

SUPREME COURT ETHICS REGULATION: AMENDING THE ETHICS IN GOVERNMENT ACT OF 1978 TO ADDRESS JUSTICES' UNETHICAL BEHAVIOR

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I. INTRODUCTION

The United States Supreme Court is tasked with resolving difficult questions of law and its decisions have a profound impact on the nation.¹ To maintain its legitimacy, the Court must be perceived as a fair and impartial body,² particularly when it comes to deciding key politically sensitive issues. However, the Court's legitimacy and ability to remain independent has been questioned. The Justices' decisions are increasingly viewed as polarized along ideological lines.³ The Court's 6-3 conservative majority exemplified

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1. See United States Courts, *About the Supreme Court*, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> [<https://perma.cc/HVV4-UAY3>].

2. See Michael J. Nelson & Alicia Uribe-McGuire, *Confidence in the US Supreme Court is Declining, and That Puts its Decisions at Risk from Congress*, LONDON SCH. OF ECON., U.S. POL. & POL'Y BLOG (July 24, 2018), <https://blogs.lse.ac.uk/usappblog/2018/07/24/confidence-in-the-us-supreme-court-is-declining-and-that-puts-its-decisions-at-risk-from-congress/> [<https://perma.cc/QCB5-K3V3>]; Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2254 (2019) (reviewing RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) [hereinafter *The Legitimacy Dilemma*].

3. See Ganesh Sitaraman & Daniel Epps, *How to Save the Supreme Court*, 129 YALE L.J. 148, 148 (2019) (arguing that increasingly partisan battles over Supreme Court nominations will lead to Supreme Court Justices that are more likely to consistently vote along party lines which ultimately threatens the Court's legitimacy); see also Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018),

this perception during the 2021-2022 term, where they issued controlling and monumental decisions on hot-button cases involving reproductive rights, Second Amendment rights, and climate change regulations.⁴ The public's declining confidence in the Supreme Court⁵ and the Court's faltering legitimacy⁶ have, in turn, fueled calls for court reform.⁷ In response, scholars have proposed several measures to reform the Court.⁸ In 2021, President Biden also addressed the court reform debate by creating the Presidential Commission on the Supreme Court of the United States.⁹

<https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/6WSP-8QK2>]; Alison Durkee, *Most Americans Don't Think Supreme Court Acts In A "Serious And Constitutional Manner" And Want Reforms, Poll Finds*, FORBES (Mar. 15, 2022, 3:26 PM), <https://www.forbes.com/sites/alisondurkee/2022/03/15/most-americans-dont-think-supreme-court-acts-in-a-serious-and-constitutional-manner-and-want-reforms-poll-finds/?sh=153277b95a8b> [<https://perma.cc/Y382-P8FY>]; Angie Gou, *As Unanimity Declines, Conservative Majority's Power Runs Deeper Than the Blockbuster Cases*, SCOTUSBLOG (July 2, 2022, 8:21 PM), <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/> [<https://perma.cc/P7WA-VFWM>]; Angie Gou, et al., *Stat Pack for the Supreme Court's 2021-22 Term*, SCOTUSBLOG (July 1, 2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf> [<https://perma.cc/7D8W-4JJS>].

4. Robert Barnes, *With Sweep and Speed, Supreme Court's Conservatives Ignite a New Era*, WASH. POST (July 2, 2022), <https://www.washingtonpost.com/politics/2022/07/02/supreme-court-conservative-majority/> [<https://perma.cc/KW5Z-F4CM>].

5. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> [<https://perma.cc/QJ79-HF37>].

6. *The Legitimacy Dilemma*, *supra* note 2, at 2253 (describing how Fallon divides legitimacy into three categories: moral legitimacy, sociological legitimacy, and legal legitimacy).

7. See Harper Neidig, *Watchdog Group Calls for Supreme Court Reforms*, THE HILL (July 8, 2021, 10:00 AM), <https://thehill.com/regulation/562028-watchdog-groups-calls-for-supreme-court-reforms> [<https://perma.cc/CG8Y-S333>]; see also *Two Dozen Legal Ethics Scholars Ask Chief Justice Roberts for an Ethics Code*, FIX THE COURT (Feb. 3, 2022) <https://fixthecourt.com/2022/02/two-dozen-legal-ethics-scholars-ask-chief-justice-roberts-ethics-code/> [<https://perma.cc/5JS6-TZEY>]; Sam Levine, *Democrats Introduce Bill Requiring Term Limits for US Supreme Court Justices*, THE GUARDIAN (July 27, 2022, 9:14 AM), <https://www.theguardian.com/law/2022/jul/27/supreme-court-justices-term-limits-democrats-bill> [<https://perma.cc/G9EK-6VH8>].

8. See Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. 821, 823, 837, 841, 849 (2021) (discussing court reform measures such as a "balanced" court, Supreme Court lottery, term limits, court packing, and imposing a Code of Conduct on the Supreme Court).

9. See Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 9, 2021); see also PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, WHITE HOUSE, <https://www.whitehouse.gov/pscotus/> (stating that the "Commission's purpose is to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals").

The Court's legitimacy is further threatened by its lack of a formal written Code of Conduct.¹⁰ Supreme Court Justices, unlike all other judges in the United States, are not bound by a formal code of conduct.¹¹ The absence of a code of conduct allows Justices to engage in ethically dubious behavior¹² that is prohibited for lower court judges.¹³

This Note argues that the Ethics in Government Act of 1978 (EGA)¹⁴ serves as precedent for congressional intervention with judicial transparency and can be used to strengthen the Court's legitimacy. Part II of this Note discusses the origins of the Court's legitimacy dilemma. Part III examines court reform through the adoption of a Code of Conduct for the Supreme Court and provides a summary of the arguments for and against this approach. Part IV explains how the EGA serves as precedent for congressional intervention, examines how the EGA can be used to require additional disclosures from Justices, and suggests amendments that Congress can enact to strengthen the Court's legitimacy. Part V concludes.

II. THE SUPREME COURT'S LEGITIMACY DILEMMA

The Supreme Court's legitimacy has been increasingly questioned in recent years.¹⁵ This threatens the Court's power and authority because, unlike the Legislative and Executive branches, which hold the power to make

10. See Johanna Kalb & Alicia Bannon, *Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency*, BRENNAN CTR. FOR JUST. (Sept. 24, 2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf [<https://perma.cc/TR4B-BBMD>] (arguing that the Supreme Court should itself adopt a Code of Conduct and lay out three recommendations that the Court can adopt to strengthen the Court's legitimacy).

11. KEVIN M. LEWIS, CONG. RESEARCH SERV., LSB10255, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS, 1, 2 (2022).

12. See *Recent Ethical Lapses by Supreme Court Justices*, FIX THE COURT, <https://fixthecourt.com/wp-content/uploads/2022/05/Recent-Ethical-Lapses-by-the-Justices-May-2022.pdf> [<https://perma.cc/A8DB-8KKG>].

13. *Where's the Ethics Code, Chief?*, FIX THE COURT (Sept. 17, 2019), <https://fixthecourt.com/2019/09/wheres-ethics-code-chief/> [<https://perma.cc/ZL3C-9TNJ>].

14. Ethics in Government Act of 1978, 5 U.S.C. app. 4. §§ 101-505 (2018 & Supp. 2020) [hereinafter 5 U.S.C. app. 4].

15. See Amelia Thomson-DeVeaux & Oliver Roeder, *Is The Supreme Court Facing A Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/> [<https://perma.cc/S87J-ERVE>]; see also Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html> [<https://perma.cc/EE9T-2PPA>]; Ruth Marcus, *Opinion, The Supreme Court's Crisis of Legitimacy*, WASH. POST (Oct. 1, 2021, 1:50 PM), <https://www.washingtonpost.com/opinions/interactive/2022/ann-te/naes-supreme-court-crisis-legitimacy/> [<https://perma.cc/7WA2-X3GU>].

laws and enforce them,¹⁶ the judicial branch's institutional power rests on deciding cases in a manner that the public sees as legitimate.¹⁷ While numerous factors are contributing to the Court's decline in public support,¹⁸ this Note will focus on two reasons for the Supreme Court's faltering legitimacy: the politicization of the nomination process and Justices behaving in a manner that would be prohibited if they were lower federal court judges.¹⁹

A. *Politicization Of Supreme Court Nominations*

Under Article II, Section 2 of the Constitution, the President has the power to nominate a Justice, and the Senate has the power to confirm or reject the President's nominee.²⁰ The Constitution gives the Senate discretion to make its own rules, including rules governing the judicial confirmation process.²¹ The President's nominee is sent to the Senate Judiciary Committee, where the candidate is vetted through a series of investigations and hearings.²² The Committee then makes a recommendation, which is sent to the Senate.²³ The Senate will next hold a debate before voting to confirm or reject the nominee.²⁴

Historically, filibusters were rarely used to block Supreme Court nominees.²⁵ To end a filibuster, a cloture motion can be invoked, which traditionally required a supermajority vote of 67 senators (two-thirds) but was later changed to a three-fifths majority.²⁶ The cloture rule for Supreme

16. See Nelson & Uribe-McGuire, *supra* note 2.

17. See *Legitimacy Dilemma*, *supra* note 2, at 2246; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992); Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 906 (quoting Andrew Jackson's response to the U.S. Supreme Court's decision in *Worcester v. Georgia*: "John Marshall has made his decision; now let him enforce it").

18. Nick Niedzwiadek, *Poll: Public opinion of Supreme Court Sags Over Past Year*, POLITICO (Aug. 4, 2021, 6:01 AM), <https://www.politico.com/news/2021/08/04/poll-public-opinion-of-supreme-court-sags-over-past-year-502309> [<https://perma.cc/QN5U-T7HZ>].

19. Kalb & Bannon, *supra* note 10.

20. U.S. CONST. art. II, § 2.

21. U.S. CONST. art. I, § 5

22. BARRY J. MCMILLION, CONG. RESEARCH SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 1, 2 (updated Feb. 22, 2021).

23. *Id.*

24. *Id.*

25. See RICHARD S. BETH, ET AL., CONG. RESEARCH SERV., RL32878, CLOTURE ATTEMPTS ON NOMINATIONS: DATA AND HISTORICAL DEVELOPMENT THROUGH NOV. 20, 2013, at 2, 3 (2018).

26. *Id.* at 6 (explaining a cloture motion traditionally required a two-thirds supermajority vote of sixty-seven senators, but in 1975, the rule was changed to only require a three-fifths majority

Court nominations changed on April 2017 when Democrats used a filibuster to block President Trump's nominee, Neil Gorsuch.²⁷ Senate Majority Leader Mitch McConnell invoked the "nuclear option" after Republicans' attempt to end the Democratic filibuster using a cloture motion failed in a 55-45 vote.²⁸ In a 52-48 party-line vote, Republicans reduced the threshold for advancing Supreme Court nominations from 60 votes to a simple majority of 51 votes.²⁹ The "nuclear option" allowed Republicans to successfully invoke cloture with a simple majority of 55 votes³⁰ and ultimately confirm Neil Gorsuch. This nomination faced backlash, with some critics arguing that Republicans used "underhanded tactics" to fill a "stolen seat."³¹

The "stolen seat" criticism stems from the Republican Party's actions in 2016 when Republican members of the Senate Judiciary Committee refused to consider President Obama's nominee Merrick Garland since only seven months remained of Obama's eight-year term.³² Republicans argued that the American people should have a "voice" in the selection of the next Supreme

vote of 60 senators); U.S. SENATE, *About Filibusters and Cloture*, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm#:~:text=That%20year%2C%20the%20Senate%20adopted,of%20the%20100%2Dmember%20Senate> [<https://perma.cc/YK5B-AP5B>].

27. See Seung Min Kim, et al., *Senate GOP Goes 'Nuclear' on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 8:59 AM), <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937> [<https://perma.cc/H4J4-ELXU>]; see also Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/6S7W-NZYM>].

28. See Flegenheimer, *supra* note 27; see also VALERIE HEITSHUSEN, CONG. RESEARCH SERV., R44819, *SENATE PROCEEDINGS ESTABLISHING MAJORITY CLOTURE FOR SUPREME COURT NOMINATIONS: IN BRIEF 2* (2017).

29. See Flegenheimer, *supra* note 27; see also Wilson Andrews, *How Senators Voted on the Gorsuch Filibuster and the Nuclear Option*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/interactive/2017/04/06/us/politics/gorsuch-supreme-court-vote.html> [<https://perma.cc/Z4TG-2WSD>].

30. See HEITSHUSEN, *supra* note 28, at 1.

31. See The Editorial Board, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html> [<https://perma.cc/VE3M-FX3X>] (arguing that Republicans stole late Justice Scalia's seat from Democrats after the Republican-controlled Senate broke long-standing tradition and refused to consider President Obama's highly respected and qualified nominee); see also MCMILLION, *supra* note 22, at 1.

32. See Domenico Montanaro, *Going "Nuclear": How We Got Here*, NPR (Apr. 4, 2017 1:53 PM), <https://www.npr.org/2017/04/04/522598965/going-nuclear-how-we-got-here> [<https://perma.cc/XH66-U7UN>]; see also Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC NEWS (July 20, 2016, 7:14 AM), <https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541> [<https://perma.cc/482U-5TGG>].

Court Justice by having the newly elected President fill the vacancy.³³ Senate Republicans changed their view after Justice Ginsburg's death.³⁴ Just one week before the 2020 presidential election, Republicans supported and confirmed Trump's third nominee, Amy Coney Barrett, by a slim majority.³⁵ Critics argued that the Republican Party undermined the nomination process by employing "hypocritical" tactics to confirm Barrett.³⁶ The controversy was fueled by the fact that Barrett's nomination cemented a 6-3 conservative majority on the Court.³⁷ This partisan maneuvering has further eroded public confidence in the Court's integrity.

Two years after Gorsuch's highly contentious nomination, President Trump's second nominee, Brett Kavanaugh, also stirred controversy. Critics referred to Kavanaugh's confirmation as "nakedly political"³⁸ because he was confirmed by a narrow vote,³⁹ despite sexual assault allegations. One critic described Kavanaugh's testimony to the Senate as "nakedly partisan

33. Aaron Blake, *How the GOP Is Trying to Justify Its Supreme Court Reversal*, WASH. POST (Sept. 21, 2020), <https://www.washingtonpost.com/politics/2020/09/21/how-gop-is-trying-justify-its-supreme-court-reversal/> [https://perma.cc/2AB2-25JR] (quoting Republican Senator Lindsey Graham: "I want you to use my words against me: If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey O. Graham said, 'Let's let the next president, whoever it might be, make that nomination,' . . . and you could use my words against me, and you'd be absolutely right").

34. *Id.* (The Republican Party defended its actions by arguing, among other things, that during Trump's term, the presidency and the Senate were both controlled by the same party, whereas in 2016, there was a Democratic president and a Republican Senate).

35. See John F. Harris, *The Supreme Court Is Begging for a Legitimacy Crisis*, POLITICO (Oct. 19, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/10/29/supreme-court-begging-for-legitimacy-crisis-433573> [https://perma.cc/PTG3-7BFD]; see also Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM) <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [https://perma.cc/4LMC-27P4].

36. Nicholas Goldberg, Opinion, *Amy Coney Barrett's Confirmation Was Shockingly Hypocritical. But There May Be a Silver Lining*, L.A. TIMES (Oct. 26, 2020, 5:46 PM), <https://www.latimes.com/opinion/story/2020-10-26/confirmation-amy-coney-barrett-silver-lining> [https://perma.cc/C84G-DFC9].

37. Andrew Desiderio, *Senate Confirms Barrett to Supreme Court, Sealing a Conservative Majority for Decades*, POLITICO (Oct. 26, 2020, 10:06 PM), <https://www.politico.com/news/2020/10/26/senate-confirmation-barrett-supreme-court-432520>.

38. Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [https://perma.cc/GM5J-M85E].

39. *Roll Call Vote 11th Cong., 1st Sess., Vote Number: 111*, U.S. SENATE (Apr. 7, 2017, 11:31 AM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00111.htm [https://perma.cc/68NV-WJTJ] (YEAs 54, NAYs 45, and Not Voting 1; Neil M. Gorsuch Nomination Confirmed).

and baselessly conspiratorial.”⁴⁰ Although Trump lost the popular vote, he appointed three Supreme Court Justices during his tenure. Currently, five out of the nine Justices were appointed by presidents who lost the popular vote.⁴¹ This further exacerbates concerns about the Court’s legitimacy because the majority of unelected Supreme Court Justices were appointed by presidential candidates who did not represent the views of the majority of the nation.

B. Supreme Court Justices’ Partisan and Questionable Ethical Behavior

In addition to conduct by outside actors, the Justices’ own biased and improper conduct undermines the Court’s legitimacy. Since Supreme Court Justices are called upon to resolve complex and politically sensitive issues, their legitimacy hinges on the expectation that they will remain independent.⁴² However, Supreme Court Justices are not bound by a Code of Conduct.⁴³ This allows Justices to engage in behavior that is forbidden for lower court judges.⁴⁴

There have been multiple instances of Justices on both sides of the political spectrum behaving in partisan or partisan-like ways. For example, in 2017, Justice Neil M. Gorsuch gave a speech funded by the Charles Koch Foundation, a conservative group “dedicated to promoting limited government, free markets and weaker unions.”⁴⁵ The morning of Justice Gorsuch’s speech, the Supreme Court announced that it would decide *Janus v. AFSCME*, a case regarding public sector unions.⁴⁶ Justice Gorsuch’s actions were criticized for their apparent partisanship and conflict of interest. His judicial independence was also questioned after he traveled to the

40. Matt Ford, *Brett Kavanaugh Is the Point of No Return*, NEW REPUBLIC (Oct. 6, 2018), <https://newrepublic.com/article/151597/brett-kavanaugh-confirmed-supreme-court-point-no-return> [https://perma.cc/2SP5-QJQ8].

41. *66% of Supreme Court Justices are There in Spite of Public Opinion*, FACT PAC (July 23, 2021), <https://factpac.org/66-of-supreme-court-justices-are-there-in-spite-of-public-opinion/> [https://perma.cc/M7WF-EQBC].

42. *Planned Parenthood v. Casey*, 505 U.S. 833, 864-65 (1992); 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 (1998) (stating that judicial power entails deciding “rights and responsibilities of the parties on the basis of independently developed legal reasons”).

43. *Where’s the Ethics Code, Chief?*, *supra* note 13.

44. *Id.*

45. Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO (Nov. 01, 2017), <https://www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772/> [https://perma.cc/AN4X-42DF].

46. *Id.*

University of Louisville with then-Senate Majority Leader Mitch McConnell to give a speech.⁴⁷

Justice Clarence Thomas' impartiality was questioned when he refused to recuse himself from a case involving a challenge to the Affordable Care Act, despite his wife actively campaigning against the law,⁴⁸ and when he accepted expensive gifts and significant donations from Harlan Crow, a major conservative donor.⁴⁹ Additionally, Justice Antonin Scalia famously refused to recuse himself in a case where Vice President Dick Cheney was a party, even though Scalia accepted an Air Force II plane ride to go duck hunting with the Vice President.⁵⁰ Subsequently, Justice Scalia held for Cheney and issued a memorandum explaining why he did not recuse himself from the case.⁵¹ Chief Justice John Roberts also refused to recuse himself from *ABC v. Aereo* and voted in favor of ABC, despite owning up to \$500,000 worth of Time Warner stock, which had filed an amicus brief in support of broadcast giant ABC.⁵² Justices Breyer and Alito have also been accused of voting in favor of parties that support their financial interests.⁵³

47. Robert Barnes, *Gorsuch's Speeches Raise Questions of Independence*, WASH. POST (Sep. 27, 2017), https://www.washingtonpost.com/politics/courts_law/gorsuchs-speeches-raise-questions-of-independence-critics-say/2017/09/27/5accdb3c-a230-11e7-b14f-f41773cd5a14_story.html [<https://perma.cc/VKN6-V9LJ>].

48. See Kathleen Hennessey & David G. Savage, *Justice Thomas' Wife Says Healthcare Law Is Unconstitutional*, L.A. TIMES, (Oct. 21, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-oct-21-la-na-virginia-thomas-20101021-story.html> [<https://perma.cc/53DW-LDYZ>] (noting that Ginni Thomas has also been heavily criticized for her active participation in various conservative organizations.); see also Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, NEW YORKER (Jan. 21, 2022), <https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court> [<https://perma.cc/LWV4-JLHL>].

49. Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES (June 18, 2011), <https://www.nytimes.com/2011/06/19/us/politics/19thomas.html> [<https://perma.cc/5QWB-FCGD>]; Joshua Kaplan, et. al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM) <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/ACM5-KKKS>] ((describing how for over twenty years, Thomas has accepted luxury trips virtually every year from billionaire Republican donor Harlan Crow without disclosing them on annual financial disclosures).

50. *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J.) (order denying the motion to recuse); Richard A. Serrano & David G. Savage, *Justice Thomas Reports Wealth of Gifts*, L.A. TIMES (Dec. 31, 2004, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html> [<https://perma.cc/Y7SF-MGHV>].

51. *Cheney*, 541 U.S. 913 (Scalia, J.) (order denying motion to recuse).

52. Lincoln Caplan, *Does the Supreme Court Need a Code of Conduct?*, NEW YORKER (July 27, 2015), <https://www.newyorker.com/news/news-desk/does-the-supreme-court-need-a-code-of-conduct> [<https://perma.cc/WQ72-Q9ND>].

53. FIX THE COURT, BLIND TRUST: HOW SUPREME COURT JUSTICES ARE RULING IN FAVOR OF THE PUBLICLY TRADED COMPANIES WHOSE SECURITIES THEY OWN, 1, 9 (2015), <https://fixthecourt.com/archives/2015/05/20150528-Report-FixTheCourt-BlindTrust.pdf> [<https://perma.cc/YY5E-7TQZ>].

Additionally, after Justices Thomas and Scalia both attended a conservative political retreat organized by billionaire Charles Koch, a petition was filed to investigate whether they should recuse themselves from a campaign financing case due to potential bias in favor of Koch.⁵⁴ Justices Scalia and Thomas were also criticized for attending a fundraiser hosted by the Federalist Society, a notoriously conservative group.⁵⁵ Justice Samuel Alito has also openly expressed partisan views. In a keynote speech delivered at a Federalist Society Convention, he publicly expressed his conservative views and willingness to pursue a conservative agenda.⁵⁶ Currently, five out of nine sitting Justices have had significant post-appointment interactions with the Federalist Society.⁵⁷

Justice Ruth Bader Ginsburg also received large monetary awards while serving on the Court⁵⁸ and was criticized for accepting an international trip paid for by the American Sociological Association, which is viewed as a liberal organization.⁵⁹ Justices Stephen Breyer and Sonia Sotomayor have also spoken at events hosted by the American Constitution Society, a left-leaning organization.⁶⁰ In addition, Justice Ginsburg was criticized for making comments about former President Trump while he was running for re-election.⁶¹ Similarly, Justice Alito openly challenged remarks made by

54. Eric Lichtblau, *Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases*, N.Y. TIMES (Jan. 19, 2011), <https://www.nytimes.com/2011/01/20/us/politics/20koch.html> [<https://perma.cc/DS88-XMGD>].

55. Andrew Rosenthal, Opinion, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), <https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice> [<https://perma.cc/9ZTW-Q5GC>]; Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html> [<https://perma.cc/CJ4Z-HLEB>].

56. See Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html> [<https://perma.cc/4H3Y-CB72>].

57. See David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> [<https://perma.cc/UT2H-2EW3>] (explaining the influence that the Federalist Society wields on the Supreme Court and government).

58. Serrano & Savage, *supra* note 50.

59. Editorial, *The Justices' Junkets*, WASH. POST (Feb. 21, 2011), https://www.washingtonpost.com/opinions/the-justices-junkets/2011/02/20/ABCJb7H_story.html [<https://perma.cc/Z756-9NJM>] [hereinafter *The Justices' Junkets*].

60. Adam Liptak, *Neil Gorsuch Speech at Trump Hotel Raises Ethical Questions*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/us/politics/gorsuch-speech-trump-hotel-ethics.html> [<https://perma.cc/5K63-E929>].

61. Editorial, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donaldtrump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html [<https://perma.cc/AWS6-VV59>].

former President Obama about the Court in a State of the Union address.⁶² Justices have also been criticized for accepting expensive gifts and lavish trips.⁶³ The Justices' financial disclosure reports revealed that eight sitting Justices enjoyed extravagant, privately-sponsored international trips.⁶⁴ The Supreme Court's legitimacy depends on its perception as a fair and unbiased institution. This expectation is directly questioned when Justices behave in ways that appear partisan or accept expensive gifts from organizations with strong political views.

III. JUDICIAL CODE OF CONDUCT

All state and federal judges in the United States are subject to some Judicial Code of Conduct.⁶⁵ However, the Code does not apply to Supreme Court Justices, nor has the Supreme Court adopted a written Code of Conduct.⁶⁶ As a result, Supreme Court Justices are the only judges in the United States that are not bound by a formal Code of Conduct.⁶⁷ This section will discuss the Judicial Code of Conduct and summarize the prominent arguments supporting and opposing an ethics code for the Supreme Court.

A. *Background of Judicial Code of Conduct*

The current Code of Conduct was adopted in 1973 by the Judicial Conference of the United States, the national policymaking body for federal courts.⁶⁸ The Code was enacted to provide guidance to federal judges on

62. Jonathan Turley, Opinion, *With Ginsburg Apology, Congress Should Look at the Real Problem*, CHI. TRIB. (July 15, 2016, 6:29 PM), <https://www.chicagotribune.com/opinion/commentary/ct-ginsburg-trump-ethics-supreme-court-perspec-0717-jm-20160715-story.html> [<https://perma.cc/WQ2Y-PUQ2>].

63. See Amy Howe, *Supreme Court Justices: Not Just Like Us*, SCOTUSBLOG (Jun. 9, 2017, 1:16 PM), <https://www.scotusblog.com/2017/06/supreme-court-justices-not-just-like-us/> [<https://perma.cc/7N59-NFY5>]; see also *The Justices' Junkets*, *supra* note 59 (criticizing Justices Ginsburg and Sotomayor for accepting international trips paid for by liberal organizations).

64. Adam Liptak, *Justices Disclose Privately Paid Trips and Gifts*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/us/politics/justices-disclose-privately-paid-trips-and-gifts.html> [<https://perma.cc/SXU8-P8J2>].

65. JOANNA R. LAMPE, CONG. RESEARCH SERV., LSB10255, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 1 (updated Apr. 6, 2022), <https://sgp.fas.org/crs/misc/LSB10255.pdf> [<https://perma.cc/Z34G-HT66>].

66. LAMPE, *supra* note 65, at 1-2.

67. Caplan, *supra* note 52.

68. 2A JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY 2 (2019), https://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf [<https://perma.cc/J6NW-DUX7>] (The code applies to "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges" [hereinafter GUIDE TO JUDICIARY POLICY]).

issues such as integrity, independence, impartiality, permissible extrajudicial activities, and the avoidance of or even the appearance of impropriety.⁶⁹ Federal judges are bound by the Code of Conduct and must abide by it.⁷⁰ Though the Code itself does not enforce federal judges' conduct, violations can be subject to investigation and sanction under the Judicial Conduct and Disability Act of 1980.⁷¹

The code consists of five canons. Canon 1 states, “[a] judge should uphold the integrity and independence of the judiciary.”⁷² Under Canon 2, “[a] judge should avoid impropriety and the appearance of impropriety in all activities.”⁷³ Canon 3 asserts that “[a] judge should perform the duties of the office fairly, impartially and diligently.”⁷⁴ According to Canon 4, “[a] judge may engage in extrajudicial activities that are consistent with the obligations of judicial office.”⁷⁵ Finally, Canon 5 stipulates that “[a] judge should refrain from political activity.”⁷⁶

Although Supreme Court Justices consult the Code of Conduct, they are not bound by it. Therefore, Justices are free to disregard the Code without any real consequences,⁷⁷ although their conduct is somewhat constrained by statutes.⁷⁸ In 2019, Justice Kagan revealed that Chief Justice Roberts was

69. ETHICS POLICIES, CODE OF CONDUCT FOR U.S. JUDGES, <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies> [<https://perma.cc/BY7J-4Z6F>].

70. GUIDE TO JUDICIARY POLICY, *supra* note 68, at 2.

71. *Id.* at 2-3.

72. *Id.* at 1.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Charles Geyh & Stephen Gillers, *SCOTUS Needs a Code of Ethics*, POLITICO (Aug. 8, 2013, 5:20 AM), <https://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-095301> [<https://perma.cc/DJ4X-A34B>].

78. *See* 28 U.S.C. § 455. Federal judges, including Supreme Court Justices, must recuse themselves under certain circumstances, like in proceedings where their impartiality would be questioned or for reasons of bias or prejudice. All federal judges are also statutorily required to file annual financial disclosure statements. *See infra* Part IV. Additionally, in a 1991 resolution, the then-sitting Supreme Court Justices voluntarily agreed to adopt the Judicial Conference's regulations on gifts. Supreme Court Internal Ethics Resolution (Jan. 18, 1991), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991_Resolution.pdf [<https://perma.cc/6AMU-BGBF>].

considering an ethics code for the Supreme Court.⁷⁹ However, the Court has yet to adopt a Code of Conduct.⁸⁰

B. Arguments for and Against a Code of Conduct for the Supreme Court

Public approval and confidence in the Supreme Court have fallen to new lows.⁸¹ This is partially due to the politicization of the Supreme Court Justices' nomination process and Justices' behavior off the bench. Proponents and opponents have argued extensively on whether the Supreme Court should be required to adopt a formal Code of Conduct. Those in favor of imposing a Code of Conduct on the Supreme Court are primarily concerned with the Court's legitimacy. The proposals fall into two categories: (1) a code adopted by the justices themselves or (2) a statutory code imposed by Congress.

1. Supreme Court Self-Adopted Code of Conduct

Justices seem to be aware that the public is increasingly viewing the Court as a politicized institution and have publicly acknowledged the Court's legitimacy.⁸² While some Justices defend the Court's legitimacy,⁸³ others seem to agree with the public's perception of the Court.⁸⁴

79. Robert Barnes, *Supreme Court Justices Tell Congress They Are Not Considering Televised Hearings*, WASH. POST (Mar. 7, 2019, 6:39 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html [<https://perma.cc/NZ3D-79DK>].

80. *Where's the Ethics Code, Chief?*, *supra* note 13.

81. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> [<https://perma.cc/3A6R-CFGY>] (describing how the Supreme Court's public-approval rating is at its lowest point in Gallup's polling history).

82. Jamelle Bouie, Opinion, *The Supreme Court Seems Awfully Nervous About Its Own Legitimacy*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/opinion/roberts-alito-kagan-barrett-thomas.html> [<https://perma.cc/Z3CZ-TTDJ>].

83. In a judicial conference, Chief Justice Roberts stated: “[s]imply because people disagree with an opinion is not a basis for criticizing the legitimacy of the court.” *Chief Justice Roberts on Supreme Court Legitimacy and Public Opinion*, C-SPAN, at 06:51 (Sept. 9, 2022), <https://www.c-span.org/video/?522764-1/chief-justice-roberts-discusses-supreme-courts-legitimacy-public-opinion> [<https://perma.cc/M522-QNLA>].

84. During oral arguments in *Dobbs v. Jackson Women's Health Org.*, Justice Sotomayor stated, “[W]ill this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?” Transcript of Oral Argument at 15, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 414 (2021) (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4h25.pdf [<https://perma.cc/59GB-TQB5>]. During a talk at Temple Emanu-El in New York, Justice Kagan stated: “Judges create legitimacy problems for themselves . . . when they instead stray into places where it looks like they’re an extension of the political process or when they’re imposing their own

Scholars argue that the Court should adopt its own Code of Conduct to send a clear message that the nation's highest justices are still committed to the integrity and independence of the judicial branch.⁸⁵ Moreover, if the Court adopts a Code of Conduct rather than having Congress impose one, this could strengthen confidence and trust in the Court. It would demonstrate that the Justices are cognizant of the perception of bias and impropriety and are committed to accountability.⁸⁶ Additionally, proponents argue that all other state and federal judges are bound by an ethics code, whereas the Justices, who sit on the nation's highest court, are not.⁸⁷ This negatively affects the public perception of the Supreme Court. Since Justices have already stated that they consult the Code of Conduct and are committed to certain values, a self-adopted Code should be relatively uncontroversial and could increase the Court's legitimacy.⁸⁸

2. Congressionally Imposed Code of Conduct

Second, proponents of imposing a Code of Conduct on the Supreme Court argue that if the Court fails to adopt its own Code of Conduct, Congress has the constitutional authority to impose one on the Court. Proponents argue that congressional intervention would not violate the Constitution or raise separation of powers issues, but opponents question Congress's authority to enact such ethics legislation.⁸⁹

Professor Amanda Frost argues that Congress has the authority to enact ethics legislation on the Supreme Court based on its powers under the Necessary and Proper Clause of Article I.⁹⁰ Professor Frost contends that the vague language of Article III, combined with the fact that the judicial branch is not self-executing⁹¹ like the executive and legislative branches, gives

personal preferences.” Jennifer Rubin, Opinion, *Elena Kagan to her Colleagues: You're Why the Supreme Court Has Lost Legitimacy*, WASH. POST (Sept. 14, 2022, 12:00 PM), <https://www.washingtonpost.com/opinions/2022/09/14/kagan-speech-supreme-court-legitimacy-roberts/> [<https://perma.cc/T8DC-ZWF7>].

85. See Kalb & Bannon, *supra* note 10.

86. *Id.* at 2, 4.

87. *Id.* at 1.

88. *Id.*

89. See LAMPE, *supra* note 65, at 1-3.

90. Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 457-59 (2013).

91. See *id.* at 447; see also Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309, 309, 312, 330 (2007) (noting that Article III of the Constitution does not explicitly mention the types of cases that the Court can hear, the size of the court, or the scope of its appellate jurisdiction. Thus, under the Necessary and Proper Clause, Congress may have significant power to enact legislation to assist the judicial branch in executing its judicial power).

Congress a significant role in regulating judicial administration through legislation to assist the Court in exercising its judicial power.⁹² Though this power is not unlimited, Frost asserts that just as this power allows Congress to enact legislation regarding the Court's size, meeting dates, and other important administrative matters, it also allows Congress to enact legislation governing judicial ethics.⁹³

Frost acknowledges that congressional regulation of judicial ethics is limited by the principles of separation of powers, but it is not prohibited.⁹⁴ Article III, Section 1 vests the judicial power in "one supreme Court" and protects federal judges' independence.⁹⁵ She argues that Congress may impose a Code of Conduct on the Court as long as the legislation is neutral and does not undermine Justices' decisional independence, protected by the Constitution.⁹⁶ Moreover, Frost states that this conclusion is also supported by long-standing constitutional practice because Congress has historically used legislation to regulate judicial ethics.⁹⁷

Opponents argue that the Constitution already provides a framework for keeping Justices accountable through its impeachment and appointment powers.⁹⁸ Article II, Section 2 of the Constitution requires the Senate to confirm all presidential nominees, including Supreme Court Justices.⁹⁹ Before Justices are confirmed, they must go through a rigorous process of investigation and questioning.¹⁰⁰ The confirmation process thoroughly vets Justices for both professional and personal integrity and serves as an essential check on the Court's members.¹⁰¹ Furthermore, Article III allows Justices to "hold their offices during good behavior."¹⁰² Article II of the Constitution allows for the impeachment of Justices for "Treason, Bribery, or other high Crimes and Misdemeanors."¹⁰³ Thus, while Justices may be impeached for major ethical violations, the Constitution was framed to shield judges from political pressures through lifetime tenure.

92. Frost, *supra* note 90.

93. *Id.* at 462.

94. *Id.* at 463-67.

95. *Id.* at 471.

96. *See id.* at 465-56.

97. *Id.* at 476.

98. Madeleine Case, *A Case for the Status Quo in Supreme Court Ethics*, 33 GEO. J. LEGAL ETHICS 397, 399 (2020).

99. U.S. CONST. art. II, § 2.

100. MCMILLION, *supra* note 22, at 1.

101. Case, *supra* note 98, at 419.

102. U.S. CONST. art. III, § 1.

103. U.S. CONST. art. II, § 4.

Opponents also contend that Congress would violate the principle of separation of powers by imposing a Code of Conduct on the Supreme Court.¹⁰⁴ Article III of the Constitution expressly creates only the Supreme Court but grants Congress the power to create lower federal courts.¹⁰⁵ Under its Article III power, Congress established the Judicial Conference to “provide national guidance” to the lower federal courts it created.¹⁰⁶ Thus, opponents argue that since the Supreme Court derives its power directly from Article III, the Judicial Conference has no jurisdiction over the Supreme Court.¹⁰⁷ Furthermore, those who oppose congressionally enacted ethics legislation believe that such reform is not necessary because several statutes already govern Justices’ unethical behavior and promote transparency.¹⁰⁸

Moreover, Chief Justice Roberts has stated that the Code of Conduct does not apply to the Supreme Court because the Code “does not adequately answer some of the ethical considerations unique to the Supreme Court.”¹⁰⁹ Though there is no formal written Code of Conduct for the Supreme Court, Chief Justice Roberts has stated that there is “no reason [for the Court] to adopt the Code of Conduct as its definitive source of ethical guidance.”¹¹⁰ Justices “consult” the Code in assessing ethical obligations and “difficult questions,” but it is not the exclusive source of guidance for the Justices.¹¹¹ Ten years later, Chief Justice Roberts still calls for judicial independence.¹¹² In his 2021 Year-End Report, he stated, “[t]he 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.”¹¹³

There is sharp disagreement on whether the Supreme Court should adopt a Code of Conduct. Some believe a Code of Conduct is necessary, while

104. 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. UNIV. L. REV. 925, 933 (2013).

105. U.S. CONST. art. III, § 1.

106. JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2011).

107. *Id.* at 3-4.

108. *See id.* at 4-7.

109. *Id.* at 3-5.

110. *Id.* at 5.

111. *Id.* at 4-5.

112. Many commentators have viewed Justice Robert’s report as a call for judicial independence. *See* Olafimihan Oshin, *Roberts Calls for Judicial Independence in Year-End Report*, THE HILL (Dec. 31, 2021), <https://thehill.com/regulation/administration/587848-roberts-calls-for-judicial-independence-in-year-end-report?rl=1> [<https://perma.cc/ED9C-ZHM5>]; *see also* Samriddha Sen, *Chief Justice Roberts Bats for Judicial Independence in Annual Year-End Report*, JURIST (Jan. 2, 2022, 5:35 PM) <https://www.jurist.org/news/2022/01/chief-justice-roberts-bats-for-judicial-independence-in-annual-year-end-report/> [<https://perma.cc/Y8U6-P99H>].

113. JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2021).

others argue that the existing mechanisms are sufficient. Although the constitutionality of congressionally enacted ethics legislation on the Court is debatable, it is evident that some action is needed to improve the Court's legitimacy and address the perception of impropriety and bias among Supreme Court Justices. In its final report, the Presidential Commission on the Supreme Court agreed that at least an advisory code would be a sound step.¹¹⁴ Congress has also attempted to pass legislation to address ethical concerns raised by the Supreme Court.¹¹⁵ The House introduced legislation to reform judicial ethics as recently as May 2022.¹¹⁶

The Supreme Court should follow a written Code of Conduct. Justices serve lifetime appointments, but this is intended to insulate Justices from political pressure, not to immunize unethical behavior. Contrary to opponents' arguments, existing constitutional mechanisms are insufficient to address post-appointment ethical issues and misconduct.¹¹⁷ Moreover, impeachment to remove federal judges is rarely used, and even when invoked, the process is typically unsuccessful.¹¹⁸ Furthermore, the Court itself should adopt a Code of Conduct because the Justices' own actions are contributing to the Court's faltering legitimacy.¹¹⁹ However, even if the Court adopts or is made to adopt a Code of Conduct, Congress should still step in and use the existing statutory framework to further curtail the Justices' questionable ethical behavior.

IV. THE ETHICS IN GOVERNMENT ACT OF 1978: A TOOL FOR SUPREME COURT REGULATION

Congress can utilize the Ethics in Government Act of 1978 to address Supreme Court Justices' controversial ethical behavior. First, this Note will discuss how the EGA serves as precedent and authority for congressional intervention in judicial transparency. Second, this Note offers specific recommendations that Congress can enact to promote judicial transparency and strengthen the Court's legitimacy.

114. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 221 (Dec. 8, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/UD3G-EQVM>].

115. See, e.g., Supreme Court Ethics Act, H.R.1057, 116th Cong. (2019) [hereinafter H.R. 1057]; Judicial Ethics and Anti-Corruption Act, H.R.7706, 117th Cong. (2022) [hereinafter H.R. 7706].

116. See H.R. 7706.

117. See Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1220 (1991).

118. See *id.*, at 1220-23 (discussing the historical use and decline of judicial impeachment as a method of judicial discipline).

119. *Where's the Ethics Code, Chief?*, *supra* note 13.

A. *Background to Ethics in Government Act of 1978*

The EGA was adopted after the Watergate scandal, as a response to perceived governmental corruption.¹²⁰ The Act aims “to preserve and promote the accountability and integrity of public officials” and federal government institutions.¹²¹ The statute seeks to promote accountability and integrity through transparency by requiring financial disclosures¹²² and imposing limitations on outside earned income and employment.¹²³

First, the EGA seeks to foster accountability and integrity within the Supreme Court because Section 109 specifically includes Supreme Court Justices within its definition of judicial officers who must comply with the requirements and provisions of the statute.¹²⁴ The EGA limits the Justices’ outside earned income and outside employment, as well as the gifts and honoraria they may receive.¹²⁵ Additionally, under the statute’s requirements, Justices must file annual financial disclosure statements with the Judicial Conference stating the source, amount, and identity of specified categories of financial interests.¹²⁶ Thus, the EGA specifically seeks to increase transparency not only within the judicial branch but also within the Supreme Court.

The EGA also provides a mechanism for enforcing violations. Unlike a self-imposed written Code of Conduct, which would be self-regulating,¹²⁷ judicial officers who willfully fail to file or falsify their financial disclosure statements are subject to referral to the Attorney General and may face civil penalties under the EGA.¹²⁸ The statute thus imposes strict requirements and penalties for judicial officers who fail to comply with its requirements. Some critics argue that there are no real repercussions to a Justice’s violation of the EGA, pointing to Justice Thomas as the prime example.¹²⁹ For thirteen years,

120. Krystal Walker & Rebecca Mayer, *A Brief History on the Formation of Government Ethics and Its Importance to the Rule of Law*, 67 DEP’T OF JUST. J. FED. L. & PRAC. 125, 128 (2019).

121. S. REP. NO. 95-170, at 1 (1977).

122. 5 U.S.C. app. 4 §§ 101-111

123. 5 U.S.C. app. 4 §§ 501-505

124. 5 U.S.C. app. 4 §§ 101, 109.

125. 5 U.S.C. app. 4 §§ 101, 109; 5 U.S.C. app. 4 §§ 501-02.

126. 5 U.S.C. app 4 § 102.

127. See ROBERTS, JR., *supra* note 106, at 2-5; Kalb & Bannon, *supra* note 10, at 5 (noting that since justices can only be disciplined through impeachment, a self-adopted Code of Conduct, would be primarily self-enforcing but would still have “great value”).

128. 5 U.S.C. app 4 § 104.

129. Bill Blum, *Why Clarence Thomas Is a Clear-Cut Case for Impeachment from the Supreme Court*, SALON (Nov. 2, 2020, 6:59 AM), https://www.salon.com/2020/11/02/why-clarence-thomas-is-a-clear-cut-case-for-impeachment-from-the-supreme-court_partner/ [https://perma.cc/84EQ-ENXQ].

Justice Thomas failed to report his wife's earnings under the statute's mandatory financial disclosures, which are signed under penalty of perjury.¹³⁰ Justice Thomas later amended his financial disclosures and claimed he had misunderstood his reporting responsibilities, but critics were skeptical of his misunderstanding claims.¹³¹ Justice Thomas was never referred to the Attorney General, nor did he face civil penalties for this omission. Even if he had been referred to the Attorney General, critics worry about the precedent such a referral would set.¹³² However, Justices have complied with the statute and filed the requisite financial disclosures for years without challenging its constitutionality.¹³³ Moreover, Justices have even corrected errors on their financial disclosure forms.¹³⁴ As shown by the Justices' faithful compliance with the statutorily imposed restrictions and requirements of the EGA, the statute serves as precedent for congressionally imposed requirements on Supreme Court Justices' actions and, implicitly, as authority for the constitutionality of the requirements.

B. *Proposed Amendments to the Ethics in Government Act*

Congress should amend the EGA to regulate more ethical issues and to impose further disclosures and restrictions on judicial officers. By doing so, Congress can improve the Supreme Court's transparency and, as a result, help strengthen the Court's legitimacy. First, Congress can amend existing EGA provisions to require further disclosures and restrictions on Supreme Court Justices. Second, Congress can enact new provisions to the EGA to require additional disclosures and stricter rules. As a preliminary matter,

130. See Eric Lichtblau, *Thomas Cites Failure to Disclose Wife's Job*, N.Y. TIMES (Jan. 24, 2011), <https://www.nytimes.com/2011/01/25/us/politics/25thomas.html> [<https://perma.cc/H4VB-J6QC>]; see also Justin Elliott, et al., *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, 2:20 PM) <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus> [<https://perma.cc/DRZ7-HJ27>] (reporting that Justice Thomas failed to disclose a 2014 real estate deal he made with billionaire Republican donor Harlan Crow).

131. See *id.*

132. See Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics? — A Lot*, BROOKINGS (Nov. 28, 2011), <https://www.brookings.edu/research/whats-so-hard-about-regulating-supreme-court-justices-ethics-a-lot/> [<https://perma.cc/TXH4-N93C>].

133. See Suzanne Levy, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161, 1186 (2014).

134. See Ariane De Vogue & Devin Dwyer, *Justice Clarence Thomas Amends 20 Years of Disclosure Forms With Wife's Employers*, ABC NEWS, (Jan. 24, 2011, 1:28 PM), https://abcnews.go.com/Politics/Supreme_Court/justice-clarence-thomas-amends-financial-disclosure-reports-virginia/story?id=12750650 [<https://perma.cc/EQQ8-WMMW>]; see also Debra Cassens Weiss, *2 SCOTUS Justices Agree to Amend Financial Disclosures After Fix the Court Asks Questions*, ABA J. (Mar. 24, 2020, 3:04 PM), <https://www.abajournal.com/news/article/justices-agree-to-amend-disclosures-after-fix-the-court-asks-questions> [<https://perma.cc/9RFL-WLY6>].

these proposed amendments target judicial officers generally through procedural reform. Hence, these proposals would not interfere with the Court's core decision-making functions, and Congress would not be unconstitutionally interfering with the judicial branch.

1. Amending existing EGA provisions

First, Congress should amend Section 501 of the EGA¹³⁵ to include limitations on federal officers' ownership and purchase of individual stocks. Congress recently passed legislation to tighten stock disclosure rules.¹³⁶ Though this is a step in the right direction, this alone is insufficient since it does not address the root of the issue: that owning and buying individual stocks creates far too many conflicts of interest that require recusals. The recusal issue is especially salient with Supreme Court Justices because they cannot be replaced like lower court judges.¹³⁷ Amending the EGA to limit federal officers' ownership and purchase of individual stocks will reduce the appearance of impropriety and limit potential conflicts of interest.

Second, Section 101 should be amended to require, at the very least, semiannual updates of financial disclosures of gifts and honoraria, which are presently only filed annually.¹³⁸ Congress sought to address this issue by passing legislation that promotes more transparency of financial disclosures through a "searchable internet database to enable public access to any report required to be filed under this title by a judicial officer, bankruptcy judge, or magistrate judge."¹³⁹ This improves information accessibility but does not sufficiently address the issue of limited transparency that arises when reports are only published once a year. Annual disclosures are especially problematic for parties arguing before the Supreme Court since the transparency required to determine whether a Justice's impartiality may be compromised could come after the case has been decided.¹⁴⁰ In order to promote greater transparency, Congress should amend the EGA to require at least biannual financial disclosures by federal judges.

Lastly, to ensure greater compliance and actual repercussions for EGA violations, the requisite mental state required under Section 104 should be

135. 5 U.S.C. app. 4 § 501.

136. Courthouse Ethics and Transparency Act, S. 3059, 117th Cong. (2022).

137. *See Stocks and Recusals, FIX THE COURT*, <https://fixthecourt.com/fix/stocks-and-recusals/> [<https://perma.cc/5UAU-LXJG>] (discussing the effects on stocks on Supreme Court recusals and the conflicts of interests they cause).

138. *See* 5 U.S.C. app. 4 § 101; *see also* GUIDE TO JUDICIARY POLICY, *supra* note 68, at § 150.

139. Courthouse Ethics and Transparency Act, S. 3059, 117th Cong. (2022).

140. Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 568 n.183 (2005).

updated. Critics argue that despite EGA's enforcement provisions, the statute is insufficient to deter Justices' unethical behavior.¹⁴¹ Changing the requisite mental state to a lower standard would enable more prosecutions and address the inadvertence mistake defense that Justice Thomas invoked to justify his failure to disclose.¹⁴² Referral to the Attorney General should be made if an individual either negligently or recklessly falsifies or "fails to file or report any information that such individual is required to report," as opposed to "willful" non-compliance.¹⁴³ Judicial officers are entrusted with complicated cases and issues of law and should be required to complete disclosure documents with the same level of scrutiny they exercise when sitting on the bench. Therefore, lowering the statute's requisite mental state would allow more prosecutions for violations and provide greater deterrence against potential non-compliance.

2. Enacting new EGA provisions

Congress can also promote transparency and improve accountability by amending the EGA to require stricter rules for outside earned income and employment. Supreme Court Justices have been criticized for accepting expensive travel perks and lodging when teaching and speaking at universities,¹⁴⁴ as well as for accepting expensive memberships and memorabilia.¹⁴⁵ Pursuant to the EGA,¹⁴⁶ judicial officers must disclose certain gifts in their annual financial disclosures.¹⁴⁷ Though the EGA specifically imposes limitations on Justices' teaching compensation and prohibits officials from receiving honoraria,¹⁴⁸ there are loopholes that allow

141. 5 U.S.C. app. 4 §§ 101, 109.

142. *Id.*

143. 5 U.S.C. app. 4 §104.

144. See TYLER COOPER & DYLAN HOSMER-QUINT, WHEN JUSTICES GO TO SCHOOL: LESSONS FROM SUPREME COURT VISITS TO PUBLIC COLLEGES AND UNIVERSITIES 3-4 (Gabe Roth ed.) (Mar. 24, 2020), <https://fixthecourt.com/wp-content/uploads/2020/03/FTC-public-universities-report-3.24.20.pdf> [<https://perma.cc/3RB7-Z445>].

145. See Kalb & Bannon, *supra* note 10, at 1, 5.

146. 5 U.S.C. app. 4 § 102; COMMITTEE ON FINANCIAL DISCLOSURE ADMINISTRATIVE OFFICE OF THE U.S. COURT, FILING INSTRUCTIONS FOR JUDICIAL OFFICERS AND EMPLOYEES 5 (2022) https://www.uscourts.gov/sites/default/files/financial_instructions_0.pdf [<https://perma.cc/G48K-SAML>] [hereinafter COMMITTEE ON FINANCIAL DISCLOSURE].

147. See Sonia Sotomayor, Financial Disclosure Report for Calendar Year 2020 (May 7, 2021) (unpublished completed form), https://fixthecourt.com/wp-content/uploads/2021/06/Sotomayor-S-J3.-SC-SIA_SR_20.pdf [<https://perma.cc/DYD6-RNJJ>]. On March 14, 2023, The Judicial Conference of the United States adopted a narrower definition for the "personal hospitality" exception. See Letter from Roslynn R. Mauskopf to Sheldon Whitehouse (Mar. 23, 2023), in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, at 1-3.

148. See 5 U.S.C. app. 4 §§ 501-502; see also COMMITTEE ON FINANCIAL DISCLOSURE, *supra* note 146, at 15-19.

Justices to engage in ethically questionable behavior.¹⁴⁹ To address these issues, the EGA should be amended to require greater financial disclosures by lowering the minimum dollar amount required for disclosures and redefining “honoraria” to close loopholes that currently permit Justices to receive “perks” for their public speaking engagements.

Another amendment that Congress can enact to promote transparency and accountability is to require judicial officers to disclose attendance or appearances at non-personal events. Events, where judicial officers’ status or prestige is linked to their attendance at or participation in a said event, could be characterized as non-personal events, such as when a judicial officer speaks at a partisan event relevant to an organization or individual’s political agenda. This proposed amendment would not substantially infringe on a Justice’s autonomy because it does not prohibit Justices from attending partisan events, nor does it require disclosing purely personal events.¹⁵⁰ Additionally, federal judges are already restricted from personally participating in fundraising activities. Consequently, a requirement to disclose attendance in potentially partisan events based on a Justice’s judicial prestige is not significantly more burdensome. This amendment would encourage transparency, especially within the Supreme Court, as potential instances of impartiality would be disclosed in one source, as opposed to news outlets sporadically reporting select stories. This would also promote more ethical behavior, particularly among Justices who are not governed by a Code of Conduct, because their potential biases would be displayed in one location, which would make a much more powerful statement. Lastly, the public is entitled to know the potential biases of judicial officers who are entrusted to be impartial.

V. CONCLUSION

The Supreme Court has faced increased scrutiny in recent years. As a result of acts by outside actors and Justices’ behavior both on and off the bench, the public’s confidence in the Court’s impartiality has waned, undermining its legitimacy. Court reform through a statutorily or self-imposed Code of Conduct is arguably one of the easiest ways to improve the Court’s legitimacy, although it is debatable whether Congress has the

149. For a detailed account of the travel expenses and gifts Justices received, see COOPER & HOSMER-QUINT, *supra* note 144.

150. Though some commentators argue that some Justices’ personal relationships may interfere with their ability to remain unbiased, that argument is outside the scope of this Note. See Mayer, *supra* note 48 (arguing that Justice Thomas’ impartiality is questionable due to his wife Ginni Thomas’ activism and participation in conservative groups that have subsequently been parties in Supreme Court cases).

authority to statutorily impose a Code of Conduct on the Supreme Court. Even if the Court adopts or is made to adopt a Code of Conduct, Congress should still step in and regulate Justices' questionable ethical behavior and participation in partisan events. Congress should amend the EGA to impose stricter disclosures and tighten ethical rules because it would strengthen the Court's legitimacy by promoting transparency and credibility. Additionally, the EGA has the added benefit of enforcement that a self-adopted code lacks. Justices serve lifetime appointments, but lifetime appointments are meant to insulate Justices from political pressure, not to immunize unethical behavior. It is time to hold Supreme Court Justices to the same ethical standards as every other judge in the country. Doing so would ultimately strengthen the Court's legitimacy and reinforce the power that Justices have come to enjoy as members of the nation's highest court.