



Calling Balls and Strikes: Ethics and Supreme Court Justices

Cynthia Brown

Legislative Attorney

August 20, 2018

At his confirmation [hearing](#) in 2005, Chief Justice Roberts famously described his view of judges as umpires, pledging that, if confirmed, he would “call balls and strikes” when applying the law. Chief Justice Roberts emphasized the constitutional structure that underpins the Supreme Court and the rest of the federal judiciary, which is based on independence from political influence. The Court’s independence and its insulation from political influence is a perennial issue, which has received heightened attention with Judge Brett Kavanaugh’s [pending nomination](#). What mechanisms ensure the integrity of Justices as federal officials? Are Justices subject to any rules of ethical conduct? How might such ethics rules be enforced? This Sidebar examines these questions and Congress’s potential role in regulating the ethics of the Supreme Court Justices.

Ethics Rules that Govern Judicial Conduct Generally

State [codes of conduct](#) and the [Judicial Conference of the United States’](#) (Judicial Conference) federal [Code of Conduct for United States Judges](#) (Code of Conduct) set forth judicial ethics and standards of professional conduct. The Code of Conduct is largely aspirational and does not delineate specific prohibited behaviors. Rather, it identifies five canons of conduct, instructing that judges:

- Should uphold the integrity and independence of the judiciary;
- Should avoid impropriety and the appearance of impropriety in all activities;
- Should perform the duties of the office fairly, impartially and diligently;
- May engage in extrajudicial activities that are consistent with the obligations of a judicial office; and
- Should refrain from political activity.

Congressional Research Service

7-5700

www.crs.gov

LSB10189

In addition to these professional codes of conduct, federal judges and judicial employees are subject to rules designed to maintain the integrity of public officials. Specifically, the Judicial Conference has established ethics policies governing issues such as [gifts](#) and [outside activities](#). These codes of conduct and ethics policies, however, do not apply to Supreme Court Justices.

Using his [2011 annual report](#) to explain how ethics rules apply to the federal judiciary, Chief Justice Roberts acknowledged that the Code of Conduct does not expressly apply to the Supreme Court. He also informed Congress that the Court [does not intend](#) to adopt formally the Code of Conduct in its entirety. Instead, the Chief Justice highlighted that Justices comply voluntarily with the Judicial Conference's regulations on gifts and outside earned income, having adopted [a resolution](#) in 1991 committing officers and employees to comply with the regulations.

Conflicts of Interest: Disclosure and Disqualification

Under federal law, [Supreme Court Justices](#) are subject to [financial disclosure requirements](#) designed to ensure transparency and prevent conflicts of interest. The [Ethics in Government Act of 1978](#) generally requires high-level officials in all three branches of government to disclose information about their financial interests and those of certain members of their immediate family. As covered officials, Justices must file annual reports on their financial interests during the previous year. [Such disclosures include](#), for example, income, gifts, assets, liabilities, financial transactions, outside positions held, any agreements for future private employment, and the cash value of blind trusts. The disclosure requirements mandate that covered officials inform the public of potential conflicts that may arise in the course of their official duties, but do not require them to divest particular interests while holding office.

At times, ethics rules require judges to recuse themselves to ensure that conflicts of interest do not cast doubt on judicial impartiality. [Two](#) recent Court decisions, authored by Justice Kennedy, illustrate the constitutional implications of such scenarios. A [2009 case](#) involved a challenge to a West Virginia state supreme court justice's decision not to recuse himself from a case in which one of the justice's campaign contributors who, according to Justice Kennedy, had had a "significant and disproportionate influence" in electing the justice to the court while the case was pending, led one of the corporate parties. A [2016 case](#) involved a challenge to a Pennsylvania state supreme court justice's decision not to recuse himself from a death penalty sentencing proceeding when the justice, in his previous position as district attorney, had authorized prosecutors to seek the death penalty in the trial's initial phase. In both cases, the Court held that the justices' participation in the cases violated the claimants' due process rights under the Fourteenth Amendment of the Constitution. Notably, while these cases illustrate the constitutional requirements for recusal, they involved state justices and do not directly address recusal by Supreme Court Justices.

The [federal disqualification statute](#) requires any federal judge—expressly including Supreme Court Justices—to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." It also requires disqualification from cases when the Justice may have a personal bias or interest; previously served as counsel in the matter; previously participated in the proceeding or expressed an opinion on its merits; or has a personal or familial interest in the outcome of the proceeding.

While constitutional due process requirements and the disqualification statute apply to Supreme Court Justices, [questions](#) remain about whether a Justice's recusal is necessary under particular circumstances. Under either standard, the mechanism to challenge a judge's decision not to recuse himself or herself from a case is an appeal to a higher court to review the judge's decision. Because there is no court to which parties may appeal decisions made by Supreme Court Justices, neither the constitutional nor statutory protection has an effective means of enforcement.

Separation of Powers and Congress's Role in Regulating Judicial Conduct

Concerns about whether current law can ensure the Justices' impartiality have led to calls for binding standards of conduct for the Court, including proposals for congressional action. Legislative proposals to regulate the Justices' conduct include [directly applying](#) the Code of Conduct to the Justices; [requiring](#) the Court to [promulgate its own ethical code](#); [requiring rulings](#) on disqualification motions to disclose the underlying reasoning; and [establishing a review process](#) through which a party can request a separate judicial panel to review a disqualification ruling. However, short of [congressional oversight options](#), it is unclear whether Congress has the constitutional authority to impose ethics requirements on Supreme Court Justices, which, ironically, is a question that the Court ultimately may have to decide.

Congressional Adoption of Current Conduct Standards for Supreme Court Justices

Because the Code of Conduct is aspirational, rather than declaratory, congressional action to codify it as currently written would present certain enforcement challenges. Omitting any clear statement of prohibited behavior, the Code of Conduct might face legal challenges for vagueness. Under the vagueness doctrine, based on the constitutional guarantee of due process, the [Supreme Court](#) has [required](#) that “a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” While members of a profession may adopt codes of conduct to self-regulate their behavior, such codes do not render otherwise applicable legal protections obsolete. For example, the Supreme Court has ruled that certain constitutional protections are paramount to professional codes of conduct and cannot be curtailed by membership in a self-regulating profession.

Congressional Direction to Establish a Code of Conduct or Review Recusal Decisions

Whether and to what extent Congress may regulate the Court has been debated by legal scholars. [Some](#) scholars assert that Congress has sufficient constitutional power to require the Court to adopt a code of conduct. They cite examples of Congress regulating other aspects of Supreme Court practice, noting that Congress has authority “to regulate the size of the Supreme Court, where, when and how often the court meets, how many [J]ustices constitute a quorum, and the duties of the [J]ustices themselves....” Others [assert](#) that “[r]egulating the Justices' ethical duties is not one part of [Congress'] enumerated powers.” Similarly, in his [2011 annual report](#) on the federal judiciary, Chief Justice Roberts identified a “fundamental difference,” which justifies distinguishing the Supreme Court from the rest of the federal judiciary vis-à-vis the Code of Conduct, stating:

Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress 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 federal courts, its committees have no mandate to prescribe rules or standards for any other body.

Thus, the exact parameters of congressional authority over the Supreme Court remain unclear.
