

Statement of Russell R. Wheeler*

To the Presidential Commission on the Supreme Court of the United States

June 30, 2021—Panel Four

Members of the Commission: Thank you for your June 21 invitation to testify, principally on whether the Supreme Court needs a formal code of conduct and whether revisions to the justices' recusal practices are in order. These are areas fraught with misunderstanding. I hope the commission will use its report in part as a public educational effort to mitigate them.



In this statement, rather than advocate for particular positions, I have tried—consistent with the commission's mission as prescribed in the President's executive order—to sketch "Yes" and "No" responses to several questions that these topics prompt. To summarize:

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- 3 SUPREME COURT CODE OF CONDUCT
- 3 Background: The Code of Conduct for U.S. Judges provides ethical guidance (not laws) for federal judges other than Supreme Court justices.
- 5 Does the Supreme Court need a Code of Conduct that by its terms applies to the justices?
- No The Court has and uses adequate sources of guidance without a dedicated code.
- Yes Such a code would have symbolic value.
- 6 Should Congress create a mechanism by which other judges would investigate and sanction justices' misconduct?
- No Such a mechanism would be inconsistent with the statutory and perhaps constitutional bifurcation of the Supreme Court and the rest of the federal judiciary.
- Yes There is precedent for judges who are lower in the judicial hierarchy to consider misconduct complaints of judges above them in the hierarchy.
- 9 SUPREME RECUSALS
- 9 Should the justices make recusal and disqualification decisions on their own?
- Yes Any mechanism for review of such decisions could violate the Constitution's "one Supreme Court" mandate, and could provoke unnecessary disharmony.
- 10 No Congress and the Court should at least explore whether formal or informal mechanisms could provide litigants assurance that justices are not being judges in their own cases.
- 11 Should Congress (or the Court) Require Justices to Make Public Their Reasons for Recusal and for Denying Disqualification Motions?
- 11 Yes Explanations can force justices to think through the reasons for their actions and provide assurance they have done so.

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11 No Requiring explanations may risk disclosure of legitimately private matters, discourage judges from recusing to avoid such disclosure, and do so in the absence of conventional factual record.



The regulation of federal judges’—including justices’—ethics has been a recurrent topic throughout American history. In just the last half century, aberrant federal judicial behavior¹ including the Justice Fortas controversy,² prompted the Judicial Conference to adopt its Code of Conduct for United States Judges³ in 1973, and Congress to enact the 1980 Judicial Conduct and Disability Act.⁴ Judicial impeachments and convictions in the 1980s led Congress to create the National Judicial Discipline and Removal Commission.⁵ Congressional concern early in this century over the judiciary’s administration of the 1980 statute led Chief Justice Rehnquist to appoint the committee chaired by Justice Breyer that produced the 2006 report to the U.S. Judicial Conference on the Act’s implementation.⁶ Controversies about the conduct of Supreme Court justices a decade ago prompted Chief Justice Roberts to devote his 2011 year-end report⁷ almost entirely to the subject, seeking, as he said, to “dispel some common misconceptions” about federal judicial ethics regulation and the Supreme Court. Criticisms of the justices and calls for further action from legislators and others has continued unabated since then.⁸

¹ See, e.g., Chandler v. Judicial Council, 398 U.S. 74 (1970)

² Glass, Abe Fortas Resigns from Supreme Court, May 15, 1969, Politico, May 14, 2017, available at <https://www.politico.com/story/2017/05/14/abe-fortas-resigns-from-supreme-court-may-15-1969-238228>

³ Available at

https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf

⁴ Codified at Title 28. Ch. 16

⁵ Its 1993 report is available at <https://www.fjc.gov/content/report-national-commission-judicial-discipline-and-removal-0>

⁶ Implementation of the Judicial Conduct and Disability Act of 1980, available at

<https://www.fjc.gov/content/implementation-judicial-conduct-and-disability-act-1980-report-chief-justice-0>. Full disclosure: while at the Judicial Center and shortly thereafter, I was in essence the committee’s staff director.

⁷ Available at <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>

⁸ References to recent developments are in Case, A Case for the Status Quo in Supreme Court Ethics, 33 Geo. J. Legal Ethics 397 (2020). See also the items collected at the website of the advocacy group, Fix the Court, at <https://fixthecourt.com/news/>

A sample of recent activity includes S. 956, 117th Congress, Supreme Court Transparency Act, requiring the Administrative Office of the U.S. Courts to establish a searchable data base of Justices financial disclosure, available at <https://www.congress.gov/bill/117th-congress/senate-bill/956/text?q=%7B%22search%22%3A%5B%22Supreme+Court+Ethics+Act%22%5D%7D&r=1&s=2>;

HR 6017 (Twenty-First Century Courts Act), 116th Congress, requiring the Supreme Court to issue a code of conduct for the court, amending the judicial disqualification statute, discussed below, to require justices and judges to explain disqualifications, with exceptions, on-line financial disclosure reports, and other provisions, available at <https://www.govinfo.gov/content/pkg/BILLS-116hr6017ih/html/BILLS-116hr6017ih.htm>; H.R. 1057, and identical S. 393, Supreme Court Ethics Act, requiring the Judicial Conference to issue a code of conduct applicable to all federal judges and justices, available at <https://www.congress.gov/bill/116th-congress/house-bill/1057/text?q=%7B%22search%22%3A%5B%22HR+1057%2C+116th+Congress%22%5D%7D&r=2&s=4>.

An example of recent journalistic comment is Timothy O’Brien, Supreme Court’s Ethics Problems are Bigger than Amy Coney Barrett, Chicago Tribune, May 4, 2021, recounting controversy over recent book deals and outside-funded travel, available at

[HTTPS://WWW.CHICAGOTRIBUNE.COM/OPINION/COMMENTARY/CT-OPINION-SUPREME-COURT-ETHICS-BOOK-DEAL-OBRIEN-20210504-ULZR7AZB3ZC5BDDV6MRF3XCJZY-STORY.HTML](https://www.chicagotribune.com/opinion/commentary/CT-OPINION-SUPREME-COURT-ETHICS-BOOK-DEAL-OBRIEN-20210504-ULZR7AZB3ZC5BDDV6MRF3XCJZY-STORY.HTML)

Regulating judicial conduct requires balancing the protection of independent judicial decision making while demanding some measure of public accountability by judges. Regulation must protect impartiality in judicial dispute resolution while allowing judges some engagement in the life of the community and the law. It must respect the need for transparency against judges' legitimate need for privacy.

SUPREME COURT CODE OF CONDUCT

Background The Judicial Conference of the United States has adopted, and occasionally revises, its "Code of Conduct for United States Judges." Two things about the Code bear emphasis: to whom it applies and its purpose.

The Code's "Introduction" says it "applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges."

By these terms, the Code does not "apply" to members of the Supreme Court. This arrangement is consistent with Congress's 1939 decision to separate the administration of the bulk of the federal judiciary from the administration of the Court. That decision merits brief mention because it is relevant to the current debate over Supreme Court ethics regulation.

Congress adopted the 1939 Administrative Office Act in the twilight of the judicial council era and before the trend in state courts to seek unified court systems with administrative authority vested in the jurisdiction's highest court. Instead, the 1939 Act vested supervisory administrative authority over the lower courts in groups of judges: the 17-year-old Conference of Senior Circuit Judges (later renamed the Judicial Conference), and the newly created judicial councils. The Conference's agent was the (also) newly created Administrative Office of the U.S. Courts, to which Congress transferred the administrative duties then performed by the Justice Department.⁹

By its silence, the Act left Supreme Court administration to the Court. The Court's involvement with the Judicial Conference was limited to the chief justice's service as the Conference's presiding officer and the Court's role in appointing the director of the Administrative Office (a task since redelegated to the chief justice alone¹⁰). (Pursuant to later statutes, referenced below, the justices also file certain financial reports for review by a Judicial Conference committee.)

Congress acted in 1939 on the practical view that the justices tend to be unfamiliar with the administrative dynamics of the other federal courts. Too, the justices did not want to be responsible for any misdeeds of a court official in some distant place. And some justices, thought, as did Justice Brandeis, "that it was the duty of the Court to adjudicate, not to administer."¹¹ By the same token, the judges of courts of appeals and district courts are unfamiliar with the Court's administrative challenges.

As to the Code's purpose, a federal court repeated a common misconception by stating, in 2001, that the "Code of Conduct is the law with respect to the ethical obligations of federal judges."¹²

⁹ See for an introductory explanation, Wheeler, *A New Judge's Introduction to Federal Judicial Administration* (2003), available at <https://www.fjc.gov/sites/default/files/2012/NewJudge.pdf>. See also Peter Fish, *The Politics of Federal Judicial Administration*, 128, 137-42 (1973). See in particular, Title 28, United States Code, Sections 331, 332 and chapters 41, 42, and 45.

¹⁰ 28 U.S.C. § 601

¹¹ Quoted in Fish, *The Politics of Federal Judicial Administration* 128 (1973).

¹² *U.S. v. Microsoft, U.S.*, 253 F.3d 34, 113 (D.C. Circuit, 2001)

In fact, the Judicial Conference has no authority to require that judges comply with the Code. The Code itself makes clear that, unlike a statute (and unlike some state judicial conduct codes), the U.S. Judicial Conduct Code is advisory. Its “Commentary” on Canon 1 says “The Code is designed to provide guidance to judges and nominees for judicial office”—language the Chief Justice quoted in his 2011 report. “Many of the restrictions in the Code,” the Commentary continues, “are necessarily cast in general terms, and judges may reasonably differ in their interpretation.”

The notion nevertheless persists that the Code “binds” lower court judges as would a statute, and that a Code for the Supreme Court would similarly “bind” the justices: a court-reform group complained that the “Supreme Court . . . does not even have a binding code of conduct.”¹³ A lawyer journalist wrote in 2015 that “the Justices . . . are the only judges in the United States who are not bound by a formal, full-blown ethics code.”¹⁴ A legislator objected that some recent actions by justices “could violate the Judicial Code of Conduct, but because unlike all other federal judges, [they] are not bound by a code of ethics, they are immune from any judicial investigations into misconduct.”¹⁵

There is, of course, “law” governing the justices’ conduct, including disqualification requirements, outside income and gift limits, as well as requirements to file annual financial disclosure reports with the Judicial Conference Committee on Financial Disclosure.¹⁶

The 1980 Judicial Conduct Act creates an additional “law” for lower court judges by the ground it establishes for filing a misconduct complaint: judges risk sanctions if they “engage . . . in conduct prejudicial to the effective and expeditious administration of the business of the courts.”¹⁷ The Conference’s rules for the administration of the Act acknowledge that these words are “not subject to precise definition” and thus provides some examples. It adds that the Code of Conduct:

sets forth behavioral guidelines for judges. While the Code’s Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules.¹⁸

Although the Code includes some specific admonitions—telling judges not to belong to organizations that practice invidious discrimination¹⁹, for example—much of it is hortative and

¹³ From the website of the group “Demand Justice” available at https://demandjustice.org/priorities/supreme-court-reform/?utm_content=cr&utm_source=djo&utm_medium=web&utm_content=hp27,%202015

¹⁴ Caplan, Does the Supreme Court Need a Code of Conduct?” *The New Yorker*, July 27, 2015, available at <https://www.newyorker.com/news/news-desk/does-the-supreme-court-need-a-code-of-conduct>

¹⁵ <https://elizabethwarren.com/plans/restore-trust>

¹⁶ Citations to various statutory restrictions on outside earned income, honoraria, and employment, as they pertain to the federal judiciary are in §1010 of the Judicial Conference’s implementing regulations, contained in 2 Guide to Judiciary Policy Part C, Ch. 10, available at

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02C-Ch10.pdf>; Citations to

various statutory restrictions on gifts as they pertain to the federal judiciary are in §620 of the Judicial Conference’s implementing regulations, contained in 2 Guide to Judiciary Policy Part C, Ch. 6, available at

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02C-Ch06.pdf>

¹⁷ 28 U.S.C. §351

¹⁸ Commentary on Rule 4, available at

https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf

¹⁹ Code of Conduct Canon 2C

aspirational: “[a] judge,” for example, “should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”²⁰ The Code says a “judge should dispose promptly of the business of the court,” an admonition amplified by the commentary’s advising judges to “monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs [and] to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission.”²¹ These words, however, do little to clarify how to assess when behavior contrary to these well-taken generalities constitutes misconduct.

The 1980 Judicial Conduct Act, as amended, authorizes anyone to file a judicial misconduct complaint with the respective chief circuit judge. The chief judge, in turn—using the statutory standard of “conduct prejudicial” to effective administration of the courts’ business—must either (1) dismiss or conclude the complaint (on various grounds), or, (2) if she determines that the complaint involves matters “reasonably in dispute,” appoint a special investigative committee of district and circuit judges to report to the judicial council (composed of district and circuit judges) for action it deems appropriate.²²

Does the Supreme Court need a Code of Conduct that by its terms applies to the justices?

NO.

In his 2011 report, the Chief Justice delineated numerous sources to which the justices turn for advice, starting with the Code. He said that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations”—something justices regularly say, particularly during congressional appropriations hearings, the principal forum in which justices’ ethical regulations get discussed.²³

The Chief Justice added that justices “may also seek advice . . . from the Judicial Conference’s Committee on Codes of Conduct,” which is charged with providing advisory opinions to judges who seek guidance as to whether a contemplated action comports with the code. He identified other sources of advice available to the justices—“judicial opinions, treatises, scholarly articles, . . . disciplinary decisions, . . . the Court’s Legal Office . . . and . . . their colleagues.” Thus, he concluded, “the Court has no reason to adopt the Code of Conduct as its definitive source of ethical guidance.”

YES

The strongest argument for the Court’s adopting a code is not that the justices are unmoored as to their ethical obligations—they’re not—but rather as a statement that the justices have thought through those obligations, put them in writing, and intend to honor them.

The Chief Justice’s nuanced argument about the plethora of guidance available to the justices has not gained much traction. Calls, including proposed legislation, requiring the Court to adopt either the Conference Code or its own Code have persisted. And apparently at least some of the justices believe the idea merits consideration. Justice Kagan reported, at the Court’s 2019

²⁰ Canon 2A

²¹ Canon 3 (A) (5) and its Commentary

²² See Title 28, Ch. 16

²³ See Justice Alito’s and Justice Kagan’s remarks at the March 7, 2019, hearing of the House Appropriations Subcommittee on Financial Services and General Government, starting around minute 54, available at <https://appropriations.house.gov/legislation/hearings/supreme-court-budget-hearing>

appropriations hearing, that “the Chief Justice is studying the question of whether to have a code of judicial conduct that’s applicable only to the . . . Court, so that’s something that we have not discussed as a conference yet and it has pros and cons, I’m sure, but it’s something that’s being taken very seriously.”²⁴ (There have been no Supreme Court appropriations hearings since then and thus no opportunity, at least in that forum, to learn of any developments.)

The Court’s adopting its own code would also decrease pressure from Congress either to legislate a code or direct the Judicial Conference to do so and stop some of the “Court-has-no-code” cacophony from public discussion of Supreme Court ethics.

Should Congress create a mechanism by which other judges would investigate and sanction justices’ misconduct?²⁵

Judicial ethics regulations are two-pronged. The Code, as well as statutory reporting and other requirements aim to help judges stay out of trouble. Other mechanisms—such as those established by the 1980 Act—to receive and investigate allegations of misconduct and impose sanctions if misconduct is established.

NO

Various proposals have sought to create a complaint-receiving, sanctions-imposing mechanism for the Supreme Court analogous to the 1980 Act. As far as I am aware, the most recent comprehensive effort was a 2011 House bill,²⁶ which went nowhere.²⁷ It illustrated the difficulty of crafting a Supreme Court justice misconduct act.

First, it would have applied the Conference’s Code to the Supreme Court and required the Judicial Conference to “establish procedures, modeled after” the 1980 Judicial Conduct Act, to receive “complaints alleging that a justice . . . has violated the Code”. That would have created separate grounds for sanctionable federal judicial conduct—the Code for justices, the Act’s standard for other judges.

Second, it would have created a panel of retired justices and judges to review a justice’s denial of a disqualification motion, unaware that it was creating a limited jurisdiction court of last resort in possible violation of the constitutional mandate that there be “one Supreme Court.” (Recusal and disqualification decisions are not administrative acts but rather judicial decisions, subject to appellate review.)

Despite the 2011 bill’s flaws, it was probably correct that, if Congress is to create a Supreme Court disciplinary mechanism, lower court judges or retired justices are the most (only?) plausible officials to staff it.

But the justices, at least, argue that lower-court judges simply have no legitimate role in the administration of the Supreme Court. The Chief Justice in his 2011 year-end report explained that the Constitution created the Court while Congress created the other federal courts. Pursuant

²⁴ Transcribed from video of the March 7, 2019, hearing of the House Appropriations Subcommittee on Financial Services and General Government, starting around minute 102, available at <https://appropriations.house.gov/legislation/hearings/supreme-court-budget-hearing>

²⁵ I am grateful to Professor Arthur Hellman for his review of an earlier draft of this section. He is, of course, not responsible for my analysis.

²⁶ Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Congress, available at <https://www.congress.gov/bill/112th-congress/house-bill/862/text>

²⁷ <https://www.brookings.edu/opinions/regulating-supreme-court-justices-ethics-cures-worse-than-the-disease/>

to that bifurcation, Congress, he added, also “instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower courts, [it and] its committees have no mandate to prescribe rules or standards for any other body.”

Although he was referencing conduct codes, not misconduct enforcement, it stands to reason that if lower court judges should have no role in the former, they should have none in the latter. This is essentially the reason the Conference gave when recommending removal of the justices from a 1975 precursor of the 1980 Act: “Sufficient means exist through the impeachment process and further that it would be inappropriate for judges of the inferior courts to pass judgment on the action of a Justice of the Supreme Court. Moreover, the Judicial Conference has no jurisdiction over the Supreme Court.”²⁸ The Court stands apart from the other federal courts. Congress, for example, authorizes the temporary transfer of district judges to serve on the courts of appeals, and vice versa²⁹ but has made no provision for such transfers involving Supreme Court justices.

Justice Kennedy framed the argument somewhat differently in a 2011 appropriation hearing. His topic was applying the Conference’s Code to the justices, but the principle he stated is broader. He referred “to “an institutional dissonance problem. [The Code of Conduct] rules are made by the Judicial Conference . . . , which are district and appellate judges, and we would find it structurally unprecedented for district and circuit judges to make rules that supreme court judges have to follow. There’s a legal problem in doing this.”³⁰

Justice Alito said somewhat the same thing in 2019 hearings: the reason “we don’t regard ourselves as being legally bound by [the Conference’s Code] can be found in the structure of Article III of the Constitution, which says that the judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may create.” Those courts, he continued, “are subordinate and we think—I think—that it is inconsistent with the constitutional structure for lower court judges to be reviewing the [word unclear] by Supreme Court justices for compliance with ethical rules. And our situation is not exactly the same as lower court judges”³¹ Put aside that the Code doesn’t create “rules that [judges] have to follow,” and that the immediate “reason” the Conference code doesn’t apply to the justices is because the Code says it doesn’t. The basic argument is that lower court judges have no business passing judgment on the conduct of the justices.

There are also practical objections. For one thing, more so than with district and circuit judges, partisans would weaponize a judicial conduct complaint procedure for the justices, drawing in

²⁸ Report of the Proceedings of the Judicial Conference, March 1975, available at <https://www.uscourts.gov/sites/default/files/1975-03.pdf>. See also Arthur Hellman, An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings, 32 *Georgetown Journal of Legal Ethics*, 341, 348-49 (2019). For a discussion of the Act’s evolution, see Michael J. Remington, Circuit Council Reform: A Boat Hook for Judges and Court Administrators, 1981 *BYU L. Rev.* 695 (1981). Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1981/iss3/11>

²⁹ See Title 28, ch. 13.

³⁰ April 14, 2011, House Committee on Appropriations, Subcommittee on Financial, Services and General Government Holds a Hearing on the U.S. Supreme Court Budget

³⁰ <https://www.brookings.edu/wp-content/uploads/2019/06/RWheeler-Stmt-6.21.19-HJC-Cts-Subcom-1-3-converted.pdf>

³¹ Transcribed from video of the March 7, 2019, hearing of the House Appropriations Subcommittee on Financial Services and General Government, starting around minute 54, available at <https://appropriations.house.gov/legislation/hearings/supreme-court-budget-hearing>

not only the justices but also those who appoint the panel. Legislators, for example, might be more willing to file complaints than they are to invoke the more cumbersome impeachment process.

And, as a practical matter, creation of a complaint procedure would need a small bureaucracy to process the flood of complaints—almost all of them frivolous, if filing patterns under the 1980 statute as a guide—searching for a possible needle in the haystack.

YES

An aspirational code may be important symbolically, but dealing with misconduct requires enforcement of rules, including the threat of sanctions. And a properly constructed enforcement mechanism for the Supreme Court can be consistent with the design of the federal judiciary.

First, it is incongruous to argue that it is “inappropriate” or disharmonious for district and circuit judges to act on misconduct complaints about higher-level judges (i.e., the justices) while allowing district judges to act on misconduct complaints about higher-level judges’ (i.e., circuit judges), which they do under the 1980 Act as members of the special committees and judicial councils.

At the least, there was a paucity of debate in the 1787 convention on federal courts other than the supreme court. That makes it difficult to know whether (as Justice Alito implied) the Constitution’s creating the Supreme Court but leaving creation of other courts to Congress, creates a bar against district and circuit judges’ involvement in the regulation of Supreme Court justices’ ethics.

Second, the state experience may be instructive, at least to the question of how non-supreme court justices exercise their authority to evaluate complaints of supreme court justices’ misconduct. All state judicial conduct bodies³² include—indeed most are dominated by—non-supreme court justices, but all or at least almost all include court-of-last-resort judges within the category of judges about whom complainants may file. The footnote reports three examples from my review of all states’ commissions’ websites.³³

³² Based on the National Center for State Courts’ Center for Judicial Ethics’ “Composition of State judicial conduct commissions” and its links to the websites of each state’s agency, at “State judicial conduct organizations”, both available at <https://www.ncsc.org/topics/judicial-officers/ethics/center-for-judicial-ethics>

³³ The Alabama Court on the Judiciary, comprising lower court judges and lawyers, adjudicates complaints filed by the Judicial Inquiry Commission, similarly constituted, which investigates complaints against judges, defined in the Commission’s rules as “any judge or justice of the judicial system of this state.” See text at <http://judicial.alabama.gov/appellate/judiciary> and <http://judicial.alabama.gov/appellate/jic> (In 2016, the Alabama Supreme Court upheld the then-chief justice’s second removal, by suspension, from that court as recommended by, the state’s Court on the Judiciary (which comprises judges, lawyers, and laypersons (and no members of the Supreme Court); Faulk, Roy Moore’s suspension upheld by Alabama Supreme Court, Birmingham Real-Time News, April 17, 2016, available at https://www.al.com/news/birmingham/2017/04/suspended_alabama_supreme_cour.html

The California Commission Judicial Performance consists of lower court judges, attorneys, and “lay citizens;” its “jurisdiction includes all judges of California’s superior courts and the justices of the Court of Appeal and Supreme Court.” See <https://cjp.ca.gov>

The Texas Commission on Judicial Conduct, similarly constituted, investigates complaints about judges, including “any Justice or Judge of the Appellate Courts.” See http://www.scjc.state.tx.us/media/8115/procedure_rules.pdf and the Frequently Asked Questions as to whom the commission may and may not investigate at <http://www.scjc.state.tx.us/faq>

These arrangements are consistent with the dominant state court administrative structure, in which most of the courts of the state (including the supreme court) are part of the state judicial system, and the supreme court or chief justice is the administrative head of the system. I know of no reason to believe, however, that state judges and other commission members are any less respectful, in an institutional sense, of their supreme court justices than are federal judges of the justices of the U.S. Supreme Court. (I worried in earlier writings about at least the specter of lower court judges imposing on a justice one of the sanctions authorized by the Act: “ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint.”³⁴ In retrospect, my worries may have placed insufficient faith in the good sense of federal judges. And, although I have expressed opposition to this idea, most recently in 2019 House Judiciary Subcommittee testimony,³⁵ at this juncture, the matter seems to me somewhat more nuanced.)

SUPREME COURT RECUSAL

Section 455 of Title 28 directs “any justice [or] judge” to disqualify “himself [sic] in any proceeding in which his impartiality might reasonably be questioned” (section a) or in a number of other situations, most involving financial matters (section b). Parties may waive disqualification under (a) but not (b). Canon 3C of the Code of Conduct repeats the statute, mostly verbatim. Judges may disqualify themselves in response to motions or recuse themselves *sua sponte*.

The Chief Justice said in his 2011 report that the justices comply with the statute, while noting that “the limits of Congress’s power to require recusal has never been tested.”

Should the justices make recusal (and disqualification) decisions solely on their own?

YES

The Chief Justice’s 2011 report said that, when faced with a question of recusal or disqualification, “the individual Justices” like district and circuit judges, “decide for themselves whether recusal is warranted,” possibly “examin[ing] precedent and scholarly publications, seek[ing] advice from the Court’s Legal Office, consult[ing] colleagues, and even seek[ing] counsel from the [Judicial Conference’s] Committee on Codes of Conduct.” (The majority of that committee’s published advisory opinions concern recusal and disqualification.) “As in the case of the lower courts,” the Chief Justice continued, “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.”

But, he added, unlike in the lower courts, there “is no higher court to review a Justice’s decision not to recuse in a particular case. This is a consequence of the Constitution’s command that there be only ‘one supreme Court.’” By implication, some review process involving other judges would run afoul of the same command.

He also considered the possibility of a review mechanism within the Court: “if the Supreme Court reviewed [individual justices’ recusal] 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.” In other words, allowing justices to review a colleague’s ethics could impair

³⁴ 28 U.S. C. § 354 (a) (2) (A) (1)

³⁵ <https://www.brookings.edu/wp-content/uploads/2019/06/RWheeler-Stmt-6.21.19-HJC-Cts-Subcom-1-3-converted.pdf>

collegiality or, alternatively, encourage strategic justices to use a motion requesting disqualification of a colleague to effect a temporary change in the composition of the court and thus manipulate the court's law-declaring function.

Moreover, the Chief Justice continued, "lower court judges can freely substitute for one another. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge's place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership. A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case." (A recusal creating a four-four tie, although rare, means that the decision below stands as if the Court had not agreed to review the case.)

Justice Breyer referred to somewhat the same situation in the disqualification context, noting the heightened demands for justices to sit in cases because other judges cannot be substituted. It is possible, he said, that the parties could "try to choose their panel . . . [by removing a Justice] So what that means is that there's an obligation to sit, where you're not recused, as well as an obligation to recuse. And sometimes those questions are tough and I really have to think through and I have to make up my own mind. Others can't make it up for me. And that's a very important part, I think, of being an independent judge."³⁶

Finally, some scholars have argued that Congress has no authority to say when the Justices must disqualify themselves, arguing that the judicial power that the Constitution vests in the Supreme Court includes the sole authority to make recusal decisions.³⁷

NO

Having a justice—or any judge—decide their own disqualification motions violates the age-old adage that no one should be a judge in her own case. Scholars have argued that such regulation is well within Congress's authority, noting that Congress in 1789 gave shape to the Court and has subsequently defined its term, its size, the justices' oath of office, their former circuit-riding obligations, and the court's support offices (the Marshal, Clerk of Court, Reporter of Decisions, and Librarian).³⁸ The Court or Congress could and should at least explore establishing a recusal procedure that reflects the key elements of good litigation: enable litigants to frame the recusal question, provide an impartial decision maker and encourage the challenged judge to respond to a disqualification motion.³⁹

To say the least, we have little precedent on the "one Supreme Court" language. It is arguable that a Conference-established "process" in which only active justices participated clearly would not violate the "one Supreme Court" mandate.

³⁶ Federal News Service, October 5, 2011, Hearing of the Senate Judiciary Committee Subject: "Considering the Role of Judges Under the Constitution of the United States" Chaired by: Senator Patrick Leahy (D-VT)

³⁷See, e.g., Louis Virelli III, *The (UN)constitutionality of Supreme Court Recusal Standards*, 2011 Wisconsin L. Rev. 1208 (2011)

³⁸See, Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 *Georgetown Journal of Legal Ethics* (2013)

³⁹See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 *U.Kan. L. Rev.* 531 (2005), especially text at notes at 239 to 274.

The commission may want to look for lessons from the state judiciaries, which have been more active than federal courts in exploring mechanisms by which challenged judges refer disqualification motions to other judges⁴⁰—in part because campaign contributions raise disqualification problems. I have not investigated whether operation of a Texas rule—requiring a justice either to grant a disqualification motion or refer it to the other justices for decision without the subject justice’s participation⁴¹—has had the results, noted above, that Chief Justice Robert said might occur were a similar rule to govern the U.S. Supreme Court.

Should Congress (or the Court by its Rules) Require Justices to Make Public Their Reasons for Recusals and for Denying Disqualification Motions?

YES

The reasons for requiring all federal judges to explain why they deny non-frivolous disqualification motion apply to the justices. Such a requirement can help ensure accountability to the judicial oath of impartiality. What a judge may regard initially as an obvious conclusion may become less obvious when the judge cannot explain it in a reasoned opinion. In the same vein, formal explanations promote due process by demonstrating that judicial decisions are well reasoned rather than arbitrary. They promote transparency in the recusal process as a whole, and they provide guidance to other judges by establishing common law interpretations of vague or ambiguous recusal requirements. In 2004, Justice Scalia refused for some time to explain why he refused to disqualify himself in litigation involving a vice-presidential task force. When he finally issued a memorandum of explanation,⁴² the general reaction was that his explanation was instructive, even if it was not timely.

As to recusals, just as requiring financial disclosure promotes transparency and accountability in government, so too justices’ providing at least brief statements for why they decide not to participate in a case would serve the same values. Not stating the reasons for recusals fuels curiosity in the press⁴³ that covers the court and from attorneys who argue before it. More broadly, some argue it “imperils [the Justices’] accountability and legitimacy,” especially because the Court regularly offers reasons for its other collective decisions.⁴⁴

NO

Recusals and disqualification may involve delicate matters involving justices’ family members, and third parties, the airing of which would serve little public purpose. Requiring explanations in such situations could lead justices to eschew recusal rather than put private matters on the record.

⁴⁰ See generally Wheeler and Reddick, Judicial Recusal Procedures: A Report on the IAALS Convening July 2017, available at https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf

⁴¹ Texas Rule of Appellate Procedure 16.3, available at [https://casetext.com/rule/texas-court-rules/texas-rules-of-appellate-procedure/section-one-general-provisions/rule-16-disqualification-or-recusal-of-appellate-judges/rule-163-procedure-for-recusal#:~:text=Rule%2016.3%20%2D%20Procedure%20for%20Recusal%20\(a\)Motion..participate%20in%20deciding%20the%20case](https://casetext.com/rule/texas-court-rules/texas-rules-of-appellate-procedure/section-one-general-provisions/rule-16-disqualification-or-recusal-of-appellate-judges/rule-163-procedure-for-recusal#:~:text=Rule%2016.3%20%2D%20Procedure%20for%20Recusal%20(a)Motion..participate%20in%20deciding%20the%20case)

⁴² Memorandum from Justice Scalia on *Chaney v. U.S. District Court*, 541 U.S. 913 (2004)

⁴³ See, for example, Tony Mauro, Why Does Justice Stevens Recuse in Agent Orange cases”, Blog of the Legal Times, March 2, 2009, available at <http://legaltimes.typepad.com/blt/2009/03/why-does-justice-stevens-recuse-in-agentorange-cases.html> or Mike Scarcella, Disclosure Sheds Light on Justice Alito’s Recusals, Blog of Legal Times, 7/17/13 <http://legaltimes.typepad.com/blt/2013/07/disclosure-shedslight-on-justice-alitos-recusals.html>

⁴⁴ Louis J. Virelli III, Congress, the Constitution, and Supreme Court Recusal, 69 Wash. & Lee L. Rev. 1535, 1552 (2012)

Invoking statutory exceptions for such matters could be revealing by themselves. Although legislative proposals to require recusal explanations have provided for exceptions in areas involving personal delicate matters,⁴⁵ it may be difficult to fashion a rule that exempts such delicate situations from disclosure while still requiring disclosure of more mundane circumstances. Even requiring a simple statement that a recusal is for other than financial conflicts might give rise to speculation as to the real reason.

In a 2015 appropriations hearing, Justice Kennedy referred to the “argument that the reason for recusals should be more apparent. I'm not sure about that,” he said. “In the rare cases when I recuse, I never tell my colleagues, oh, I'm recusing because my son works for this company and it's a very important case for my son. Why should I say that? That's almost like lobbying. So, in my view, the reason for recusal should never be discussed.”⁴⁶

And in 1972, then-Associate Justice Rehnquist explained why he was denying a disqualification motion (involving a case with which he had some contact as a Justice Department official), while adding that judges’ explaining the reasons for denying such motions, except “in the peculiar circumstances” of that case, would not be “desirable or even appropriate.” Those circumstances were, he said, a misreading of a statute rather than a factual dispute where there was no factual record.⁴⁷



As the commission is well aware, these two topics, while vital and current, do not exhaust matters of Supreme Court conduct and ethics, including such matters as readily accessible financial disclosure forms and blind trust. Within the short time available to me to prepare this statement, I have developed no comments on them.

⁴⁵ See HR 6017 (Twenty-First Century Courts Act), 116th Congress, described supra in note 8.

⁴⁶ Quoted at <https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236>

⁴⁷ Laird v. Tatum, Memorandum Opinion, 409 U.S. 824 (1972)