DECLARING INDEPENDENCE TO SECURE INTEGRITY: THE SUPREME COURT JUSTICES' CODE OF CONDUCT*

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> *[T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.*[1]
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> - Alexander Hamilton

> *I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind, and you will pay the price! You won't know what hit you if you go forward with these awful decisions.*[2]
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> - Charles Schumer

In late 2023, the nine current members of the U.S. Supreme Court adopted the Code of Conduct for Justices of the Supreme Court of the

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] THE FEDERALIST NO. 78 (Alexander Hamilton).

[2] Ronn Blitzer, *Schumer faces mounting ethics complaints over Supreme Court comments*, FOX NEWS (Mar. 10, 2020), https://www.foxnews.com/politics/schumer-faces-mounting-ethics-complaints-over-supreme-court-comments; *see also* Gregg Re, *Chief Justice Roberts issues rare rebuke to Schumer's 'dangerous' and 'irresponsible' comments; Trump slams lawmaker, says 'must pay a severe price'*, FOX NEWS (Mar. 5, 2020), https://www.foxnews.com/politics/chief-justice-roberts-rare-rebuke-schumer-calling-comments-kavanaugh-gorsuch-dangerous.

United States ("Justices' Code of Conduct").[3] Although over past decades the Justices have made various official statements[4] and unofficial comments[5] pertaining to Supreme Court ethics, the adoption of the Justices' Code of Conduct "represents the first time that the Court has implemented and published a written code of conduct for Justices" to guide them in performing their duties.[6] Unsurprisingly, an array of legal commentators, academics, and federal legislators immediately criticized the new Code as inadequate, especially because it does not include a specific enforcement mechanism.[7]

This article will argue the new Justices' Code of Conduct represents a bold and appropriate declaration of the Court's independence in the face of the recent surge of congressional and media-driven efforts at intimidation of the individual Justices to influence their adjudication of cases. It is no coincidence that just as the Court's majority began making decisions that the Democratic Party and the progressive academic and media commentariat regard as beyond the pale,[8] attacks on the ethics of the most conservative Justices have

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[3] CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023) [hereinafter JUSTICES' CODE OF CONDUCT], *available at* https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[4] *See* Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Richard J. Durbin, Chair Comm. on the Judiciary of the U.S. Senate (Apr. 25, 2023), *available at* https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf (attaching Statement of Ethics Principles and Practices "to which all of the current Members of the Supreme Court subscribe"); *Statement of Recusal Policy*, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Sup. Ct. (Nov. 1, 1993), *available at* https://eppc.org/docLib/20110106_RecusalPolicy23.pdf.

[5] *See, e.g.*, David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7; Melissa Quinn, *Kagan Says Congress Has Power to Regulate Supreme Court: "We're Not Imperial,"* CBS NEWS (Aug. 4, 2023), https://www.cbsnews.com/news/elena-kagan-congress-regulate-supreme-court-ethics-code/.

[6] Cong. Research Serv., *The Supreme Court Adopts a Code of Conduct*, LEGAL SIDEBAR, at 1, https://crsreports.congress.gov/product/pdf/LSB/LSB11078.

[7] *See, e.g.*, *Judicial Ethics*, 137 HARV. L. REV. 1677 (2024); Russell Wheeler, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS INST. (Nov. 29, 2023), https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism; Jeannie Suk Gersen, *The Supreme Court's Self-Excusing Ethics Code*, THE NEW YORKER (Nov. 21, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-courts-self-excusing-ethics-code ("[N]one of the alleged ethical breaches by Justices that have been reported in the past several years would likely be a violation of the new code of conduct.").

[8] *E.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (holding the U.S. Constitution does not create a right to abortion and overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

increased in both frequency and intensity.[9] Sound constitutional interpretation and principles of separation of powers establish that Congress lacks the institutional authority or policy prerogative to impose ethics regulations on the Court.[10] With proper respect for the Supreme Court's decisional and institutional independence, Congress' exclusive post-confirmation recourse for what it regards as ethical misconduct by individual Justices is impeachment and removal under the Impeachment Clauses.[11]

Part I of this article will provide a summary overview of the regulatory apparatus that has existed over recent decades concerning the lower federal courts and the Supreme Court on matters relating to ethics. Then, Part II will comment on several key aspects of the Justices' Code of Conduct and why they are appropriate and effective for their intended purposes. Part III will explore core constitutional principles of judicial independence, with special attention to why Article III is properly understood as providing maximum protection for the decisional independence of individual Justices, including by restraining Congress in its regulation of the Court as an institution. Part IV will address recent media and congressional efforts to influence the Court's decisions by repeated demands for the recusals of conservative Justices, and it will argue that the Court's principled stand on its independence and securing the integrity of its decisions is so crucial in the current climate of ideologically and politically motivated intimidation. Part V concludes.

I. Overview of Existing Federal Regulations Concerning Judicial Conduct

Since the early 1970s, lower federal judges have been governed by a set of ethical canons now called the Code of Conduct for United States Judges

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[9] *See, e.g.*, Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, ProPublica (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Justin Elliot et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, ProPublica (June 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court.

[10] *See, e.g.*, *Supreme Court Ethics Reform Before the S. Comm. on the Judiciary*, 118th Cong. (May 2, 2023) statement of Michael B. Mukasey, Former Att'y Gen. of the United States), *available at* https://www.judiciary.senate.gov/imo/media/doc/2023-05-02%20-%20Testimony%20-%20Mukasey.pdf ("As to policy, I believe that basic principles of the separation of powers mean that the Court, as a separate branch of government and the only court specifically provided for in the Constitution, is solely responsible for its financial disclosure and ethics rules.").

[11] U.S. Const. art. I, § 2, cl. 5; § 3, cl. 6; *see also* U.S. Const. art. II, § 4

("Judges' Code of Conduct").[12] The Judicial Conference of the United States, the national policymaking body for the federal courts, adopted the Judges' Code of Conduct to promote public confidence in the integrity, independence, and impartiality of the federal judiciary.[13] Rather than creating a corpus of mandatory law, it instead formulates a set of "aspirational rules" federal judges should seek to follow;[14] it describes itself as "designed to provide guidance to judges and nominees for judicial office."[15] The Judges' Code of Conduct does not establish its own means or methods of enforcement and states that it "is not designed or intended as a basis for civil liability or criminal prosecution."[16] Significantly, it does not include Supreme Court Justices within its intended scope.[17] However, for many years, the Justices, including most notably Chief Justice John G. Roberts, Jr. in his 2011 Year-End Report on the Federal Judiciary ("2011 Year-End Report"), have emphasized that they regularly consult the Judges' Code of Conduct and other authorities "to resolve specific ethical issues."[18]

In the Judicial Conduct and Disability Act of 1980 ("JCDA"), Congress created a disciplinary apparatus for lower federal court judges that provides a means for addressing their misconduct within the judicial branch without resort to impeachment and removal.[19] The commentary to Canon 1 of the Judges' Code cites the JCDA but also highlights that "not every violation of the Code should lead to disciplinary action."[20] Under the JCDA, "a judge who engages in misconduct may be publicly or privately reprimanded, temporarily barred from hearing new cases, disqualified from an existing case, or

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[12] CODE OF CONDUCT FOR U.S. JUDGES Intro., at 1 (JUD. CONF. OF THE U.S. 2019) [hereinafter JUDGES' CODE OF CONDUCT], *available at* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[13] *Id.* at Intro., at 2-3.

[14] *The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 1 (citing White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009) (observing the Judges' Code "establishes aspirational rules and relies upon self-enforcement")).

[15] JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 1 Comment., at 3.

[16] *Id.*

[17] *Id.* at Intro., at 2.

[18] JOHN G. ROBERTS, JR., CHIEF J. OF THE U.S. SUP. CT., 2011 YEAR-END REPT. ON THE FED. JUDICIARY 5 (2011) [hereinafter ROBERTS, 2011 YEAR-END REPT.], *available at* http:// www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[19] Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331-32, 372, 604).

[20] JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 1 Comment., at 3.

referred for possible impeachment."[21] However, formal discipline is not often imposed on federal judges.[22]

The JCDA does not assert any disciplinary authority over Supreme Court Justices.[23] But in other legislation, Congress has included them as the purported subjects of regulation, including on matters involving the individual Justices and their adjudication of cases. For example, 28 U.S.C. § 455 provides that federal judges—and, since 1948, Supreme Court Justices—shall be disqualified under specified circumstances, such as "a personal bias or prejudice concerning a party" or "a financial interest in the subject matter in controversy."[24] Although the Justices have regularly cited this statute in published opinions analyzing their recusal decisions,[25] the Court has never addressed the constitutionality of 28 U.S.C. § 455 under Article III, including, most importantly for this article, the constitutionality of the 1948 amendment bringing the Justices within its claim of authority.[26] In his 2011 Year-End Report, Chief Justice Roberts alluded to this reality by broadly observing that "the limits of Congress's power to require recusal have never been tested."[27]

Moreover, the Ethics in Government Act of 1978 created financial reporting requirements that apply broadly to federal officials.[28] As Chief Justice Roberts explained in his 2011 Year-End Report, "[t]he Justices also observe

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[21] *The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 1.

[22] *Id.*

[23] 28 U.S.C. 351(d)(1) (defining "judge" as "circuit judge, district judge, bankruptcy judge, or magistrate judge").

[24] Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455); *see* Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 449 (2013) ("In 1792, Congress passed the first statute requiring lower federal court judges to recuse themselves under certain circumstances. Over the years, Congress repeatedly modified and broadened the law, but continued to limit its application to judges on the 'inferior' courts. It was not until 1948 that Congress expanded the law to include the Justices.").

[25] *See, e.g.*, Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004) (Scalia, J., mem.); Laird v. Tatum, 409 U.S. 824, 825 (1972) (Rehnquist, J., mem.).

[26] *See* Madeleine Case, Note, *A Case for the Status Quo in Supreme Court Ethics*, 33 GEO. J. LEGAL ETHICS 397, 402 (2020).

[27] ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 8. As Madeleine Case has noted, when discussing 28 U.S.C. § 455, "some Justices have implied that the statute exercises binding authority over the Supreme Court's recusal decisions." Case, *supra* note 26, at 402 (citing *Cheney*, 541 U.S. at 916). "Others have suggested the opposite." *Id.* (citing ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 8 ("Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455.").

[28] Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.); *see also* Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.).

the same limitations on gifts and outside income as apply to other federal judges."[29] He further related that, "[i]n 1991, the Members of the Court adopted an internal resolution in which they agreed to follow Judicial Conference regulations" that "provide additional guidance to lower court judges."[30] In each of these comments, Chief Justice Roberts took care to couch the Court's compliance decisions in terms of voluntariness. In fact, he went as far as to inform Congress that although it "has directed Justices" to comply with these financial requirements, "[t]he Court has never addressed whether Congress" may do so.[31] "The Justices," he said, "nevertheless comply with those provisions."[32]

II. KEY ELEMENTS OF THE JUSTICES' CODE OF CONDUCT

On November 13, 2023, the Court published the Justices' Code of Conduct.[33] According to its accompanying introductory statement, it is intended to "set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court"; and for the most part, its "rules and principles are not new."[34] Rather, the Court observes, the new code "largely represents a codification of principles that we have long regarded as governing our conduct."[35]

The Justices' Code of Conduct is organized into five canons, the titles of which closely match those in the Judges' Code of Conduct:

> CANON 1: A JUSTICE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY. . . .
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> CANON 2: A JUSTICE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES. . . .
>
> CANON 3: A JUSTICE SHOULD PERFORM THE DUTIES OF OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY. . . .
>
> CANON 4: A JUSTICE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF THE JUDICIAL OFFICE. . . .

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[29] ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 6.

[30] *Id.* at 6-7; *see* 2 GUIDE TO JUDICIARY POLICY, pt. C & ch. 6 (ADMIN. OFF. OF THE U.S. CTS. rev. July 27, 2021), *available at* https://www.uscourts.gov/file/2855/download.

[31] ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 6.

[32] *Id.*

[33] JUSTICES' CODE OF CONDUCT, *supra* note 3.

[34] *Id.* at Statement of the Court Regarding the Code of Conduct.

[35] *Id.*

CANON 5: A JUSTICE SHOULD REFRAIN FROM POLITICAL ACTIVITY . . . .[36]

The rule provisions that accompany each canon have significant similarities to those of the Judges' Code of Conduct, but also notable differences. For example, the Justices' Code of Conduct adds "knowingly" to the provision in Canon 2B regarding Outside Influence, while the counterpart in the Judges' Code of Conduct contains no mens rea component.[37] Moreover, the "explanatory notes" of the two codes differ considerably,[38] both in structure—embedded in the canons for the judges and provided in conclusion for the Justices—and in substance.[39] In the Commentary to its Code, the Supreme Court explains its contents are "substantially derived from" the Judges' Code of Conduct but have been "adapted to the unique institutional setting of the Supreme Court" and "tailored to the Supreme Court's placement at the head of a branch of our tripartite governmental structure."[40] It emphasizes the importance of the Justices having room for the "exercise of judgment or discretion" in the face of uncertainty in the application of its "broadly worded general principles," especially "given the often sharp disagreement concerning matters of great import that come before the Supreme Court."[41]

The most dramatic contrast between the substance of the two codes is found in the blackletter and commentary to Canon 3 concerning disqualification.[42] Canon 3B(1) of the Justices' Code of Conduct states that "[a] Justice is presumed impartial and has an obligation to sit unless disqualified."[43] The Court's Commentary sheds helpful light on both the scope and the purpose of the Justices' duty to sit, and it makes a special point to describe recusal as an "inherently judicial function."[44] Although "[t]he Justices follow the same general principles and statutory standards for recusal as other federal judges," the Commentary emphasizes that "the application of those principles can differ due to the effect on the Court's process and the administration of justice

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[36] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canons 1-5, at 1-8.

[37] *Id.* at Canon 2B, at 1; JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 2B, at 3.

[38] *The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 2.

[39] *Compare* JUSTICES' CODE OF CONDUCT, *supra* note 3, *with* JUDGES' CODE OF CONDUCT, *supra* note 12.

[40] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(1), at 2.

[41] *Id.* at Comment., at 10.

[42] *Compare* JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B *with* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C.

[43] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(1).

[44] *Id.* at Comment., at 10.

in the event that one or more Members must withdraw from a case."[45] Citing Justice Scalia's 2004 memorandum in *Cheney v. United States District Court for D.C.*,[46] the Court explains "the loss of one Justice is 'effectively the same as casting a vote against the petitioner,'" who "'needs five votes to overturn the judgment below.'"[47] Thus, "the absence of one Justice risks the affirmance of a lower court decision by an evenly divided Court—potentially preventing the Court from providing a uniform national rule of decision on an important issue."[48] With similar concerns in mind, the Court notes that although "Canon 3B(2)(d) retains language from the lower court code relating to known interests of third-degree relatives that might be substantially affected by the outcome of a proceeding," considering "the broad scope of the cases that come before the Supreme Court and the nationwide impact of its decisions, this provision should be construed narrowly."[49] In underscoring the practical necessity of a knowledge standard for "relationships and interests," the Court explains it "receives approximately 5,000 to 6,000 petitions for writs of certiorari each year," and "[r]oughly 97 percent of this number may be and are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review."[50] The Court underscores that its recusal standards and decisions "must be considered in light of this reality,"[51] and it further highlights Canon 3B(3) as providing that "the time-honored rule of necessity may override the rule of disqualification."[52] Moreover, the Court's Canon 3B omits the remittal process found in Canon 3D of the Judges' Code of Conduct.[53]

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[45] *Id.*

[46] 541 U.S. at 913.

[47] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 10 (quoting *Cheney*, 541 U.S. at 916). In *Cheney*, Justice Scalia also noted that a recusal by a Justice in consideration of a petition for writ of certiorari is, in effect, a vote for the respondent, as there is one fewer Justice left to potentially satisfy the Court's rule-of-four for granting the petition. *Cheney*, 541 U.S. at 916.

[48] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 10-11 (citing Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000) (Rehnquist, J., statement)).

[49] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11. The Court also departs from the Judges' Code of Conduct by moving the "known by the Justice" qualifier to the beginning of the third degree of relationship/ "spouse of such person" provision so that it qualifies each of its components, including those for such persons who are a party/officer-director-trustee or "acting as a lawyer in the proceeding." JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(d); *cf.* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1)(d).

[50] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11.

[51] *Id.*

[52] *Id.*

[53] *Id.*; *see* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3D.

Beyond these variations, there are several other important ways in which the substance of the Court's Canon 3B(2) recusal provision differs from that of the Judges' Code of Conduct. First, consistent with its express emphasis on the Justices' duty to sit, it provides that "[a] Justice *should* disqualify himself or herself," rather than using the mandatory "shall" found in both the Judges' Code of Conduct and 28 U.S.C. § 455.[54] The Court's conspicuous decision to depart from the mandatory language of the federal disqualification statute is highly significant evidence that it does not consider itself constitutionally bound to submit to Congress on the standards for exercising its judicial power in hearing and deciding cases and controversies.[55]

Next, the Court specifically carves out "the filing of a brief *amicus curiae*" and "the participation of counsel for *amicus curiae*" from the factors requiring a Justice's disqualification.[56] In support of this departure from the Judges' Code, it explains the Court, in contrast with the lower federal courts, has "adopted a permissive approach to *amicus* filings, having recently modified its rules to dispense with the prior requirement that *amici* either obtain the consent of all parties or file a motion seeking leave to submit an *amicus* brief."[57] Thus, the Court "receives up to a thousand *amicus* filings each Term" and, in some cases, "more than 100 *amicus* briefs have been filed in a single case."[58] In addition to the impracticality of identifying potential conflicts in such volumes of *amicus* filings, including them as grounds for disqualification of the Justices would invite strategic behavior on the part of parties in the solicitation of such briefs in matters before the Court.

Finally, when defining the standard for when a Justice should be disqualified, Canon 3B adds to the language of the Judges' Code of Conduct in a very prominent and significant way. After opening with the statement that "[a] Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned," and before listing illustrative "instances" of such circumstances, Canon 3B(2) qualifies the reasonable questioning of impartiality by stating "that is, where an *unbiased and reasonable person who is aware of all relevant circumstances would doubt*

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[54] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(2) (emphasis added); *see* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1); 28 U.S.C. § 455(a).

[55] *See* discussion *infra* Part III.

[56] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(4).

[57] *Id.* at Comment., at 11.

[58] *Id.*

that the Justice could fairly discharge his or her duties."[59] The "reasonable person who is aware of all relevant circumstances" standard on appearance of lack of impartiality is drawn from the Court's own case law interpreting 28 U.S.C. § 455.[60] However, the Court's addition of the words "unbiased and" before "reasonable person"[61] was clearly purposeful and meaningful in setting the parameters for interpreting the recusal standard, especially in the face of demands for recusal being lodged by outsiders to Supreme Court litigation. Those words are absent from both the Judges' Code of Conduct and 28 U.S.C. § 455[62] and underscore the importance of the "unique institutional setting of the Supreme Court" and the "often sharp disagreement concerning matters of great import" it is called upon to decide.[63] Their inclusion in the Justices' Code of Conduct has substantial value in communicating and promoting the Court's independence from ideologically and politically motivated pressures on them to recuse.[64]

III. JUDICIAL INDEPENDENCE UNDER ARTICLE III AND THE JUSTICES' CODE OF CONDUCT

Judicial independence is a well-established core principle of American jurisprudence and is well-reflected in the structure and text of the United States Constitution.[65] As Judge Anthony J. Scirica has observed, judicial independence may be helpfully thought of in "two dimensions":

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[59] *Id.* at Canon 3B(2) (emphasis added); *see* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1); 28 U.S.C. § 455(a).

[60] *See, e.g.*, *Microsoft*, 530 U.S. at 1302 (Rehnquist, J., statement) ("This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.") (citing Liteky v. United States, 510 U.S. 540, 548 (1994)).

[61] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(2).

[62] *See* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1); 28 U.S.C. § 455(a).

[63] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11.

[64] The meaning and value of the "unbiased" language has already been demonstrated by the standard articulated by Justice Samuel A. Alito, Jr. in response to recusal demands from members of Congress based on incidents involving the flying of flags. *See infra* Part IV, discussing Letter from Samuel A. Alito, Jr., Assoc. J. of the U.S. Sup. Ct., to Richard J. Durbin, Chair of the S. Comm. on the Judiciary et al. (May 29, 2024), *available at* https://www.judiciary.senate.gov/download/letter-from-justice-alito-to-senators-durbin-and-whitehouse [hereinafter Justice Alito Letter to Chair Durbin].

[65] *See, e.g.*, The Honorable Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 780 (2015) ("Judicial independence is at the core of the rule of law."); Frost, *supra* note 24, at 463 ("Although Congress has constitutional authority to regulate judicial ethics, its powers are constrained by other constitutional values, such as the separation of powers and the need to preserve judicial independence.").

> *Decisional independence* is the ability of an individual judge to render a decision in the absence of political pressures and personal interests . . . . Deference to the judgment and rulings of the courts depends on public confidence that those decisions were based on the law and the facts . . . .
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> *Institutional independence* is the structural autonomy of the judicial branch as a coequal branch of government. Robust institutional independence is necessary to ensure decisional independence because external regulation of judges' conduct may chill the ability and willingness to reach just merits decisions.[66]

These principles apply across the judiciary. However, when it comes to regulation of the Supreme Court, there are unique considerations that arise from the language of Article III of the Constitution and its implications supporting the exceptionalism of the Court and its placement at the apex of the judicial branch. All agree that the Court's decisional independence is of paramount importance in our constitutional system. The competing views on the question of regulating the Court reflect, first and foremost, a strong divergence of opinion on whether the Court's decisional independence depends on its maintaining a highly "[r]obust institutional independence," or whether it would be better supported by robust external regulation to increase "public confidence" and the perceived legitimacy of its decisions.[67] Notably, Chief Justice John Roberts aligned himself with the first school of thought in his 2021 Year-End Report on the Federal Judiciary, asserting that the federal courts "require ample institutional independence," and insisting that "the Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."[68]

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[66] Scirica, *supra* note 65, at 782 (emphases added) (citing Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 839 (1995); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 159, 162-63 (2003)).

[67] *See, e.g.*, *Judicial Ethics*, *supra* note 7, at 1690 ("Since the Court has not bound itself to any ethical standards, protectors of the Court's legitimacy should look to enforcement by another branch.").

[68] JOHN G. ROBERTS, JR., CHIEF J. OF THE U.S. SUP. CT., 2021 YEAR-END REPT. ON THE FED. JUDICIARY 1 (2021), *available at* http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

A. Key Constitutional Provisions

Two components of Article III are most central to the disagreements about the scope of judicial independence as a limitation on Congress and its regulation of Supreme Court ethics. The first is Article III, Section One, which provides:

> 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[69]

Thus, the "one supreme Court" was a special creation of the Constitution, directly granted by the People through representative ratification the investment with, and the authority to exercise, "[t]he judicial Power of the United States." Unlike the "from time to time" to-be-ordained-and-established "inferior Courts," the existence of the Supreme Court precedes any act of Congress and, strictly speaking, is not dependent on Congress's adoption of any authorizing legislation.[70]

The core principles of judicial independence, as ultimately reflected in Article III, Section One, are articulated and justified quite effectively in *The Federalist Papers* that were published prior to the Constitution's ratification, including those authored by Alexander Hamilton. For example, in *The Federalist No. 78*, Hamilton observed, "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution," and, in

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[69] U.S. CONST. art. III, § 1; *see* Cong. Research Serv., *Historical Background on Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-2/ALDE_00013558/.

[70] This independent existence is significant for interpreting Congress's authority to regulate the Supreme Court as differentiated from its authority to regulate the lower federal courts, even though the spare terms of Article III created a practical need for Congress to pass the Judiciary Act of 1789 and include the Supreme Court's basic structure and organization in that legislation. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); Frost, *supra* note 24, at 457-58; *see also* Frost, *supra* note 24, at 458 n.74 ("If Congress had not enacted legislation establishing the Supreme Court, the Court might nonetheless have come into existence had the President nominated a Chief Justice who was then confirmed by the Senate. Thus, congressional legislation was perhaps not required to establish the Supreme Court, though such legislation was surely envisioned by the Framers, as evidenced by the First Judiciary Act."); U.S. CONST. art. I, § 8 (providing Congress authority to "constitute Tribunals inferior to the Supreme Court").

furtherance of that independence, "[t]he standard of good behaviour for the continuance in office is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws."[71] Moreover, in *The Federalist No. 79*, Hamilton emphasized that "[t]he precautions for their responsibility are comprised in the article respecting impeachments. . . . This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."[72]

Another key provision from Article III is Section Two, Clause Two (the "Exceptions Clause"), which specially creates the Court's original jurisdiction and designates its subject matter ("all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party").[73] In reference to "all the other Cases before mentioned," Section Two, Clause Two further states, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[74] Finally, those arguing for Congress's extensive authority to regulate the Court have relied upon Article I's Necessary and Proper Clause, which provides, "[the Congress shall have Power . . .] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[75]

B. The Scholarly Debate About Congress's Regulation of Supreme Court Ethics

In recent years, law reviews have published multiple articles insisting Congress has far-reaching legislative power to impose various ethics-related

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[71] THE FEDERALIST NO. 78 (Alexander Hamilton).

[72] THE FEDERALIST NO. 79 (Alexander Hamilton).

[73] U.S. CONST. art. III, § 2, cl. 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—. . . between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[74] *Id.*

[75] U.S. CONST. art. I, § 8, cl. 18.

regulations on the Supreme Court,[76] including specific recusal standards and procedures,[77] additional financial disclosure and gift rules,[78] external ethics commission oversight,[79] or non-impeachment disciplinary processes.[80] Other articles have disagreed with these positions in various respects.[81] These debates have tended to follow in the wake of proposed legislation in Congress that would impose stronger regulatory control over the Supreme Court's conduct both internally and externally.[82]

In her 2013 article *Judicial Ethics and Supreme Court Exceptionalism*, Professor Amanda Frost expresses her view that the Constitution solely protects "federal judges' *decisional* independence."[83] She construes this aspect of

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[76] *See, e.g.*, Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 HOFSTRA L. REV. 557, 558–61 (2024); Frost, *supra* note 24, at 443 ("[C]ongress has broad constitutional authority to regulate the Justices' ethical conduct, just as it has exercised control over other vital aspects of the Court's administration, such as the Court's size, quorum requirement, oath of office, and the dates of its sessions.").

[77] *See, e.g.*, Ahearn & Milov-Cordoba, *supra* note 76, at 564-69.

[78] *See* April Rivera, Note, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices' Unethical Behavior*, 52 SW. L. REV. 308, 323-28 (2023).

[79] *See* Veronica Root Martinez, *Supreme Impropriety? Questions of Goodness and Power*, LAW & CONTEMP. PROBS. (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4685507#.

[80] *See* Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 479 (2014).

[81] *See, e.g.*, Case, *supra* note 26, at 399 (arguing "outside of one which the Court itself creates, . . . there should not be an imposed code of conduct on the judicial branch"); Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1185 (2011) [hereinafter Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*] ("[A]ny legislative interference with Supreme Court recusal decisions is an unconstitutional intrusion into the judicial power vested in the Court by Article III of the Constitution."); Kevin Hopkins, *Supreme Court Leaks and Recusals: A Response to Professor Steven Lubet's* SCOTUS Ethics in the Wake of *NFIB v. Sebelius*, 47 VAL. U. L. REV. 925, 929 (2013) ("[T]he Constitution makes impeachment and removal from office the only political check available to the legislative branch for regulating the behavior of Supreme Court justices."); *cf.* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 211-12 (1993) (arguing that "history provides clear evidence that impeachment was to be the sole political mechanism for disciplining federal judges," but allowing for "judiciary-dependent mechanisms for judicial discipline" created by congressional legislation for judges "not sitting on the Supreme Court").

[82] *See, e.g.*, Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011), *available at* https://www.congress.gov/bill/112th-congress/house-bill/862/text. *See also, e.g.*, Judicial Ethics and Anti-Corruption Act of 2023, H.R. 2973, 118th Cong. (2023), *available at* https://www.warren.senate.gov/imo/media/doc/SIL23572.pdf; Supreme Court Ethics Act, S. 325, 118th Cong. (2023), *available at* https://www.govtrack.us/congress/bills/118/s325/text; Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023), *available at* https://www.govtrack.us/congress/bills/118/s359/text.

[83] Frost, *supra* note 24, at 463.

judicial independence in narrow terms and with protections almost solely sourced in Article III, Section One's specific limitations on congressional power: "that is, their ability to issue judicial decisions free from fear that their compensation will be diminished or that they will be forced from office."[84] She does not think the distinctive constitutional status of our "one supreme Court" under Article III, Section One substantially limits the authority of Congress under the Necessary and Proper Clause to regulate the ethical standards of conduct for the Court.[85] Rather, in her opinion, provided it is "careful to avoid interfering with judges' decisions in specific cases"—understood as the substantive outcomes of cases on the merits, and not including the imposition of recusal standards—Congress's power is extremely broad and includes its ability to legislate for the imposition of "judicial discipline" on the Justices.[86] According to Frost, "as long as such legislation is neutral in its application—applying to all judges and Justices, and to all litigation—it does not undermine the decisional independence protected by the Constitution."[87] Finally, she concludes that the Impeachment Clauses[88] should not be interpreted as the exclusive remedy for judicial misconduct, including by Justices, or as an "implied bar to all legislation regarding judicial ethics."[89]

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[84] *Id.*

[85] *Id.* at 456-75. Although the author acknowledges that the "one supreme Court" provision "has never been the subject of litigation, or even much close academic scrutiny," she concurs with commentators who think it merely "prohibits Congress from establishing multiple Supreme Courts populated by different sets of Justices, all empowered to issue decisions binding on the nation as a whole." *Id.* at 471-72 (citing EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 2-3 (9th ed. 2007)).

[86] *Id.* at 466.

[87] *Id.* at 465 (citing Geyh, *supra* note 66, at 919). She further explains that because "separation of powers generally, and judicial independence in particular, are constitutional values that protect all Article III judges, not just the Justices on the Supreme Court," in her view, "any independence-based limits on Congress's authority to legislative regarding recusal and judicial misconduct apply equally to legislation affecting all three existing tiers of the federal judiciary." *Id.* at 465-66.

[88] U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6; *see also* U.S. CONST. art. II, § 4 (providing federal judges, "as civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors").

[89] Frost, *supra* note 24, at 466-68. In addition to her textual analysis of the "silence" of the Impeachment Clause on discipline short of removal by Congress, Frost raises pragmatic concerns about an "impeachment-or-nothing" approach to congressional authority:

> If the only method of regulating judicial misconduct were impeachment, Congress might resort to this ultimate sanction more often than the Framers intended, and more often than would be healthy for judicial independence. Alternatively, Congress might refrain from taking any action, leaving judges free to engage in serious, but not impeachment-worthy, offenses without fear of consequences.

A number of legal scholars, such as those responding to the recent controversies surrounding allegations of unethical conduct by conservative Justices, have shared Frost's opinion that the Constitution places minimal constraints on Congress's authority to regulate the Supreme Court's ethics.[90] But other legal scholars have made compelling counterarguments that, properly understood in the light of text and history, the Constitution and core principles of judicial independence require a far more circumscribed role for Congress in regulating the Supreme Court than claimed by advocates for "Supreme Court ethics reform."[91] To capture the essence of the latter arguments, this article will focus primarily on the scholarly contributions of Professor Louis J. Virelli III[92] and, more recently, Madeleine Case.[93]

Virelli has researched and written extensively on the constitutionality of congressional regulation of Supreme Court recusals.[94] Although recusal has been his principal point of concern, his constitutional, structural, and policy arguments also have broader implications for congressional efforts to regulate Supreme Court ethics. In response to scholars who have relied upon the Exceptions Clause (providing for the Court's "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"[95]) to justify Congress's authority to regulate recusal, he offers convincing contrary arguments:

> The Exceptions Clause applies to the Court but only with regard to its appellate jurisdiction, which is far removed from recusal. . . .[T]he Framers did not equate judicial power with jurisdiction. . . . [A]uthority over a
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> Either way, the result would diminish the courts' legitimacy in the eyes of the public—a result at odds with the Framers' goals.

Id. at 467-68.

[90] *See, e.g.*, Ahearn & Milov-Cordoba, *supra* note 76, at 571-72; *Judicial Ethics*, *supra* note 7, at 1690-96.

[91] *See, e.g.*, Shane, *supra* note 81, at 211-12; Hopkins, *supra* note 81, at 928-30; Thomas Jipping, *Senate Democrats' Supreme Court "Ethics" Bill Is Really About Disapproval of Rulings*, DAILY SIGNAL (July 13, 2023), https://www.heritage.org/courts/commentary/senate-democrats-supreme-court-ethics-bill-really-about-disapproval-rulings.

[92] LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION (2016); Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81; Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1535 (2012) [hereinafter Virelli, *Congress*].

[93] Case, *supra* note 26.

[94] VIRELLI, *supra* note 92; Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81.

[95] U.S. CONST. art. III, § 2, cl. 2.

> court's jurisdiction does not necessarily extend to authority over questions arising before the court under the proper exercise of that jurisdiction.[96]

Virelli further observes that "[i]t would prove too much to read the Exceptions Clause as also granting Congress the power to mandate judicial recusal, especially when the recusal power represents a potentially greater infringement on judicial independence than limiting the Court's appellate jurisdiction."[97] And, in addition, "since recusal is just as likely to arise in cases under the Court's original jurisdiction, which is not subject to congressional influence under the Exceptions Clause or any other part of Article III, it would be a gross over-reading of the Exceptions Clause to assume that it grants Congress some measure of authority over the Court's recusal decisions."[98]

Virelli concludes this argument with a persuasive textualist point that "the Framers' choice to empower Congress to affect Supreme Court appellate jurisdiction suggests a countervailing intent to preclude congressional intrusion into those exercises of the judicial power—like recusal—that are not expressly subjected to congressional authority under Article III."[99] In making this textualist argument, he relies upon "the interpretive canon of *expressio unius est exclusio alterius* ('to state the one is to exclude the other')."[100] He makes similar arguments against Congress's constitutional authority under the Impeachment Clauses:

> [I]mpeachment is the only authority granted in the Constitution's text for the removal of life-tenured federal judges, including Supreme Court Justices. . . . Since recusal is not included in the Constitution along with impeachment as one of Congress's powers over the judiciary, it should not be treated as such. This more targeted and more efficient remedy [of

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[96] Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81, at 1208-09 (citing James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708 (1998)).

[97] *Id.* at 1209.

[98] *Id.*

[99] *Id.* He has also observed that, although the Court "has offered very limited guidance regarding the scope of the [Exceptions] Clause, . . . the information it has provided indicates that Congress has a robust, *yet not unbounded*, authority to limit the Court's appellate jurisdiction." VIRELLI, *supra* note 92, at 59-60 (emphasis added). For example, "it has consistently stopped short of allowing Congress to wholly insulate a class of cases from Supreme Court review." *Id.* Thus, if Congress passed a "jurisdiction-stripping statute incorporating substantive recusal standards," it would invite "constitutional challenges on the basis that it improperly use[d] jurisdiction stripping to influence the substantive outcome of particular cases." *Id.* at 69.

[100] Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81, at 1209 n.163.

> recusal] has a far greater deleterious effect on the independent exercise of judicial power to decide specific cases. This level of intrusion into the judicial power is simply not anticipated by the Impeachment Clauses.[101]

For this reason, he opines, "the Impeachment Clauses should be read in connection with Article III to accord proper respect for the federal judiciary's role in our constitutional scheme as the repository of judicial power."[102] Reading these together, it becomes clear that "the Impeachment Clauses offer structural support for the proposition that recusal is sufficiently distinct from impeachment to be understood as a feature of judicial, rather than legislative, constitutional authority."[103]

Finally, Virelli makes a very effective case for why the Necessary and Proper Clause does not support congressional regulation of the Court's recusal processes. He begins by framing the question as "whether the Necessary and Proper Clause empowers Congress to regulate the Court's recusal practices, or whether recusal is within the Court's 'inherent power' under Article III such that Congress (and other governmental actors outside the Court, for that matter) is precluded from doing so."[104] In answering that question, it is essential for the interpreter of the constitutional text to recognize that the Supreme Court is "the nation's court of last resort, and one which is set apart in the language of Article III as unique among all the federal courts."[105] As such, it "provides the strongest constitutional case for retaining robust and inviolable inherent judicial powers."[106] These powers include "the power to decide cases properly before it without interbranch dictates, interferences, or influences. [So viewed,] Supreme Court recusal . . . falls within the core of judicial power widely considered to be exclusively committed to the Court by Article III."[107] In light of the significance of the "inherent power" issue in determining whether Congress has authority under the Necessary and Proper Clause, the Commentary in the Justices' Code of Conduct describing recusal as an "inherently judicial function" implicitly signals the Court may support

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[101] *Id.* at 1211-12.
[102] *Id.* at 1212.
[103] *Id.* at 1211-12.
[104] *Id.* at 1214-15.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1217; *see also* VIRELLI, *supra* note 92, at 71-75.

a constitutional interpretation that denies Congress power to mandate the Court's recusal standards.[108]

In 2020, Madeleine Case published a Note in the Georgetown Journal of Legal Ethics titled *A Case for the Status Quo in Supreme Court Ethics*.[109] In her introduction, she correctly points out that "[v]ery few, if any, have made a case in opposition to a code of conduct externally imposed on the Supreme Court by a branch of government or the Judicial Conference."[110] She crafts a compelling defense of the "status quo" that reflects the Supreme Court's unique need for independence, and she proposes a "self-created" code of conduct to be internally enforced by the Court—much like what the Court ultimately adopted in the November 2023 Justices' Code.[111] Case's "status quo" argument proceeds with three categories of justification: (1) the "serious structural concerns" with congressional regulation of Supreme Court ethics; (2) the important ways in which "existing constitutional safeguards take into account the ethical conduct of the Supreme Court Justices without threatening underlying separation of powers principles or the integrity of the institution"; and (3) the significant "pragmatic reasons why it is difficult for the Court to adopt an inflexible code of conduct."[112]

As to the structural concerns with congressional regulation of Supreme Court ethics, Case presciently remarks that "[t]he primary problem with executive branch involvement and legislative branch involvement beyond the nomination process is that it automatically injects an independent branch with partisanship, or at the very least, has the potential to do so."[113] That the problem Case identifies is quite real rather than merely hypothetical has been made all the more clear in light of the recent patterns of vitriolic rhetoric[114]

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[108] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11. In other scholarship, Virelli has argued that although Congress lacks constitutional authority to directly regulate recusal standards, it should nevertheless "take the lead on resolving [the inter-branch] impasse over recusal by using "indirect constitutional mechanisms to do so. Virelli, *Congress*, *supra* note 92, at 1535. For example, he recommends Congress should amend 28 U.S.C. § 455 to remove the 1948 addition of Supreme Court Justices to the judges covered by the statute and "focus instead" on tools such as "impeachment, procedural reform, judicial confirmation, appropriations, and investigation" in order to "influence the Justices' recusal practices." *Id.* at 1535-36.

[109] Case, *supra* note 26.

[110] *Id.* at 398.

[111] *Id.* at 411.

[112] *Id.* at 412.

[113] *Id.*

[114] *See, e.g.*, text accompanying note 2, *supra* (quoting United States Senate Majority Leader Charles Schumer, warning, "I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have

and strategic delegitimization efforts from federal legislators directed at conservative Supreme Court Justices.[115] In response to those who argue that the Chief Justice or the other Justices as a group should pass judgment on the ethical conduct of individual Justices (e.g., by recommending that they recuse from certain cases),[116] Case initially notes that it is unclear what such a process would accomplish as a practical matter beyond the status quo (i.e., voluntary collegial consultation and informal peer "enforcement") that has been deemed insufficient by critics.[117] However, she also argues that a more concerning drawback of a system of peer adjudication is that "Justices might apply the ethics code asymmetrically to the Court's members,"[118] raising the potential for tactical disqualification of certain Justices to influence the outcomes of cases.[119] She further argues that a regime requiring ethics review by other Justices could lead to a diminishment of "trust among members of the Court," especially if Justices believe that their colleagues are reviewing their recusal decisions in a biased or unjustified manner.[120] Finally, in rebuttal to those who have said the Judicial Conference of the United States should provide the mechanism for regulating Supreme Court ethics, she points out a fatal flaw of this approach: "[T]he Supreme Court is the only court created by the Constitution itself and is, by the language there, 'vested' with '[t]he judicial Power of the United States.'"[121] Responding to Frost's reliance on an

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released the whirlwind, and you will pay the price! You won't know what hit you if you go forward with these awful decisions.").

[115] *See infra* Part IV.

[116] Case, *supra* note 26, at 413 (citing Frost, *supra* note 24, at 471, 474-75).

[117] *Id.*

[118] *Id.* at 414.

[119] Case focuses on potential differences of opinion between the majority of the Justices and a "minority (or even an individual)" as to the "severity of an ethical code violation." Case, *supra* note 26, at 414. But the greater concern, especially on a closely divided Court on a controversial case, would be how such a review process could facilitate strategic decision-making that would be less about ethics and more about case results:

> As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

ROBERTS, 2011 YEAR-END REPORT, *supra* note 18, at 9.

[120] Case, *supra* note 26, at 414; *see also* Shane, *supra* note 81, at 236 ("[P]ermitting Supreme Court justices to discipline one another could so easily destabilize the Court as to pose an intolerable risk to the Court's legitimacy.").

[121] Case, *supra* note 26, at 417; *see also* Shane, *supra* note 81, at 236 ("Giving lower court judges disciplinary power over the justices would be facially inconsistent with the Supreme Court's role.").

"administrative/decisional" distinction to support the Judicial Conference's ability to regulate at least the extrajudicial conduct of Justices, Case explains that "it is underinclusive to cabin the realm of legal ethics to a purely 'administrative' category, and overinclusive to include Supreme Court Justice conduct with that of other federal judges" in light of the "higher stakes and larger consequences" involved in Supreme Court ethics.[122]

Second, Case points to the important preventive and responsive protections the Constitution provides through the Impeachment Clauses and the searching and vigorous Senate confirmation process of advice and consent.[123] As she observes, impeachment is both "an explicit method for Congress to remove Supreme Court Justices who have committed egregious ethical violations" and "a mechanism that Congress has not been afraid to wield in the past."[124] Responding to Frost's argument that impeachment procedures are not suitable for less serious unethical conduct—which would be better addressed by a code of conduct applicable to the Court—Case points out that the disciplinary sanctions that are typically imposed on lower federal court judges (i.e., under the JCDA) are not applicable to Supreme Court Justices, and she argues more broadly that "[d]iminishing its members [e.g., through temporary suspensions or similar disciplinary sanctions] only inhibits the Court's productivity."[125] However, a stronger counterargument to Frost on this point is based on a more foundational legal principle: Article III of the Constitution itself sets the Justices apart from the lower federal judges

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[122] Case, *supra* note 26, at 417 (citing Frost, *supra* note 24, at 468-69); *see, e.g.,* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 2B ("A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct *or judgment*.") (emphasis added). Case further pushes back against Frost's sharp distinction between decisional and institutional/administrative independence by pointing out that any legislation on Supreme Court ethics "does—it *must*—walk the very line between decisional and administrative independence. It is true that judicial ethics violations can occur completely outside of the Court's work to hear cases. But it is also true that any consequences imposed for *violating* an ethics code can impair a Justice's duty to hear cases and issue decisions, especially with issues like recusal. A Justice cannot make an *independent* decision on a case if he or she cannot even *make the decision to begin with* because of administrative oversight." Case, *supra* note 26, at 416.

[123] *See* Case, *supra* note 26, at 418-19.

[124] *Id.* at 418 (discussing the 1805 impeachment of Supreme Court Justice Samuel Chase).

[125] *Id.* at 419-20; *see The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 1 ("Under the [JCDA], a judge who engages in misconduct may be publicly or privately reprimanded, temporarily barred from hearing new cases, disqualified from an existing case, or referred for possible impeachment. Formal discipline under the [JCDA] is rare."). Case further comments that even though only one Supreme Court Justice has actually been impeached, "Congress has tended to propose legislation rather than propose impeachment when it has considered its tools for remedying perceived ethics errors." Case, *supra* note 26, at 419.

through its direct creation of "one supreme Court."[126] Preserving and protecting the Court's institutional independence by allowing it to police its own ethical standards is critical to maintaining its decisional independence at the apex of the judicial branch of the United States. Moreover, the confirmation process ensures that "before the Justice even reaches the bench, he or she has been thoroughly vetted for professional and personal integrity."[127] The process can certainly include questions from senators to Supreme Court nominees about their philosophies and perspectives on matters involving judicial ethics,[128] including how they understand and intend to approach the guidance found in specific provisions of the Justices' Code of Conduct.

Finally, Case defends the "status quo" of the Court's independent regulation of its ethics based on significant "pragmatic" considerations.[129] For one thing, a Justice subjected to disqualification against his or her individual judgment has no opportunity to appeal to a higher court.[130] Justices may also feel the need to isolate themselves from friendships and social connections with those in other branches of the government in order to conform to conduct mandates or threats of disciplinary action outside of the impeachment process.[131]

IV. INDEPENDENCE AND INTEGRITY IN THE FACE OF POLITICAL AND MEDIA INTIMIDATION

In recent decades, members of Congress have sometimes seen fit to write letters to members of the Supreme Court to challenge their ethical conduct.[132] However, in the lead-up to and aftermath of the Court's decision in *Dobbs v.*

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[126] *See* U.S. CONST. art. III, § 1.

[127] Case, *supra* note 26, at 419.

[128] *Id.* (citing Virelli, *Congress*, *supra* note 92, at 1594, who observes that questions to nominees about their "views on judicial recusal" would generally not be objectionable as they are "akin to questions about judicial philosophy" and are "technically not the subject of cases before the Court, as they are committed entirely to an individual Justice's judgment").

[129] *Id.* at 420.

[130] *Id.* (citing ROBERTS, 2011 YEAR-END REPORT, *supra* note 18, at 9).

[131] *Id.* (citing *Cheney*, 541 U.S. at 916).

[132] *See, e.g.*, *Should Supreme Court Justices Clarence Thomas, Elena Kagan Sit Out Health Care Case?*, ABC NEWS (Feb. 9, 2011), https://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-sit-health-care/story?id=12878346 (reporting 74 House Democrats wrote to Justice Thomas "calling on him to sit out deliberations on the Affordable Care Act because of his wife's ties to a lobbying group that opposes the health care law").

Jackson Women's Health Organization[133] and cases relating to the events at the United States Capitol on January 6, 2021,[134] progressive activists in the media and elected officials in the Democratic Party have conducted an aggressive, incessant, and increasingly venomous campaign attacking the ethics of the most conservative Justices on the Court,[135] and seeking to damage the public reputations of those disfavored Justices, particularly Clarence Thomas and Samuel A. Alito, Jr.[136] A clear pattern has emerged whereby progressive media writers publish articles that then serve as fodder for sundry congressional Democrats to issue press statements[137] and write letters of complaint to the Court petitioning for recusals of conservative Justices from controversial pending cases.[138] The transparent objectives are (1) to delegitimize any

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[133] 597 U.S. 215 (holding the U.S. Constitution does not create a right to abortion and overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

[134] *See* Trump v. United States, No. 23-939 (U.S. July 1, 2024); Fischer v. United States, No. 23-5572 (U.S. June 28, 2024).

[135] *See, e.g.*, Kaplan et al., *supra* note 9; Elliot et al., *supra* note 9; Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, POLITICO (Apr. 25, 2023), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579; *cf.* David Harsanyi, *ProPublica Exposes Clarence Thomas: He Has a Rich Friend!*, THE FEDERALIST (Apr. 6, 2023), https://thefederalist.com/2023/04/06/propublica-exposes-clarence-thomas-he-has-a-rich-friend/ (commenting, with its attacks on Justice Thomas as an example, "ProPublica often practices what you might call Potemkin journalism—dressing up non-stories with neutral-sounding reporting verbiage and lots of graphs and pictures that seem important at first glance, but in actuality tell us very little"); *see also* Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda.

[136] *See, e.g.*, Jipping, *supra* note 91; John G. Malcolm, *The Left's Relentless, Unjustified Assaults on the Supreme Court's Legitimacy*, DAILY SIGNAL (Aug. 10, 2023), https://www.dailysignal.com/2023/08/10/the-lefts-relentless-unjustified-assaults-on-the-supreme-courts-legitimacy/ (observing "[t]hese attacks are transparently partisan," as "[l]left-wing media outlets have set their sights on Supreme Court justices who were appointed by Republican presidents, while assiduously ignoring similar transgressions by liberal judges, including justices appointed by Democratic presidents").

[137] *See, e.g.*, *Durbin Calls for Justice Clarence Thomas to Recuse Himself from Loper Bright v. Raimondo in Upcoming Supreme Court Term*, U.S. SEN. COMM. ON THE JUDICIARY (Sept. 22, 2023), https://www.judiciary.senate.gov/press/releases/durbin-calls-for-justice-clarence-thomas-to-recuse-himself-from-loper-bright-v-raimondo-in-upcoming-supreme-court-term.

[138] *See, e.g.*, Letter from Sen. Richard Blumenthal to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. (Dec. 20, 2023), *available at* https://www.blumenthal.senate.gov/imo/media/doc/122023scotusthomasrecusalletter.pdf ("urg[ing the Chief Justice] to take appropriate steps to ensure that Justice Clarence Thomas recuses himself from consideration of the petition for certiorari and any future proceedings in *United States v. Trump*, or otherwise provides the public an 'explanation of [his] recusal decision' showing how his participation comports with judicial ethics and federal law") (quoting Letter from Supreme Court Justices to Sen. Richard J. Durbin, at 2 (Apr. 25, 2023)); Letter from Rep. Henry C. "Hank" Johnson, Jr. et al., to Clarence Thomas, Assoc. J. of

decision involving those Justices, along with the Roberts Court in general;[139] and (2) to goad Congress into passing legislation to impose new regulations on the Court.[140]

The passionate ideological crusade against the Supreme Court reached a new height of brazen absurdity with May 2024 investigative reporting[141] and subsequent letters from congressional Democrats[142] seeking to pressure

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the U.S. Sup. Ct. (Dec. 15, 2023), *available at* https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-media-document/2023.12.15-thomas-letter-final.pdf. ("If you want to show the American people that the Supreme Court's recent Code of Conduct is worth more than the paper it is written on, you must do the honorable thing and recuse yourself from any decisions in the case of *United States v. Trump*.").

[139] *See, e.g.*, Malcolm, *supra* note 136 (opining that "[t]o preserve our system of separation of powers and checks and balances—and for the good of the country—these one-sided attacks on Republican appointees to the Supreme Court, and the unending assaults on the legitimacy of the court itself, have to stop").

[140] *See, e.g.*, *Durbin Statement On Supreme Court Ruling In Chevron Deference Cases, Failure of Justice Thomas To Recuse*, U.S. SEN. COMM. ON JUDICIARY (July 8, 2024), https://www.judiciary.senate.gov/press/dem/releases/durbin-statement-on-supreme-court-ruling-in-chevron-deference-cases-failure-of-justice-thomas-to-recuse ("'I'm disappointed—but unsurprised—that Justice Thomas refused to recuse himself from these cases . . . . Like I've said before: even the appearance of impropriety warrants recusal, and this episode is another textbook example of a warranted recusal. Until Chief Justice Roberts uses his existing authority to implement an enforceable code of conduct for all Supreme Court justices, we will push to pass the [Supreme Court Ethics and Recusal Transparency] Act.'").

[141] Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024) [hereinafter Kantor, *Stop the Steal*], https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html; Jodi Kantor et al., *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024) [hereinafter Kantor, *Another Provocative Flag*], https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html. *But see* Kimberley A. Strassel, *A Flagging Campaign Against Justice Alito*, WALL ST. J. (May 23, 2024), https://www.wsj.com/articles/a-flagging-campaign-against-the-supreme-court-alito-jan-6-a545cd69?mod=opinion_lead_pos10; *see also* Jonathan Turley, *Capitol Vapors: The Laughably Fake Outrage Over the Alito Flags and Tapes* (June 14, 2024), https://jonathanturley.org/2024/06/14/capitol-vapors-the-laughably-fake-outrage-over-justice-alito/; Mollie Hemingway, *NYT's Jodi Kantor Has A History Of Peddling Deranged Anti-Alito Hoaxes*, THE FEDERALIST (June 6, 2024), https://thefederalist.com/2024/06/06/nyts-jodi-kantor-has-a-history-of-peddling-deranged-anti-alito-hoaxes/.

[142] Letter from Sen. Sheldon Whitehouse et al., Chairman, Senate Comm. on the Judiciary Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rts., to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. [hereinafter Chairman Whitehouse Letter to Chief Justice] (May 23, 2024), *available at* https://www.whitehouse.senate.gov/wp-content/uploads/2024/05/2024-05-23-Letter-to-CJ-Roberts.pdf.; Letter from Rep. Henry C. "Hank" Johnson, Jr., et al. to Samuel Alito, Assoc. J. of the U.S. Sup. Ct. (May 21, 2024), *available at* https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-media-document/2024.05.21%20Letter%20to%20Justice%20Alito.pdf; Letter from Rep. Henry C. "Hank" Johnson, Jr., et al. to Samuel Alito, Assoc. J. of the U.S. Sup. Ct. (May 24, 2024) [hereinafter Representative Johnson Letter to Justice Alito],

Justice Alito to recuse from two pending cases[143] and "any other cases that may arise involving Donald Trump, the January 6, 2021 attack on the Capitol, or attempts to overturn the 2020 election."[144] This media and political circus arose from two flags: an upside-down American flag flown at Justice Alito's primary residence in Virginia,[145] and an "Appeal to Heaven" flag flown at his summer home in New Jersey.[146] United States Senators Richard J. Durbin and Sheldon Whitehouse also requested a meeting with Chief Justice Roberts "as soon as possible" to discuss, among other topics, their concerns about the alleged flag incidents; their ongoing complaints about Justice Thomas, such as his alleged improper extrajudicial conduct and their prior calls for his recusal from January 6-related cases; and their recurring insistence that the Court adopt an "enforceable" code of conduct for itself, or else be subjected to continued congressional efforts to resolve "this crisis" through legislation.[147]

Justice Alito responded in a letter to Chair Durbin, firmly rejecting the demands that he recuse in any pending or future cases because "two incidents

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available at https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-mediadocument/2024.05.24%20Alito%20SECOND%20letter%20with%20signatures.pdf.

[143] The two cases pending at the time were *Trump v. United States*, No. 23-939 (concerning questions of former President Donald J. Trump's immunity from prosecution for his alleged role in the events of January 6) and *Fischer v. United States*, No. 23-5572 (concerning the interpretation of 18 U.S.C. § 1512(c)(2), which makes it a crime to "otherwise obstruct[], influence[], or impede[] any official proceeding," as applied to criminal defendants involved in the events of January 6).

[144] Representative Johnson Letter to Justice Alito, *supra* note 142, at 1.

[145] *See* Kantor, *Stop the Steal*, *supra* note 141. *See also* Courtney Campbell, *Why Is the American Flag Displayed Upside Down Sometimes?*, THE TRUE COLORS (Sept. 26, 2023), https://thetruecolors.org/upside-down-american-flag/ ("At first glance, an upside-down American flag may appear to be a sign of disrespect or disregard for the nation's symbol. However, it is essential to understand that in many cases, this inversion is not an act of disrespect but rather a symbolic signal of distress.").

[146] *See* Kantor, *Another Provocative Flag*, *supra* note 141. *See also The Meaning Behind an Appeal to Heaven Flag*, AMERICANFLAGS.COM, https://www.americanflags.com/blog/post/an-appeal-to-heaven-flag-meaning (last visited July 8, 2024) ("The Appeal to Heaven flag was designed by Colonel Joseph Reed, who served as the personal secretary to George Washington. Originally commissioned for use on six military cruiser ships, the flag was adopted on October 21, 1775. It became the official Massachusetts navy flag in 1776.").

[147] Chairman Whitehouse Letter to Chief Justice, *supra* note 142, at 1-4. The letter also renewed the Senators' complaints about Justice Alito's interviews for a 2023 *Wall Street Journal* article written by David B. Rivkin and James Taranto, in which he allegedly "opined on the constitutionality of legislation pending before the U.S. Senate." *Id.* at 3. They further complained about Alito's decision not to recuse from a matter before the Court in which Mr. Rivkin was counsel at the time. *Id.* Justice Alito, however, had already explained his well-reasoned decision not to recuse in that case. *See* Moore v. United States, No. 22–800 (Sept. 8, 2023) (Alito, J., statement), *available at* https://www.supremecourt.gov/opinions/22pdf/22-800_1an2.pdf.

involving the flying of flags" allegedly "created an appearance of impropriety."[148] This letter was the first time a Justice publicly interpreted and applied the new Justices' Code of Conduct in response to a complaint or petition relating to ethical considerations.[149] Justice Alito opened his ethics analysis by quoting Canon 3B on Disqualification, explaining that because the flag incidents "do not meet the conditions for recusal set out in (B)(2)"—i.e., where "an *unbiased* and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties"[150]—he "therefore [has] an obligation to sit under (B)(1)."[151] His description of the conditions for qualifying as an "unbiased and reasonable person" under Canon 3(B)(2) is highly significant, especially as the "unbiased" aspect of the conditions does not appear in the Judges' Code of Conduct on Disqualification:[152]

> I am confident that a reasonable person *who is not motivated by political or ideological considerations or a desire to affect the outcome of Supreme Court cases* would conclude that the events recounted above do not meet the applicable standards for recusal. I am, therefore, *required* to reject your request.[153]

Justice Alito used the quoted language in reference to the "upside-down American flag" incident; he used parallel language in rejecting the demand for recusal based on the "An Appeal to Heaven" flag incident.[154]

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[148] Justice Alito Letter to Chair Durbin, *supra* note 64.

[149] Justice Alito's statement in *Moore v. United States*, No. 22–800, addressed Senator Durbin's demand for his recusal in that case based on his interviews with the *Wall Street Journal*, but this preceded the adoption of the Justices' Code of Conduct by two months. However, Justice Alito did cite and rely upon the Statement on Ethics Principles and Practices that the Chief Justice had attached to his April 25, 2023, letter responding to Senator Durbin's invitation for him to testify at a Senator Judiciary Committee hearing on May 2, 2023. *Moore v. United States*, No. 22–800, at 1 & n.2 (citing the April 2023 Statement on Ethical Principles and Practices in support of the proposition that "[r]ecusal is a personal decision for each Justice, and when there is no sound reason for a Justice to recuse, the Justice has a duty to sit").

[150] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(2) (emphasis added).

[151] Letter from Justice Alito to Chair Durbin, *supra* note 64, at 1; *see supra* Part II (discussing Canon 3B).

[152] *See supra* text accompanying notes 59-64.

[153] Letter from Justice Alito to Chair Durbin, *supra* note 64, at 2 (emphases added).

[154] *Id.* at 3. Mollie Hemingway has astutely commented on the absurdity of the media's and congressional Democrats' appeals for recusal based on the flying of the "Appeal to Heaven" flag:

> The flag is in such wide use that left-wing city San Francisco famously flew it for 60 years in Civic Center Plaza until last week. When *The New York Times* began pushing its propaganda against the flag, San Francisco quickly removed it to help

The day after Justice Alito sent his letter, Chief Justice Roberts too wrote to the Senators.[155] In response to their "questions concerning any Justice's participation in pending cases," he reminded them that "the Members of the Supreme Court recently reaffirmed the practice we have followed for 235 years pursuant to which individual Justices decide recusal issues."[156] Consistent with this practice, rather than address the merits of the petition, he simply expressed his "understanding that Justice Alito has sent you a letter addressing this subject."[157] As to the Senators' request for a meeting, he "respectfully decline[d]" and offered these remarks in explanation of his decision:

> As noted in my letter to Chairman Durbin last April, apart from ceremonial events, only on rare occasions in our Nation's history has a sitting Chief Justice met with legislators, even in a public setting (such as a Committee hearing) with members of both major political parties present. Separation of powers concerns and the importance of preserving judicial independence counsel against such appearances. Moreover, the format proposed—a meeting with leaders of only one party who have expressed an interest in matters currently pending before the Court—simply underscores that participating in such a meeting would be inadvisable.[158]

Both Justice Alito's and the Chief Justice's responses highlight the risks to the integrity of the United States Supreme Court that are posed by opening the door to political interference with the Court's internal decision-making processes—including on questions of recusal and ethics.[159] The fact that many

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> the left's efforts against the legitimacy of the Supreme Court. What's more, *The New York Times* and other left-wing media outlets never once claimed the flag was one of the flags seen inside the Capitol on Jan. 6, until Kantor published her conspiracy theory last month. In fact, the *Times* published a detailed "Visual Investigation" of the events of Jan. 6 headlined, "Decoding the Far-Right Symbols at the Capitol Riot" — and neither of the supposedly controversial flags flown by Martha-Ann Alito were included in the article.

Hemingway, *supra* note 141.

[155] Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Sens. Richard J. Durbin & Sheldon Whitehouse (May 30, 2024), *available at* https://static.foxnews.com/foxnews.com/content/uploads/2024/05/2024-05-30-CJR-Letter-to-Chairman-Durbin-and-Senator-Whitehouse.pdf.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Illustrating the increasing levels of attempted congressional intrusiveness into the internal operations of the Court, in a letter to Chief Justice Roberts on May 30, 2024, Senator Richard Blumenthal went as far as to "urge" that "to restore the institutional integrity and standing of the Court" after their alleged ethics violations, Chief Justice Roberts should stop assigning majority opinions to Justices Thomas and Alito and remove them from the regular circuit Justice duties. Letter from Sen.

of the critiques of individual Justices are plainly politically motivated underscores the importance of the Court's institutional independence, which it declared in the November 2023 Justices' Code of Conduct. Continual vigorous defense of the Court's institutional independence will be essential to thwarting ongoing and future political efforts to influence the outcomes of cases before the Court through intimidating rhetoric[160] and legislative action.[161]

V. CONCLUSION

In June 2024, at the Annual Meeting of the State Bar Association of North Dakota, I had the privilege of moderating the Mart Vogel Lecture on Professionalism and Legal Ethics.[162] The title of the program was *The Constitution as Client*, and it featured Vikram David Amar, Distinguished Professor of Law at UC Davis School of Law, as our esteemed Vogel Lecturer. The program description opened as follows:

Richard Blumenthal to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. (May 30, 2024), *available at* https://www.blumenthal.senate.gov/imo/media/doc/53024lettertocjrobertsletter.pdf.

[160] *See, e.g.*, *supra* note 2 and accompanying text.

[161] *See, e.g.*, *supra* note 82 and accompanying text (citing 2023 and 2024 congressional legislative proposals). In July 2024, President Joseph R. Biden, Jr. issued a statement announcing his support for a package of three "reforms to restore trust and accountability" in response to an alleged "crisis of confidence in America's democratic institutions." *FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, THE WHITE HOUSE (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/. These included (1) a constitutional amendment to overturn the Supreme Court's decision in *Trump v. United States* on presidential immunity; (2) term limits for Supreme Court Justices; and (3) a "Binding Code of Conduct for the Supreme Court" passed by Congress that would "require Justices to disclose gifts, refrain from public political activity, and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest." *Id.* He stated that "Supreme Court Justices should not be exempt from the enforceable code of conduct that applies to every other federal judge." *Id.* The preface to his proposals also expressed criticism that "[i] recent years, the Supreme Court has overturned long-established legal precedents protecting fundamental rights," including "tak[ing] away a woman's right to choose." *Id.* By relying on his disagreements with the substance of the Court's decisions as an asserted basis for imposing alterations of its institutional structure and prerogatives, President Biden's statement brings into bold relief the Framers' wisdom in constitutionally protecting the Supreme Court's decisional independence against attempted regulatory influence by the executive and legislative branches.

[162] Vikram David Amar, Distinguished Professor of L., UC Davis School of L., 2024 Mart Vogel Lecture on Professionalism & Legal Ethics, St. Bar Ass'n of N.D., 125th Ann. Mtg. (June 14, 2024), *available at* https://mcusercontent.com/791139e1f4d0f79a010ab2a0c/files/d468cc75-f0ff-67d0-513d-64e55d9bfc81/AM24_PRESENTERS_CLE_schedule_at_a_glance.pdf.

> All new Justices appointed to the United States Supreme Court take oaths to "administer justice without respect to persons, and do equal right to the poor and to the rich"; to "faithfully and impartially discharge and perform all the duties incumbent upon [them] under the Constitution and laws of the United States; to "support and defend the Constitution of the United States against all enemies, foreign and domestic; to "bear true faith and allegiance to the same"; and to "well and faithfully discharge the duties of the office on which [they are] about to enter." These solemn commitments to be "faithful" to the Constitution and to the judicial office invoke profound ethical responsibilities shouldered by each Justice and tested by immense challenges and temptations that can lead them astray, even with the best of intentions.[163]

After Professor Amar's lecture, I offered remarks commenting on the United States Constitution as itself being a "client" to whom Justices owe duties of faithfulness and loyalty, and I invoked the importance of judicial independence in allowing them to fulfill those fundamental ethical duties. In their role as advisors to clients, lawyers have an ethical obligation to "exercise independent professional judgment and render candid advice."[164] Analogously, Supreme Court Justices have an ethical obligation to exercise their independent judgment in deciding cases and controversies presented to them, and to render candid opinions about the meaning of the law. Securing the integrity of the Court's role as the final arbiter of the meaning of the Constitution and other federal law[165] requires strong and stable boundaries allowing the Justices to make their decisions without fear or favor, and with their judgment unimpeded by intimidation campaigns by elected officials, media publications, or members of the general public seeking to affect the outcomes of pending or future cases. For these reasons, and considering the Court's unique status in our constitutional structure under Article III, Congress should stay

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[163] *Id.* (quoting OFFICE OF THE CURATOR, SUP. CT. OF THE U.S., TEXT OF THE OATHS OF OFFICE FOR SUP. CT. JUSTS. (updated Aug. 10, 2009), https://www.supremecourt.gov/about/oath/textoftheoathsofoffice08-10-2009.pdf). With a view of the U.S. Constitution as itself being a "'client' to whom Justices owe duties of faithfulness and loyalty," Amar's outstanding lecture discussed "how changes in the makeup and experiences of the Supreme Court bench and bar make it increasingly difficult for the Court to properly resolve many complex constitutional disputes, especially considering the Court's professed commitment to an originalist approach to constitutional interpretation."

[164] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2024).

[165] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

out of the business of regulating the internal operations of the Court and seeking to direct its management of ethical questions.[166]

Other Views:

- Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 HOFSTRA L. REV. 557 (2024), *available at* https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=3261&context=hlr.
- Veronica Root Martinez, *Supreme Impropriety? Questions of Goodness and Power*, LAW & CONTEMP. PROBS. (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4685507#.
- Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443 (2013), *available at* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2389&context=facsch_lawrev.
- James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 THE PROF. LAW. (2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690391.

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[166] Responding to a moderator question at the 2024 Ninth Circuit Judicial Conference, Justice Elena Kagan expressed her individual view that although the Justices' Code of Conduct has "good" rules, "the thing that can be criticized is . . . rules usually have enforcement mechanisms attached to them," and "this set of rules does not." Devon Cole, *Justice Elena Kagan says Supreme Court's code of conduct needs an enforcement plan. Takeaways from her wide-ranging comments.*, CNN (July 25, 2024), https://www.cnn.com/2024/07/25/politics/kagan-supreme-court-ethics-sacramento-conference/index.html. She "went on to say that she thought the best enforcers of it for the Supreme Court would be lower-court judges, but not the justices themselves." *Id.* She also remarked, "if the chief justice appointed some sort of committee of . . . highly respected judges with a great deal of experience, with a reputation for fairness . . . that seems like a good solution to me." *But see Justice Kagan's Ethics Inversion*, WALL ST. J. (July 26, 2024), https://www.wsj.com/articles/justice-kagans-ethics-inversion-def2ad0f?mod:

> Justice Kagan greatly understates the problems of her proposal. Could her panel issue subpoenas to investigate allegations? How would it sanction Justices who enjoy life tenure? Wouldn't setting up such a system encourage frivolous complaints, filed for partisan PR purposes or to make the process into the punishment?
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> There is also the constitutional question. The Supreme Court was established by the Constitution, but the lower courts were created by Congress. A lower-court tribunal would therefore subject the High Court to supervision by a creature of Congress, which is constitutionally dubious. The lower-court judges would be under political pressure to rule against this or that Justice.
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> Justice Kagan's comments are a serious misjudgment. She seems to think that an external review board would protect the High Court's reputation, but it would do the opposite.

- Russell Wheeler, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS INST. (Nov. 29, 2023), https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism