supra* note 40; Gersen, *supra* note 40; Millhiser, *supra* note 40.

[226] *But see Can America's Supreme Court Police Itself?*, ECONOMIST (Sept. 7, 2023), https://www.economist.com/united-states/2023/09/07/can-americas-supreme-court-police-itself [https://perma.cc/YL2T-BQGQ]; Svante Myrick, *The Latest Hit to the Supreme Court's Credibility Shows It Won't Police Itself*, HILL (Sept. 1, 2023, 8:30 AM),

in an interview for the op-ed page of *The Wall Street Journal* that Congress lacked any ability to oversee any aspect of the Court's functions.[227] "No provision in the Constitution gives them the authority to regulate the Supreme Court—period," Alito stated.[228] On their face, Alito's words appear accurate. No clause of the United States Constitution expressly declares that Congress can oversee matters pertaining to the behavior of Supreme Court justices.[229] Article III of the Constitution vests substantial power in the Supreme Court,[230] a degree of power that has expanded in the centuries since the Court's decision in *Marbury v. Madison*[231] affirmed that the Court could, and would, utilize the power of judicial review.[232] Nothing in this Article claims that the Court's wielding of this power was illegitimate.[233] Even though the Constitution does not expressly say

https://thehill.com/opinion/judiciary/4182046-the-latest-hit-to-the-supreme-courts-credibility-shows-it-wont-police-itself/ [https://web.archive.org/web/20240805150003/https://thehill.com/opinion/judiciary/4182046-the-latest-hit-to-the-supreme-courts-credibility-shows-it-wont-police-itself/].

227 *See* David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7 [https://web.archive.org/web/20240805150351/https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7].

228 *Id.*

229 *See* U.S. CONST. arts. I, III (lacking language expressly empowering Congress to regulate the ethics of the justices of the Supreme Court).

230 *See id.* art. I, § 2.

231 Marbury v. Madison, 5 U.S. 137 (1803).

232 *See* Dave Roos, *How John Marshall Expanded the Power of the Supreme Court*, HISTORY (Nov. 30, 2021), https://www.history.com/news/supreme-court-power-john-marshall [https://perma.cc/D2SN-GRY6]. Contrary to popular opinion, *Marbury* did not invent the concept of judicial review, nor did this decision represent the first time anyone contemplated the Supreme Court utilizing this authority. *See* Mark A. Graber, *Establishing Judicial Review:* Marbury *and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 617 (2003) ("*Marbury* established judicial review only from a remarkably jurocentric perspective on the elements of judicial review and on the criteria for determining whether those elements are established."); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707 (2003) ("The idea that courts possess an independent power and duty to interpret the law, and in the course of doing so must refuse to give effect to acts of the legislature that contravene the Constitution, was well accepted by the time *Marbury* rolled around, more than a dozen years after the Constitution was ratified."). Still, even though the concept of judicial review was not foreign at the time of *Marbury*, the fact remains that the United States Constitution does not specifically confer this power upon the Supreme Court, and that the power of the Court has expanded in the generations since *Marbury* because of the Court's determination that they indeed could and would utilize this authority. *See* Nicholas Mosvick, *Marbury v. Madison and the Independent Supreme Court*, NAT'L CONST. CTR. (Feb. 24, 2022), https://constitutioncenter.org/blog/marbury-v-madison-and-the-independent-supreme-court [https://perma.cc/6XRP-YT3J].

233 Some commentators develop the point that judicial review—including the existence of a notion of some form of judicial review before *Marbury*—demonstrates that the Framers recognized a system of governance derived from multiple sources of law rather than solely from the four corners of the written Constitution. *See, e.g.*, Suzanna Sherry, *The Founders'*

anything about judicial review,[234] the Court would have been largely neutered without it,[235] and history reveals that many—if not most—of the delegates to the Constitutional Convention anticipated that the Supreme Court would opine on matters of constitutionality in the laws enacted within the new Nation.[236]

Still, these powers, both enumerated and self-conferred, are not absolute.[237] Just as the judiciary holds vital checks that restrain the powers of the legislative and executive branches, the judicial branch's powers likewise are subject to limitations.[238] This is not a revolutionary concept, but rather a fixture in the federal government of this Nation since its nascent years.[239]

Article III, Section 2 of the federal Constitution provides Congress with powers to limit the Supreme Court's appellate jurisdiction when the elected representatives in Congress deem it necessary to do so.[240] No less an authority than United States Supreme Court Justice

Unwritten Constitution, 54 U. CHI. L. REV. 1127, 1128, 1176–77 (1987). Thus, the notion that the Supreme Court—in the Court's own words—is "the ultimate expositor of the constitutional text" retains not only authority, but legitimacy, rooted in the history and tradition of the American judiciary, even though it is not a power expressly conferred upon the Supreme Court in the Constitution itself. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

[234] *See* U.S. CONST. art. III.

[235] *See* Mosvick, *supra* note 232.

[236] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that courts must determine whether acts of Congress are constitutional and ensure that no statute conflicts with the United States Constitution, a fundamental description of what we now call judicial review, *see* Mosvick, *supra* note 232); *see also* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 894–926 (2003) (arguing that even though judicial review is not a power that the Constitution expressly granted to the judiciary, the concept of judiciary is nevertheless implicit within the Constitution and necessary for many bedrock aspects of the Constitution to function); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 114–16, 189–90 (2003) (concluding that jurists at the time of *Marbury* already recognized the power to overturn a law as being contrary not only to the written federal Constitution but also to principles of "higher law" that comprise the Constitution's so-called unenumerated rights).

[237] *See* Paulsen, *supra* note 232, at 2708–09 (explaining that *Marbury*, rather than representing an unmitigated seizure of power by the Supreme Court, rejects any notions of "judicial supremacy" and affirms founding concepts of a tripartite government with each branch possessing key abilities to check the power of the others).

[238] *See* John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 255 (1997); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO STATE L.J. 175, 181–85 (1990); Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 YALE L.J. 71, 115 (1984).

[239] Alexander Hamilton was one of the first leaders to discuss these limits, stating that the judicial branch of the government "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither [force] nor [will], but merely judgment." *See* THE FEDERALIST NO. 78, *supra* note 236.

[240] *See* U.S. CONST. art. III, § 2.

Frankfurter, a man frequently cited as one of the leading constitutional experts in American history,[241] pointed out that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred, and it may do so even while a case is *sub judice*."[242] United States Supreme Court Chief Justice Warren Burger likewise stated that Congress held power to pass legislation "limiting or prohibiting judicial review of its directives."[243]

The concept described in Article III, Section 2, is no mere thought experiment.[244] In 1867, law enforcement authorities arrested and jailed newspaper editor William McCardle for publishing editorials in his Mississippi newspaper that criticized Reconstruction policies.[245] McCardle sued, demanding that he be freed under provisions of the Habeas Corpus Act of 1867.[246] Yet the merits of McCardle's case ultimately never received a decision from the Supreme Court.[247] Congress passed legislation denying the Court

---

[241] *See, e.g.*, James R. Belpedio, *Felix Frankfurter*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/felix-frankfurter/ [https://perma.cc/B63C-NDWC] (July 2, 2024); *see also* Book Note, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal* Establishment, 136 HARV. L. REV. 1244, 1245 (2023).

[242] Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (citing *Ex parte* McCardle, 74 U.S. 506 (1869)).

[243] Volpe v. D.C. Fed'n of Civic Ass'ns, 405 U.S. 1030, 1031 (1972) (Burger, C.J., concurring); *see also Examining the Legacy of Chief Justice Warren Burger*, NAT'L CONST. CTR. (June 9. 2024), https://constitutioncenter.org/blog/examining-the-legacy-of-chief-justice-warren-burger [https://perma.cc/7NCP-KB68].

[244] *See also* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 927 (1982) ("When the dust settles, it appears likely that Congress' power will prove to be very broad. As I have attempted to demonstrate, no significant internal limitation on Congress' authority can be found, and the reach of any external constitutional restraint is, at best, uncertain."). This does not mean that Congress has unlimited authority to curb the Court's appellate jurisdiction, however. The most notable example of the Court striking back against a congressional effort to prevent the Court from deciding a case occurred in *United States v. Klein*, where the Court held unconstitutional a statute that ordered the Court to dismiss lawsuits that former Confederates—pardoned by the President of the United States—filed seeking fair compensation for property that Union troops had overtaken during the Civil War. See United States v. Klein, 80 U.S. 128, 143–44, 147 (1872). In reviewing this statute, the Court concluded that "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. Still, examples remain rare of the Court pushing back against Congress's powers under Article III, Section 2, with most situations throughout history affirming Congress's powers to limit the Court's appellate jurisdiction if Congress so desires. See, e.g., The Francis Wright Case, 105 U.S. 381, 386 (1882); see also JOANNA R. LAMPE, CONG. RSCH. SERV., R33967, CONGRESS'S POWER OVER COURT DECISIONS: JURISDICTION STRIPPING AND THE RULE OF KLEIN 4–18 (2024).

[245] *See* John E. Beerbower, Ex Parte McCardle *and the Attorney General's Duty to Defend Acts of Congress*, 47 U. S.F. L. REV. 647, 664–66 (2013).

[246] *See id.* at 666; *Ex parte* McCardle, 73 U.S. 318, 324 (1868).

[247] Initially, the Supreme Court did uphold its jurisdiction over the case, denying the government's motion to dismiss on February 17, 1868. *Ex parte McCardle*, 73 U.S. at 327.

any ability to opine on this matter.[248] The Court deliberated and agreed that Congress indeed possessed such powers, leaving them without authority to decide whether the Habeas Corpus Act's language should result in McCardle's freedom.[249] Despite criticism that its decision was permitting Congress to unjustly abridge First Amendment press freedoms,[250] the Court determined that Congress could indeed pass legislation limiting its jurisdiction and respected Congress's power to do so.[251]

Congressional powers over the Court do not end with this single provision. Congress holds control over the budget of the Supreme Court.[252] In multiple instances throughout this Nation's history, Congress has decided to expand or reduce the number of justices who sit on the Court's bench.[253] Retirement provisions for federal judges,

However, following Congress's further action, the Court concluded that it no longer held jurisdiction, as Congress had leveraged its constitutional authority to remove the Court's jurisdiction over this matter. *See Ex parte McCardle*, 74 U.S at 515.

[248] *See* Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44, 44; *Ex parte McCardle*, 74 U.S at 515. For a discussion of the congressional debates regarding this measure, see William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 239–42 (1973).

[249] *See Ex parte McCardle*, 74 U.S. at 513–15.

[250] *See, e.g.*, Van Alstyne, *supra* note 248, at 238.

[251] *See Ex parte McCardle*, 74 U.S. at 514 ("We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this [C]ourt is given by express words."). In the many years since *Ex parte McCardle*, justices of the Supreme Court have continued to affirm Congress's authority to limit the Court's appellate jurisdiction in this manner. *See, e.g.*, The Francis Wright Case, 105 U.S. 381, 386 (1882) ("What th[e appellate] powers [of the Supreme Court] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control."); Glidden Co. v. Zdanok, 370 U.S. 530, 567–68 (1962) ("For as Hamilton assured those of his contemporaries who were concerned about the reach of power that might be vested in a federal judiciary, 'it ought to be recollected that the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences.'"); Flast v. Cohen, 392 U.S. 83, 109 (1968) (Douglas, J., concurring) ("As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of [Section] 2, Art[icle] III." (citing *Ex parte McCardle*, 74 U.S. 506)). More recently, in 2016, the Court issued one of its most deferential rulings to the powers of Congress over the Court, holding in *Bank Markazi v. Peterson* that Congress "does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *See* Bank Markazi v. Peterson, 578 U.S. 212, 230 (2016) (citing Pope v. United States, 323 U.S. 1 (1944)).

[252] Steven Puro, Congress-Supreme Court Relations: Strategies of Power, 19 ST. LOUIS PUB. L. REV. 117, 118 (2000); see also Ilya Somin, Congress Can Regulate the Supreme Court—But There Are Limits to that Power, REASON: THE VOLOKH CONSPIRACY (July 29, 2023, 6:09 PM), https://reason.com/volokh/2023/07/29/congress-can-regulate-the-supreme-court-but-there-are-limits-to-that-power/ [https://perma.cc/FQ4C-REJ5] (noting that while Congress is prohibited by Article III, Section 1 from reducing the salaries of current justices, it "can mandate lower pay for judges appointed in the future").

[253] Michael C. Dorf, *Justice Alito Is Wrong: Congress Can and Does Regulate the Supreme Court*, JUSTIA: VERDICT (Aug. 16, 2023), https://verdict.justia.com/2023/08/16/justice-alito-is-wrong-congress-can-and-does-regulate-the-supreme-court [https://perma.cc/45HK-K9UK].

including Supreme Court justices, arise from the language of Congress as well.[254]

Recognizing that Congress holds authority over funding the Supreme Court, setting the number of justices who decide the cases of the Court, and even deciding whether the Court may hear a particular case under their appellate jurisdiction, the notion that Congress can also have a voice in ensuring the ethical and impartial conduct of justices does not seem so farfetched. In fact, Congress has taken measures relating to this issue for more than two hundred years.[255] It was Congress, not the Supreme Court, that wrote in 1789 the first mandatory oath that justices had to swear before they could be seated as members of the Court.[256] Three years later, Congress established the first set of statutory recusal standards for federal judges as part of the Judiciary Act of 1792.[257] In 1948, Congress passed new legislation regarding judicial recusal, this time expressly including justices of the Supreme Court within this statute's reach.[258] Three decades later, Congress set the financial disclosure rules for justices that remain the center of contemporary debates about justices failing to reveal certain fiscal relationships.[259] As recently as 2022, Congress passed—with bipartisan support—the Courthouse Ethics and Transparency Act, amplifying disclosure requirements regarding securities transactions made by federal judges, a requirement that once again encompasses the justices of the Supreme Court.[260]

Thus, while Alito is correct that nothing in the Constitution expressly calls upon Congress to regulate the ethical conduct of

---

[254] Martha Kinsella, *Congress Has the Authority to Regulate Supreme Court Ethics—And the Duty*, BRENNAN CTR. FOR JUST. (July 17, 2023), https://www.brennancenter.org/our-work/analysis-opinion/congress-has-authority-regulate-supreme-court-ethics-and-duty [https://perma.cc/VL2V-ZFNX].

[255] *See id.*

[256] *See id.*; Act of September 24, 1789, ch. 19, § 8, 1 Stat. 72, 76.

[257] Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1545 (2012). Congress's use of the term *judge* rather than *justice*, however, was recognized as Congress's intent to originally prevent these terms from extending to justices of the United States Supreme Court. *See id.*

[258] *See* Frost, *supra* note 3, at 477; *see also* 28 U.S.C. § 455(a).

[259] *See* NOVAK, *supra* note 146, at 1 (discussing the Ethics in Government Act); *see, e.g.*, *supra* note 145 and accompanying text.

[260] *See* NOVAK, *supra* note 146, at 3; Nate Raymond & Moira Warburton, *Congress Approves Tougher Financial Disclosure Rules for U.S. Judges*, REUTERS, https://www.reuters.com/world/europe/congress-poised-subject-us-judges-more-financial-disclosure-2022-04-27/ [https://web.archive.org/web/20240806170854/https://www.reuters.com/world/europe/congress-poised-subject-us-judges-more-financial-disclosure-2022-04-27/] (Apr. 27, 2022, 5:09 PM).

Supreme Court justices,[261] Alito is incorrect in ignoring more than two centuries of largely unchallenged practice by which Congress already regulates critical aspects of the Court's operations and behaviors. These regulations include guardrails and certain constraints on conduct in an effort to prevent the existence or appearance of decisions arising from justices compromised through their financial affairs. The lack of language in the federal Constitution specifically empowering Congress to take these steps has not diminished Congress's legitimacy in doing so,[262] just as the lack of language in the federal Constitution specifically conferring judicial review upon the Supreme Court has not diminished the Court's legitimacy in exercising the power of judicial review in the centuries since the Court decided *Marbury*.[263]

Justice Elena Kagan, Alito's colleague on the Court, recognized as much in recent remarks before the Ninth Circuit Judicial Conference.[264] "[I]t just can't be that the [C]ourt is the only institution that somehow is not subject to any checks and balances from anybody else," Kagan stated, "We're not imperial and we too are a part of a checking and balancing system in various ways."[265] Had the Court's new Code of Conduct contained language similar to what Kagan told the Ninth Circuit Judicial Conference, Americans concerned about a perceived lack of impartiality upon the Court[266] likely would have felt more comfortable about the Court's commitment to preventing partisan and partial decision-making. Kagan's statements demonstrated the knowledge that the Court exists within an overall system of governance, not as an ivory tower apart from it, and the humility to understand that even the Court itself should be subject to certain checks to maintain a relatively balanced government. By contrast, the statements from Alito and others insisting that the Court holds an absolute right to police itself, and that other branches of government hold no authority to question their conduct,[267] produce the opposite effect, showing both lack of knowledge and dissatisfying arrogance.

---

[261] *See supra* text accompanying notes 227–28.

[262] *See, e.g.*, Kinsella, *supra* note 254; Dorf, *supra* note 253; Frost, *supra* note 3, at 478–79.

[263] *See supra* notes 232, 234 and accompanying text.

[264] *See* Melissa Quinn, *Kagan Says Congress Has Power to Regulate Supreme Court: "We're Not Imperial"*, CBS NEWS (Aug. 4, 2023, 2:08 PM), https://www.cbsnews.com/news/elena-kagan-congress-regulate-supreme-court-ethics-code/ [https://perma.cc/2MCU-MBSZ].

[265] *Id.*

[266] *See supra* notes 9–10 and accompanying text (describing concerns that led the majority of Americans to lose faith in the Supreme Court).

[267] *See, e.g.*, *supra* text accompanying notes 228, 44.

Compounding this issue is the Court's failure to provide any genuine clarity about how, if at all, they intend to self-police their actions.[268] In the Court's opening statement to its new Code of Conduct, the drafters emphasize that the Code is designed to "codif[y] . . . principles that we have long regarded as governing our conduct."[269] This same statement asserts that the Code is meant to "dispel th[e] misunderstanding" that the Court's justices "regard themselves as unrestricted by any ethics rules."[270] Yet just as a statute with no enforcement mechanism lacks the teeth of practical application, a Code of Conduct that neglects to say anything about how these principles will be enforced likewise is missing an essential element.[271]

Even if the Court intends to govern itself, and to do so independent of other outside regulators, the Code of Conduct should establish in writing a framework of how this self-governance shall function.[272] Today, the American public still knows nothing about how the Court will ensure that any of the principles described in this Code of Conduct are actually put into practical effect.[273] For instance, if someone at the Court believes that a justice breached one of the terms that this Code of Conduct established, questions remain about what this person should do to report the suspected wrongdoing. With the Court apparently rejecting notions of external review,[274] should the allegation of a breach go to the Chief Justice? If so, what if the Chief Justice were the alleged perpetrator of the wrongdoing? In such a situation, would the report go to the justice of greatest seniority on the Court's bench? Should reports go instead to some division within the Court's Office of Legal Counsel?[275] What steps would occur once a report reached the proper person? At what point would an

[268] *See supra* note 223 and accompanying text. A reasonable argument does exist regarding the benefits (although not the constitutional necessity) of the Court serving a self-policing function. *See generally* Madeleine Case, Note, *A Case for the Status Quo in Supreme Court Ethics*, 33 GEO. J. LEGAL ETHICS 397, 399–400, 420–21 (2020). Still, even if a framework for the Court self-policing itself is seen as the better option, the Court should still be transparent in providing the public a clear look at the processes by which the Court will engage in this self-regulation.

[269] SUPREME COURT CODE OF CONDUCT, *supra* note 2, statement.

[270] *Id*.

[271] *See* sources cited *supra* note 224.

[272] *See* sources cited *supra* note 224 (discussing the objectives of codes of ethics, including the importance of transparency and the necessity of ensuring that a code of ethics creates rules that are manageable and enforceable).

[273] *See supra* note 223 and accompanying text.

[274] *See* sources cited *supra* note 223.

[275] *See generally* John W. Winkle III & Martha B. Swann, *When Justices Need Lawyers: The U.S. Supreme Court's Legal Office*, 76 Judicature 244 (1993).

investigation into the justice's alleged conduct become necessary? Who would conduct the investigation? If a breach of the Code of Conduct were identified, would this be acknowledged to the public in a report detailing the findings of the investigation? Or would the entire matter remain eternally silent behind the Court's walls?

Reasonable minds could vigorously debate the proper process for each of these questions and many more. For the purposes of this Article, though, the central point is that *none* of these questions receives any answer whatsoever in the Court's new Code of Conduct.[276] At the time of putting forward this Code of Conduct, the justices of the Court knew—or reasonably should have known—that certain members of Congress had put forth a bill that, if enacted, would allow Congress to establish an ethical code for the Court and regulate aspects of the Court's conduct, particularly regarding potential conflicts of interest arising from financial relationships.[277] Had the Court wished to silence Congress in this effort, the Court could have put forth a section in its Code of Conduct providing transparency to the public about the ways that the Court would enforce its own provisions. Public calls for congressional oversight

[276] *See supra* note 223 and accompanying text; *see, e.g.*, Moira Donegan, *The US Supreme Court's New 'Ethics Code' Is an Embarrassment*, GUARDIAN (Nov. 15, 2023, 6:02 AM), https://www.theguardian.com/commentisfree/2023/nov/15/supreme-court-ethics-code-embarrassment [https://perma.cc/B7BT-WBPA]; Canter & Lezra, *supra* note 174; Kelsey Reichmann, *Supreme Court Fails to Quiet Ethics Critiques with New Code of Conduct*, COURTHOUSE NEWS SERV. (Nov. 14, 2023), https://www.courthousenews.com/supreme-court-fails-to-quiet-ethics-critiques-with-new-code-of-conduct/ [https://web.archive.org/web/20240806172713/https://www.courthousenews.com/supreme-court-fails-to-quiet-ethics-critiques-with-new-code-of-conduct/]; Gersen, *supra* note 40; Chemerinsky, *supra* note 40. Some commentators disagree that such answers regarding enforcement are necessary. *See, e.g.*, Ed Whelan, *Chemerinsky's Confused Criticism of Court's Code of Conduct*, NAT'L REV. (Nov. 15, 2023, 11:45 AM), https://www.nationalreview.com/bench-memos/chemerinskys-confused-criticism-of-courts-code-of-conduct/ [https://perma.cc/D3PN-QYXC] (pointing out that lower court judges are rarely "subject to searching review" and disputing the need for a definite enforcement mechanism among the Supreme Court's ethical code); McLaughlin, *supra* note 40 (categorizing the Court's new Code of Conduct as a "rebuke" to the Court's critics and stating that the Court accomplished its objective by showing that it had adhered to ethical standards long before publishing this new Code). Most observers, though, have argued that a Code of Conduct without any enforcement mechanism lacks a vital element in attempting to regain the public's trust. *See* sources cited *supra* notes 223, 225–26.

[277] *See* Abbie VanSickle, *In Bipartisan Bill, Senators Urge Supreme Court to Adopt Ethics Code*, N.Y. TIMES (Apr. 26, 2023), https://www.nytimes.com/2023/04/26/us/politics/senate-bill-supreme-court-ethics.html [https://web.archive.org/web/20240806173002/https://www.nytimes.com/2023/04/26/us/politics/senate-bill-supreme-court-ethics.html]; Alison Durkee, *Supreme Court Justice Alito Slams Congress' Efforts to Impose Code of Ethics on Court*, FORBES, https://www.forbes.com/sites/alisondurkee/2023/07/28/supreme-court-justice-alito-slams-congress-efforts-to-impose-code-of-ethics-on-court/?sh=31f27f714a93 [https://perma.cc/EMF4-9S7T] (July 28, 2023, 4:50 PM).

may have been quelled by a sufficiently robust mechanism of self-enforcement in which reports of suspected wrongdoing could be made without fear of reprisals, in which thorough and independent investigations could take place when warranted, and where the public would be notified—just as the public receives notice through published reports by the Council of the Inspectors General on Integrity and Efficiency when ethical breaches are identified in the executive branch, for instance[278]—if a justice were found through the independent investigation to have violated the Code.

The Court, however, did none of these things. Instead, it left the question of enforcement as an overall mystery. This decision, coupled with the public statements that Congress lacked any authority to regulate the ethical conduct of the Court—a claim which, for the reasons discussed above, is dubious at best—will fail to soothe the fears of Americans who currently question the Court's integrity. While the new Code of Conduct is an important forward step, the lack of any semblance of an enforcement structure articulated within this Code means that this measure falls short of the outcomes desired by many in the contemporary public. Individuals worried about the Court's impartiality need more than the Court, under public pressure, finally publishing a written Code of Conduct and stating that it will live by these principles. A demonstration that these concepts will be enforced, and enforced with transparency to the public, is necessary to restore the Court to legitimacy in the minds of many. If the Court continues to leave this part of the equation unanswered, then the justices of the Court should not be surprised when Congress seeks to step forward and utilize its authority to fill this apparent enforcement gap.[279]

VI. FINAL THOUGHTS

November 13, 2023, marked a historic day in the history of the United States Supreme Court.[280] The Court's decision to issue a formalized Code of Conduct represents an important forward step in a nation where an increasing number of citizens express fear that

[278] *See CIGIE Governing Documents*, COUNCIL OF INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, https://www.ignet.gov/content/cigie-governing-documents [https://perma.cc/2MJ7-HP4S].

[279] Within days after the Court issued its new Code of Conduct, an outcry arose in some quarters for Congress to fill these holes in the Code. *See* Michael Macagnone, *Supreme Court Ethics Code Doesn't Satisfy Democratic Appetite for Legislation*, ROLL CALL (Nov. 14, 2023, 6:00 PM), https://rollcall.com/2023/11/14/supreme-court-ethics-code-doesnt-satisfy-democratic-appetite-for-legislation/ [https://perma.cc/7AZB-25GE].

[280] *See supra* note 7 and accompanying text.

this Court has been compromised on both sides of the political aisle by financial, political, and personal interests.[281] Although this Code of Conduct emerged from the Court reluctantly and amid a firestorm of public discontent, the historic nature of what the Court did here should not be discounted.[282] The decision to draft and issue this Code of Conduct was indeed a reticent one, a decision made against a backdrop of public pressure.[283] Nevertheless, by doing so, this Court took a measure of positive action that its predecessors continuously failed to take.[284]

Still, this Code of Conduct is hardly a panacea for what ails the Court's overall reputation. Already, many commentators have dissected this document and found too many components ringing hollow, a fair critique of a Code of Conduct that lacks important detail in certain areas and establishes troubling standards in others.[285] Near the end of its closing commentary, the Court's drafters indicate that this Code of Conduct may be a floor, not a ceiling, to the Court's approach to ethical issues, with the Chief Justice "direct[ing] Court officers to undertake an examination of best practices, drawing in part on the experience of other federal and state courts" and using these findings to "assess whether it needs additional resources in its Clerk's Office or Office of Legal Counsel to perform initial and ongoing review of recusal and other ethics issues."[286] Individuals and groups concerned with ensuring the Court's impartiality in rendering

[281] *See* sources cited *supra* notes 9–10; Josh Gerstein, *Embattled Supreme Court Adopts Code of Conduct*, POLITICO, https://www.politico.com/news/2023/11/13/embattled-supreme-court-adopts-code-of-conduct-00126874 [https://perma.cc/U5Z6-955S] (Nov. 13, 2023, 3:44 PM).

[282] *See* Andrew Chung & John Kruzel, *Under Fire, US Supreme Court Unveils Ethics Code for Justices*, REUTERS, https://www.reuters.com/legal/us-supreme-court-announces-formal-ethics-code-justices-2023-11-13/ [https://web.archive.org/web/20240806173922/https://www.reuters.com/legal/us-supreme-court-announces-formal-ethics-code-justices-2023-11-13/] (Nov. 14, 2023, 12:56 AM) (quoting United States Senate Majority Leader Chuck Schumer as calling the new Code "an important first step" and quoting Senate Judiciary Committee Chair Dick Durbin as calling the new Code a "step in the right direction"); Canter & Lezra, *supra* note 174 ("It's a major first step towards rebuilding public faith in the Court, which is in crisis thanks in large part to its failure to build a functioning ethics regime.").

[283] *See supra* notes 7–8 and accompanying text.

[284] *See* Alison Durkee, *Supreme Court Enacts First-Ever Ethics Code—Here's What Experts Think Should Happen Next*, FORBES (Nov. 17, 2023, 7:52 AM), https://www.forbes.com/sites/alisondurkee/2023/11/17/supreme-court-enacts-first-ever-ethics-code---heres-what-experts-think-should-happen-next/ [https://perma.cc/D2MV-MZ98]; Jimmy Hoover, *Supreme Court Lauded for 'First Step' on Ethics, but Reformers Want More*, NAT'L L.J. (Nov. 14, 2023, 6:38 PM), https://www.law.com/nationallawjournal/2023/11/14/supreme-court-lauded-for-first-step-on-ethics-but-reformers-want-more/?slreturn=20231129230951 [https://perma.cc/D5AH-56N7].

[285] *See* sources cited *supra* notes 8, 40, 276.

[286] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, cmt., at 14.

decisions should hope that the Court takes these efforts seriously, leading to a more detailed, transparent, and earnest set of ethics protections and reforms than what this new Code of Conduct currently presents.

A reasonable observer would have expected the Court to draft a Code of Conduct that directly addressed the critiques the majority of Americans had lobbed in their direction. This Code of Conduct fails to do so. Instead, it offers excuses more than solutions and provides more escape routes than accountability.[287] The most painstakingly detailed text in the entire Code is reserved to describe why it is inconvenient to the Court when justices recuse themselves from hearing a case.[288] Yet none of this hand-wringing about the impacts on the Court's allegedly onerous workload,[289] the purported "distorting effect upon the certiorari process,"[290] the apparent travails of a decision debated by eight justices instead of nine,[291] or any of the other supposedly catastrophic outcomes that can arise when a justice recuses himself or herself supersedes the public's interest in ensuring impartiality. One could imagine that the majority of Americans who are presently concerned about the Court would prefer a scenario where only eight justices sat in judgment over a case, potentially risking a deadlock and the automatic affirmance of the lower court's decision, rather than a situation where justices involved in the judgment of that case appeared, to a reasonable observer, to have conflicts of interest that could taint their administration of clear-eyed decision-making. It is, therefore, concerning that this Code of Conduct puts more pressure on justices *not* to recuse from cases, rather than encouraging justices to recuse when a financial, political,

---

[287] *See supra* notes 184–85, 215 and accompanying text.

[288] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, cmt., at 10–12.

[289] During several recent Supreme Court terms, some commentators have questioned how onerous the Court's workload actually is. *See, e.g.*, Garrett Epps, *Chamber of Secrets*, WASH. MONTHLY (June 19, 2023), https://washingtonmonthly.com/2023/06/19/chamber-of-secrets/ [https://perma.cc/WL5Q-TCGT]; Stephen Wermiel, *The Court's End-of-Term Workload: A Historical Perspective*, SCOTUSBLOG (June 10, 2022, 2:19 PM), https://www.scotusblog.com/2022/06/the-courts-end-of-term-workload-a-historical-perspective/ [https://perma.cc/EHB6-G92B]; Adam Feldman, *Looking Back to Make Sense of the Court's (Relatively) Light Workload*, EMPIRICAL SCOTUS (Jan. 9, 2018), https://empiricalscotus.com/2018/01/09/light-workload/ [https://perma.cc/6HUA-Z29J]; Oliver Roeder, *The Supreme Court's Caseload Is on Track to Be the Lightest in 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/ [https://perma.cc/D87H-UR2C].

[290] SUPREME COURT CODE OF CONDUCT, *supra* note 2, cmt., at 10.

[291] *See supra* notes 92–96 and accompanying text.

or personal relationship presents the appearance of an apparent barrier to their impartiality.[292]

Further concerns come from the watered-down standards that the justices placed upon themselves. Stating that a justice should not *knowingly* use "the prestige of the judicial office to advance" their personal interests or the private interests of others sets up an easy escape for an unscrupulous actor to claim that they did not *know* that they were abusing the prestige of their judicial office in such a manner.[293] Likewise, the Code's use of a reasonable efforts standard rather than the more rigorous best efforts standard regarding a justice's knowledge of their own financial dealings and the financial activities of their families leaves too much room for misbehavior—or, at minimum, the reasonable perception of misbehavior—to occur.[294] The use of this lenient language when stricter degrees of review were readily available represents a conscious choice by the Court to avoid placing the highest standards upon itself. Members of the public who have worried that justices on the Court are leaning toward decisions motivated by partisan or personal gain will not have their fears soothed by this language.

Lastly, the lack of any apparent enforcement mechanism appears to render this Code largely toothless.[295] Like the parent who threatens punishment if their child commits some form of wrongdoing, yet has no means of actually carrying out the threatened punishment if the child does misbehave, the Court's new Code of Conduct does not display any ability or interest in taking concrete actions if any of its provisions are broken. Even if a justice were proven to have knowingly abused "the prestige of the[ir] judicial office" for personal gain,[296] or failed to exercise best efforts to ascertain their family's financial interests before sitting on a case where those interests were implicated, or neglected to recuse themselves in a case where the conflict of interest was so blatant that even this Code would require them to stand down, it is unclear what would happen next to this justice. Nothing in this Code discusses a process for reporting wrongdoing, investigating such allegations, taking punitive actions if wrongdoing by a justice were indeed proven, or any other standards that one would reasonably expect to

[292] *See* discussion *supra* Part II.
[293] SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B); *see* discussion *supra* Part III.
[294] *See* discussion *supra* Part IV.
[295] *See* discussion *supra* Part V.
[296] SUPREME COURT CODE OF CONDUCT, *supra* note 2, Canon 2(B).

see if this Code were to have more value than the paper on which it is printed. Without such processes for actually holding justices accountable, the Code is merely a paper tiger.

The Chief Justice, and perhaps all of the justices, seem to believe that Americans concerned about the Court are fretting needlessly, and that the Court possesses the limitless ability to police itself.[297] Still, repeating this "nothing to see here" argument calls to mind the fox urging the farmer to keep on walking past the chicken coop. Perhaps every justice on the Court is indeed free of any taint of partiality and this institution is indeed capable of monitoring its own virtue without any outside interference. If this is true, though, the American people deserve to know how the Court enforces its own standards and how the Court guards against improper motivations in judicial decision-making. The public is not served by a Court that acts as if it were some sort of high temple, the inner workings of which are unfit for the public eye. Nor is the public served by any justice claiming that Congress holds no power in relation to the Court, a statement that is untrue and reeks of angry—perhaps even desperate—clutching to an undeserved level of secrecy.[298] What the public should rationally expect here is a Court that is open and honest with them about what they do, how they do it, and why this Court reasonably deserves their trust.[299] Simply stating that the Court has always abided by ethical principles, that it is a "misunderstanding" for anyone to think otherwise, and that the people of this nation should vest absolute trust in the Court's activities always being wholly impartial and untainted,[300] is not enough.

Thus, the Court has work to do if it genuinely wishes to earn back the public's trust. A code of ethics with high standards befitting justices of a high court remains necessary, as does an enforcement mechanism for violations of those standards. Additionally, there must be a remedy for the current lack of pressure on justices to recuse themselves from cases where a reasonable person would perceive that a conflict of interest would exist. The Court's new Code of Conduct fails miserably in each of these areas. What it provides instead is an arsenal of excuses that justices can use to justify a

[297] *See supra* notes 41, 208, 215, 227–28 and accompanying text.

[298] *See supra* notes 227–62 and accompanying text.

[299] *See* sources cited *supra* notes 4–8, 40, 276 (providing many examples of requests from the American public for this level of transparency from the Supreme Court, as well as showing the dissatisfaction by many observers who believe that the Court's new Code of Conduct does not meet this reasonable request from the majority of the American people).

[300] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, statement.

continuation of the problems that raised many Americans' hackles in the first place.[301] The people who doubt the Court's current legitimacy do not wish to be told that they have misunderstood the situation, nor do they want to see a gallery of excuses for the behaviors that have led to their concerns. Instead, they want assurance that the highest court in the federal judiciary is indeed an impartial body. This Code of Conduct does not provide that assurance.

Pure impartiality is a standard that is unattainable on earth, even among the justices of the Supreme Court.[302] The American people should not expect such an outcome, for this is a Court of humans sitting in judgment over other humans. Even the venerated Benjamin Cardozo stipulated to biases on the bench, no matter how hard he tried to suppress them.[303] "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action," Cardozo wrote, "Judges cannot escape that current any more than other mortals."[304]

---

[301] *See, e.g.*, Gersen, *supra* note 40; Wegman, *supra* note 40; *see also* Gerhardt, *supra* note 6, at 626; Biskupic, *supra* note 4; Alfini, *supra* note 3, at 10; Frost, *supra* note 3, at 445; Jeremy Fogel & Noah Bookbinder, *Building Public Confidence: How the Supreme Court Can Demonstrate Its Commitment to the Highest Ethical Standards*, CITIZENS FOR RESP. & ETHICS IN WASH., https://www.citizensforethics.org/reports-investigations/crew-reports/building-public-confidence-how-the-supreme-court-can-demonstrate-its-commitment-to-the-highest-ethical-standards/ [https://perma.cc/LU9T-2BS2] (Aug. 15, 2023). All of these commentators are among the individuals who have argued against the Court taking an exceptionalist stance and finding reasons to justify this exceptionalism. The Court's new Code of Conduct furthers these concerns, according to these and other commentators, by providing too many ways for the justices to excuse actions that give the reasonable appearance of partiality or partisanship. *See, e.g.*, Gersen, *supra* note 40.

[302] *See* W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 322–23 (2008) (pointing out that it would be unacceptable for a judge to render a decision solely based on partisan or ideological functions, with no basis in law, but that it would be unrealistic to expect a judge to bring none of their personal values, beliefs, and ideologies to judging all cases); John M. Kang, *John Locke's Political Plan, or, There's No Such Thing as Judicial Impartiality (and It's a Good Thing, Too)*, 29 VT. L. REV. 7, 13 (2004) ("Without even rolling out the heavy artillery of communitarianism, we can say confidently that when judges consider inherently moral issues of abortion, euthanasia, gay marriage, and the death penalty, they necessarily bring to bear a worldview constructed from an elaborate web of relationships with other people.").

[303] *See* Benjamin N. Cardozo, The Nature of the Judicial Process 12 (1921).

[304] *Id.* Cardozo even went as far as to state that the decision-making process of a judge in a case where the plain language of the law fails to provide an unambiguous answer "is not discovery, but creation." *See id.* at 166. Oliver Wendell Holmes likewise recognized judging as being far more than merely a mechanical application of facts to constitutional or statutory text. "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding," Holmes wrote. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Such decisions regarding "the relative worth and importance of competing legislative grounds" are decisions that are subject to personal bias by even the most virtuous individual, and yet they often cannot, as Holmes explained, be avoided

If the American public expects something loftier than this, as if the Court were comprised of demigods rather than simply of imperfect human beings, then they are being every bit as unrealistic as the Court's new ethical code is flimsy.[305]

Yet if the Court wishes to revise its Code of Conduct, they would do well to take a lesson from Cardozo's earnest confession. The transparency of a Justice's statement that he, too, cannot escape the human reality of favoring certain interests over others represents the level of honesty that the Court's new Code of Conduct lacks. Americans appear to want a Court that they can trust to do its best in regulating biases, partisanships, and partialities, not a Court that acts as if its members are immune from such temptations and that any belief otherwise represents some sort of "misunderstanding."[306] From this newly issued document, the people have not received what they sought and reasonably could have expected to receive. Instead, all the Court has provided here is an overall insistence that it remains above all reproach, an attitude that is all too prevalent in both the letter and the spirit of this Code of Conduct—a code that seems destined to be too easily broken.

in the process of judging. To doggedly insist otherwise creates only the unfortunate effect of deceiving ourselves.

[305] *See* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 497 (2013) ("If perfect impartiality is unattainable, the more pragmatic objective is to ensure that judges are 'impartial enough' to fulfill the role assigned them under state and federal constitutions: to uphold the rule of law."); *see generally* RICHARD A. POSNER, HOW JUDGES THINK 8 (2008) (stating that the Supreme Court should be recognized by the American people as being a political body more than a purely legal entity).

[306] *See* SUPREME COURT CODE OF CONDUCT, *supra* note 2, statement (characterizing the belief that the Supreme Court is not bound by any code of ethics as being a "misunderstanding" on the part of the public).